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EUROPEAN UNION – MEASURES AFFECTING TARIFF CONCESSIONS ON CERTAIN POULTRY MEAT PRODUCTS

REPORT OF THE PANEL

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Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
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US – COOL	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – COOL (Article 21.5 – Canada and Mexico)	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, adopted 29 May 2015, as modified by Appellate Body Reports WT/DS384/AB/RW / WT/DS386/AB/RW
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EEC – Dessert Apples	GATT Panel Report, *European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile*, L/6491, adopted 22 June 1989, BISD 36S/93
US/EEC – Poultry	GATT Panel Report, *US/EEC – Panel on Poultry*, L/2088, 21 November 1963, unadopted

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AI	Avian Influenza
CN	Combined Nomenclature
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU Schedule	Schedule CXL - European Communities
First Modification Package	Modifications to the European Union's tariff concessions notified on 29 May 2009 (G/SECRET/25 ADD.1)
GATT 1994	General Agreement on Tariffs and Trade 1994
MFN	Most-Favoured-Nation
Procedures for Negotiations under Article XXVIII	Procedures for Negotiations under Article XXVIII, adopted by the Council on 10 November 1980, C/113 and Corr. 1, BISD 27S/26-29.
Procedures for Modification and Rectification of Schedules	Decision of 26 March 1980, Procedures for Modification and Rectification of Schedules of Tariff Concessions, GATT document L/4962, BISD S27/25
PSI	Principal supplying interest
Second Modification Package	Modifications to the European Union's tariff concessions notified on 17 December 2012 (G/SECRET/32/ADD 1)
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SSI	Substantial supplying interest
TRQ	Tariff rate quota
Understanding	Understanding on the Interpretation of Article XXVIII of the GATT 1994
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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CHN-5/EU-15	Commission Decision 2002/69/EC, of 30 January 2002, concerning certain protective measures with regard to the products of animal original imported from China, OJ L 30/50 of 31.1.2002
CHN-6/EU-19	Commission Decision 2004/122/EC of 6 February 2004 concerning certain protective measures in relation to Avian Influenza in several Asian countries (O.J. L 36, 7 February 2004, p. 59).
CHN-8/EU-13	Commission Decision 2007/777/EC of 29 November 2007 laying down the animal and public health conditions and model certificates for imports of certain meat products and treated stomachs, bladders and intestines for human consumption from third countries and repealing Decision 2005/432/EC (O.J. L 312, 20 November 2007, p. 49).
CHN-9/EU-23	Commission Decision 2008/638/EC of 30 July 2008, amending Decision 2007/777/EC concerning the authorisation of China for the importation of heat treated poultrymeat products, OJ L 207/24 of 5.8.2008
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CHN-15	Article XXVIII:5 negotiations schedule CXL — European Communities, G/SECRET/25 (15 June 2006).
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CHN-17	Letter from Amb. Carlo Trojan to Amb. Sun (18 October 2006).
CHN-18	Letter from Amb. Sun to Amb. Trojan (16 November 2006).
CHN-19	Letter from Vice Minister Yi to DG O'Sullivan (19 April 2007).
CHN-20 / EU-34	Council Decision of 29 May 2007 on the conclusion of agreements in the form of agreed minutes between the European Community and the Federative Republic of Brazil, and between the European Community and the Kingdom of Thailand pursuant to Article XXVIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) relating to the modification of concessions with respect to poultry meat (2007/360/EC).
CHN-22	Council Regulation of 29 May 2007 concerning the implementation of Agreements in the form of Agreed Minutes between the European Community and Brazil, and between the European Community and Thailand pursuant to Article XXVIII of General Agreement on Tariffs and Trade 1994 (GATT 1994), amending and supplementing Annex I to Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, O.J. L 138, 30 May 2007, p. 1.
CHN-23	Commission Regulation (EC) No 616/2007 of 4 June 2007 opening and providing for the administration of Community tariff quotas in the sector of poultry meat originating in Brazil, Thailand and other third countries, OJ L 142/5 of 5.6.2007
CHN-24	Commission Regulation (EC) No 1549/2007 of 20 December 2007 amending Regulation (EC) 616/2007 opening and providing for the administration of certain Community tariff quotas in the sector of poultry meat originating in Brazil, Thailand and other third countries, OJ L 337/75 of 21.12.2007
CHN-25	Article XXVIII:5 notifications, G/SECRET/32 dated 11 June 2009 and circulated on 16 June 2009
CHN-27	Council Decision 2012/231/EU of 23 April 2012 on the signing on behalf of the EU of the Agreement in the Form of an Exchange of Letters between the EU and Brazil pursuant to Article XXVIII of the GATT 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994, and of the Agreement in the Form of an Exchange of Letters between the EU and Thailand pursuant to Article XXVIII of the GATT 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994 (O.J. L 117, 1 May 2012, p. 1).
CHN-28 / EU-35	Regulation (EU) No 1218/2012 of the European Parliament and of the Council of 12 December 2012 concerning the implementation of the Agreement in the Form of an Exchange of Letters between the EU and Brazil pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994, and of the Agreement in the Form of an Exchange of Letters between the EU and

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CHN-31	Letter from the EU to China responding to China's request for negotiation (1 June 2012)
CHN-32	Letter from the EU to China (12 October 2012)
CHN-34	Council Decision 2012/792/EU of 6 December 2012, on the conclusion of the Agreement in the form of an Exchange of Letters between the EU and Brazil pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994, and of the Agreement in the form of an Exchange of Letters between the EU and Thailand pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994, OJ L 351/44 of 20.12.20012
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EU-2	Letter from the Permanent Mission of Thailand to the WTO to Ambassador Trojan, Permanent Representative of the European Communities to the WTO, dated 11 August 2006
EU-3	Agreed Minutes initialled in Geneva by J.L Demarty (Commission of the EC) and Roberto C. De Azevedo (Delegation of Brazil), 26 October 2006
EU-4	Agreed Minutes initialled in Bangkok by F. Coturni (Commission of the EC) and B. Chutima (Delegation of Thailand), 23 November 2006
EU-5	Agreed Minutes initialled in Geneva by J.L Demarty (Commission of the EC) and Roberto C. De Azevedo (Delegation of Brazil), 6 December 2006
EU-6	G/SECRET/25/Add.1, 29 May 2009
EU-7	Letter from the Permanent Mission of Thailand to the Ambassador of the Permanent Mission of the European Communities to the WTO, 18 August 2009
EU-8	Letter from the Ambassador of the Permanent Mission of Brazil to the WTO to the Ambassador of the Permanent Mission of the European Communities to the WTO, 8 September 2009
EU-9	G/SECRET/32/ADD 1, 20 December 2012
EU-16	Commission Decision 2002/994/EC, of 20 December 2002, concerning certain protective measures with regard to products of animal origin imported from China

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EU-17	Commission Decision 2008/639/EC, of 30 July 2008, amending Decision 2002/994/EC concerning certain protective measures with regard to products of animal origin imported from China, OJ L 207/30, of 5.8.2008
EU-20	Commission Decision 2004/84/EC, of 23 January 2004, concerning protection measures relating to avian influenza in Thailand, OJ L 17/57 of 24.1.2004
EU-21	Commission Decision 2005/692/EC, of 6 October 2005, concerning certain protection measures in relation to avian influenza in several third countries, OJ L 263/20 of 8.10.2005
EU-24	Commission Decision 2005/432/EC, of 3 June 2005, laying down the animal and public health conditions and model certificates for imports of meat products for human consumption from third countries and repealing Decisions 97/41/EC, 97/221/EC and 97/222/EC, OJ L 151/3 of 14.6.2005
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EU-44 (corr.)	Import data for tariff lines 16023940 and 16023980 during the period 1999 -2015

1 INTRODUCTION

1.1 Complaint by China

1.1. On 8 April 2015, China requested consultations with the European Union pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 26 May 2015.

1.2 Panel establishment and composition

1.3. On 8 June 2015, China requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU and Article XXIII of the GATT 1994 with standard terms of reference.[2] At its meeting on 20 July 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of China, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in documents WT/DS492/2 and WT/DS492/2/Corr.1 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 23 November 2015, China requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 3 December 2015, the Director-General composed the Panel as follows:

Chairperson:	Mr Hugo Cayrús
Members:	Mr Masanori Hayashi Ms Penelope Ridings

1.6. Argentina, Brazil, Canada, India, the Russian Federation, Thailand and the United States notified their interest to participate as third parties in the Panel proceedings.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted the Working Procedures[5] and the timetable for these proceedings on 16 December 2015. The Panel adopted Amended Working Procedures[6] on 3 February 2016 to reflect the Panel's decision to grant enhanced third-party rights.

1.8. The Panel held a first substantive meeting with the parties on 22-23 March 2016. The third-party session took place on 23 March 2016. The Panel held a second substantive meeting with the parties on 5-6 July 2016. On 12 August 2016, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 21 October 2016. The Panel issued its Final Report to the parties on 2 December 2016.

[1] See China's request for consultations, WT/DS492/1. The European Union replaced and succeeded the European Communities as of 1 December 2009. In their submissions in these proceedings, the parties have generally referred to the "European Union" when describing events that took place prior to 2009. This Report follows the same approach.
[2] WT/DS492/2 and WT/DS492/2/Corr.1.
[3] See WT/DSB/M/365.
[4] WT/DS492/3.
[5] See the Panel's Working Procedures in Annex A-1.
[6] See the Panel's Amended Working Procedures in Annex A-2.

1.3.2 Requests for enhanced third-party rights

1.9. On 17 December 2015, Brazil, Canada and Thailand each requested enhanced third-party rights in these proceedings. The Panel considered the requests and consulted the parties on this matter. On 3 February 2016, the Panel informed the parties and third parties that for reasons to be elaborated in its Report, it had decided to grant the following enhanced rights to all third parties in these proceedings:

a. the right to be present and observe the entirety of the first and second substantive meetings with the parties; and,

b. the right to receive the parties' first and second written submissions, written responses to questions and comments thereupon, and related exhibits.

1.10. The reasoning for the Panel's decision is elaborated in section 7 of this Report.

1.3.3 Requests for preliminary rulings

1.11. In its first written submission of 9 February 2016, the European Union requested the Panel to make preliminary rulings that two issues raised by China in its first written submission were outside the scope of the Panel's terms of reference. At the invitation of the Panel, China submitted its response to the European Union's requests on 26 February 2016. The third parties were also invited to comment on the European Union's requests in their third-party written submissions. On 7 March 2016, the Panel informed the parties that it had decided not to make a ruling on the European Union's requests prior to the first substantive meeting with the parties. At the first substantive meeting held on 22-23 March 2016, the Panel sought further clarification from the parties on several issues relating to the European Union's requests. In a communication dated 15 April 2016, the Panel ruled on one of the issues raised by the European Union, and reserved judgment until the Panel Report on the other issue. The Panel's rulings and reasoning regarding the European Union's requests for preliminary rulings are set forth in section 7 of this Report.

2 FACTUAL ASPECTS

2.1. This section of the Report aims to provide a brief description of the measures at issue in this dispute. The facts relating to the measures at issue are elaborated in the context of our Findings in section 7 of this Report.

2.2. The claims brought by China concern the modification by the European Union of tariff concessions on certain poultry products pursuant to negotiations held under Article XXVIII of the GATT 1994. The European Union modified its concessions on the poultry products relevant to this dispute through two distinct negotiation exercises. The first negotiation exercise was initiated in 2006 and covered the modification of the tariff concessions on poultry products falling under tariff items 0210 99 39, 1602 31 and 1602 32 19 (the "First Modification Package"). The second negotiation exercise was initiated in 2009 and covered the modification of the tariff concessions on poultry products falling under tariff items 1602 20 10[7], 1602 32 11, 1602 32 30, 1602 32 90, 1602 39 21, 1602 39 29, 1602 39 40 and 1602 39 80[8] (the "Second Modification Package").

2.3. In both negotiation exercises, the European Union notified its intention to modify its tariff concessions under Article XXVIII of the GATT 1994. It subsequently entered into negotiations with Brazil and Thailand, which the European Union considered to have the requisite legal interest to participate in the negotiations. Pursuant to agreements reached with Brazil and Thailand, the European Union replaced its previous tariff concessions on the poultry products concerned with tariff rate quotas (TRQs). The TRQs and their allocation among supplying countries are as follows:

[7] As noted in China's panel request, "no change was made to the existing tariff rate for tariff subheading 1602 20 10" (China's request for the establishment of a panel, footnote 3, p. 2).

[8] As noted in China's panel request, "[t]ariff subheadings 1602 39 40 and 1602 39 80 were combined in 2012 to create a new tariff subheading 1602 39 85" (China's request for the establishment of a panel, footnote 2, p. 2).

With respect to the First Modification Package:

Tariff item number	Description of product	Prior tariff rate	New in-quota tariff rate	New out-of-quota tariff rate	TRQ volume (metric tons)	Allocation (metric tons)
0210 9939	Salted poultry meat	15.4%	15.4%	1,300 EUR/MT	264,245	Brazil: 170,807 Thailand: 92,610 Others: 828
1602 31	Prepared turkey meat	8.5%	8.5%	1,024 EUR/MT	103,896	Brazil: 92,300 Others: 11,596
1602 32 19	Cooked chicken meat	10.9%	8.0%	1,024 EUR/MT	250,953	Brazil: 79,477 Thailand: 160,033 Others: 11,443

With respect to the Second Modification Package:

Tariff item number	Description of the product	Prior tariff rate	New in-quota tariff rate	New out-of-quota tariff rate	TRQ volume (metric tons)	Allocation (metric tons)
1602 32 11	Processed chicken meat, uncooked, containing 57% or more by weight of poultry meat or offal	867 EUR/MT	630 EUR/MT	2,765 EUR/MT	16,140	Brazil: 15,800 Others: 340
1602 32 30	Processed chicken meat, containing 25% or more but less than 57% by weight of poultry meat or offal	10.9%	10.9%	2,765 EUR/MT	79,705	Brazil: 62,905 Thailand: 14,000 Others: 2,800
1602 32 90	Processed chicken meat, containing less than 25% by weight of poultry meat or offal	10.9%	10.9%	2,765 EUR/MT	2,865	Brazil: 295 Thailand: 2,100 Others: 470
1602 39 21	Processed duck, geese, guinea fowl meat, uncooked, containing 57% or more by weight of poultry meat or offal	867 EUR/MT	630 EUR/MT	2,765 EUR/MT	10	Thailand: 10
1602 39 29	Processed duck, geese, guinea fowl meat, cooked, containing 57% or more by weight of poultry meat or offal	10.9%	10.9%	2,765 EUR/MT	13,720	Thailand: 13,500 Others: 220
1602 39 40	Processed duck, geese, guinea fowl meat, containing 25% or more but less than 57% by weight of poultry meat or offal	10.9%	10.9%	2,765 EUR/MT	748	Thailand: 600 Others: 148
1602 39 80	Processed duck, geese, guinea fowl meat, containing less than 25% by weight of poultry meat or offal	10.9%	10.9%	2,765 EUR/MT	725	Thailand: 600 Others: 125

2.4. According to China's panel request, the measures at issue are "the modifications of the EU's tariff concessions and the institution of the TRQs as part of the modification packages", and "the following instruments and decision" that implement the modifications and the TRQs[9]:

"**A. For The 2007 Modification Package** [[10]]:

(i) Council Regulation (EC) No 580/2007 of 29 May 2007 concerning the implementation of agreements in the form of Agreed Minutes between the European Community and Brazil, and between the European Community and Thailand pursuant to Article XXVIII of the GATT 1994, amending and supplementing Annex I to Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

(ii) Commission Regulation (EC) No 616/2007 of 4 June 2007 opening and providing for the administration of Community tariff quotas in the sector of poultry meat originating in Brazil, Thailand and other third countries.

(iii) Commission Regulation (EC) No 1549/2007 of 20 December 2007 amending Regulation (EC) No 616/2007 opening and providing for the administration of certain Community tariff quotas in the sector of poultry meat originating in Brazil, Thailand and other third countries.

B. For The 2012 Modification Package [[11]]:

(i) Regulation (EU) No 1218/2012 of the European Parliament and of the Council of 12 December 2012 amending and supplementing Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff which was adopted after the adoption of Council Decision 2012/792/EU of 6 December 2012 approving the conclusion of the Agreement in the form of an Exchange of Letters between the European Union and Brazil pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994, and of the Agreement in the form of an Exchange of Letters between the European Union and Thailand pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994.

(ii) Commission Regulation (EU) No 1246/2012 of 19 December 2012 amending Regulation (EC) No 616/2007 opening and providing for the administration of Community tariff quotas in the sector of poultry meat originating in Brazil, Thailand and other third countries and derogating from that Regulation for 2012-2013.

(iii) Commission Implementing Regulation (EU) No 302/2013 of 27 March 2013 amending Regulation (EC) No 616/2007 opening and providing for the administration of Community tariff quota in the sector of poultry meat originating in Brazil, Thailand and other countries.

Whilst this Commission Regulation entered into force on 31 March 2013, a notice published on 28 February 2013 indicated that the agreements between the EU and Brazil on the one hand, and the EU and Thailand on the other hand, entered into force on 1 March 2013.

(iv) Refusal by the European Union in consultations held on 19 May 2014 under Article XIII of GATT 1994 to adjust the TRQs on the basis of recent import statistics establishing China's substantial supplying interests as had been requested by letter of Ambassador Yu of 19 December 2013.

[9] China's request for the establishment of a panel, p. 2.
[10] China's reference to the 2007 Modification Package is a reference to the First Modification Package.
[11] China's reference to the 2012 Modification Package is a reference to the Second Modification Package.

In addition to the measures cited in the above paragraphs, this request also covers any amendments, supplements, extensions, replacement measures, renewal measures, related measures, or implementing measures."[12]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. In its panel request, China claims that "the above measures appear to be inconsistent with the EU's obligations under Articles I, II, XIII and XXVIII of the GATT 1994", as follows:

"A. Claims With Respect To The 2007 Modification Package:

(i) The modification negotiation initiated by the EU in 2006 is inconsistent with Article XXVIII:1 of the GATT 1994, read in conjunction with Ad Article XXVIII and with the Understanding on the Interpretation of Article XXVIII, as the EU failed to negotiate or consult with all the WTO Members having a principal supplying interest or a substantial interest, or that could have had such an interest in the absence of a discriminatory quantitative restriction.

(ii) The tariff rates and the TRQs negotiated and then implemented by the EU in the measures identified above are inconsistent with Article XXVIII:2, read in conjunction with the Understanding on the Interpretation of Article XXVIII and in particular Paragraph 6 thereof, because they failed to maintain a general level of reciprocal and mutually advantageous concessions not less favorable to trade than that existing prior to the modification.

(iii) The country-specific TRQs allocated by the EU to two of the WTO Members and then implemented by the EU in the measures identified above violate GATT 1994 Article XIII by diminishing for the other WTO Members the market access commitments that the EU undertook to maintain on a non-discriminatory basis.

(iv) The allocation of all or the vast majority of the TRQs to two of the WTO Members implemented by the EU in the measures identified above, is inconsistent with GATT 1994 Article XIII:1 because the importation of the like product from the WTO Members is not similarly prohibited or restricted as a result.

(v) The allocation of all or the vast majority of the TRQs to two of the WTO Members as implemented by the EU in the measures identified above is inconsistent with the chapeau of GATT 1994 Article XIII:2 read in conjunction with the Understanding on the Interpretation of Article XXVIII and in particular Paragraph 6 thereof, which requires the allocation of a TRQ to approach as closely as possible the shares that the WTO Members might be expected to obtain in the absence of the TRQs.

(vi) The allocation of all or the vast majority of the TRQs to two of the WTO Members as implemented by the EU in the measures identified above is inconsistent with GATT 1994 Article XIII:2(d) because the EU failed to seek agreement with all WTO Members having a substantial interest in supplying the product concerned, nor did it allot to such Members shares based upon the proportions supplied by them during a previous representative period, due account being taken of any special factors which affected the trade in the product.

(vii) The allocation of all or the vast majority of the TRQs to two of the WTO Members as implemented by the EU in the measures identified above is inconsistent with GATT 1994 Article XIII:2, including its chapeau, read in conjunction with Article XIII:4, which confirms that the base period must be selected and special factors must be taken into account such as to allot to Members a TRQ that approaches as closely as possible the shares that they might be expected to obtain in the absence of the TRQs.

(viii) The EU violated GATT 1994 Article II:1 by adopting tariff rates that exceeded the bound tariff rates in its Schedule for the three tariff subheadings at issue, as the tariff

[12] China's request for the establishment of a panel, pp. 2-3. (footnotes omitted)

rates and the TRQs which the EU negotiated and then implemented under Article XXVIII in 2007 are inconsistent with GATT 1994 Articles XIII and XXVIII:2, and are, therefore, ineffectual to replace the bound rates in its Schedules preceding its implementation of the 2007 Modification Package.

(ix) In the absence of notification for certification, notification of the date on which the changes to the goods schedule come into force to the WTO Secretariat, and notification of the draft modification to its Schedule, the EU acted inconsistently with the procedures set forth in paragraph 7 of the Procedures for Negotiations under Article XXVIII and paragraph 1 of the Procedures for Modification and Rectification of Schedules and Tariff Concessions. The absence of a notification for certification of the modified schedule and of the certification following notification and the other violations mentioned herein, results in the EU having acted inconsistently with GATT 1994 Articles II:1 and II:2 by affording imports of poultry meat from China less favorable treatment than that provided for in its Schedule.

(x) The tariff rates and the TRQs negotiated and then implemented by the EU in the measures identified above are inconsistent with GATT 1994 Article I:1 which requires that any advantage, favor, privilege or immunity granted by any WTO Member to any product originating in any other country shall be accorded immediately and unconditionally to the like product originating in the territories of all other WTO Members.

B. Claims With Respect to the 2012 Modification Package:

(i) The modification negotiation initiated by the EU in 2009 is inconsistent with Article XXVIII:1 of the GATT 1994, read in conjunction with Ad Article XXVIII, and with the Understanding on the Interpretation of Article XXVIII, as the EU failed to negotiate or consult with all the WTO Members having a principal supplying interest or a substantial interest or that could have had such an interest in the absence of a discriminatory quantitative restriction.[13]

(ii) The tariff rates and the TRQs negotiated and then implemented by the EU in the measures identified above are inconsistent with Article XXVIII:2, read in conjunction with the Understanding on the Interpretation of Article XXVIII and in particular Paragraph 6 thereof, because they fail to maintain a general level of reciprocal and mutually advantageous concessions not less favorable to trade than that existing prior to the modification.

(iii) The country-specific TRQs allocated by the EU to two of the WTO Members as implemented in the measures and decision mentioned above[14] violate GATT 1994 Article XIII by diminishing for the other WTO Members the market access commitments that the EU undertook to maintain on a non-discriminatory basis.

(iv) The allocation of all or the vast majority of the TRQs to two of the WTO Members as implemented in the measures and decision mentioned above[15] is inconsistent with GATT 1994 Article XIII:1 as the importation of the like product of all the WTO Members is not similarly prohibited or restricted as a result.

[13] In a footnote to this item, China states that "[t]he EU refused to change the TRQs and its allocation mentioned in (ii) above so as to reflect China's recent shares of importation into the EU. In letters dated 1 June 2012 and 12 October 2012 addressed by EU Ambassador Pangratis to Ambassador Yi of China in response to letters from Ambassador Yi dated 9 May 2012 and 2 October 2012, respectively, the EU refused China's request to enter into consultations under Article XXVIII of the GATT 1994 on the grounds that China had become the biggest supplier in a certain number of poultry products based on EU statistical data for the period from 2009 − 2011" (China's request for the establishment of a panel, footnote 12).

[14] In a footnote to this item of its panel request, China states: "See Section I.B(iv) for the referred decision" (China's request for the establishment of a panel, footnote 13). Section I.B(iv) of China's panel request refers to "[t]he refusal by the EU in consultations held on 19 May 2014 under Article XIII of GATT 1994 to adjust the TRQs on the basis of recent import statistics establishing China's substantial supplying interests", as had been requested by China.

[15] Ibid.

(v) The allocation of all or the vast majority of the TRQs to two of the WTO Members as implemented in the measures and decision mentioned above[16] is inconsistent with the chapeau of GATT 1994 Article XIII:2 read in conjunction with the Understanding on the Interpretation of Article XXVIII and in particular Paragraph 6 thereof, because the allocation of the TRQs do not approach as closely as possible the shares that the WTO Members might be expected to obtain in the absence of the TRQs.

(vi) The allocation of all or the vast majority of the TRQs to two of the WTO Members as implemented by the EU in the measures and decisions identified above is inconsistent with GATT 1994 Article XIII:2(d) because the EU failed to seek agreement with all WTO Members having a substantial interest in supplying the product concerned, nor did it allot to such Members shares based upon the proportions supplied by them during a previous representative period, due account being taken of any special factors which may have affected or may be affecting the trade in the product.

(vii) The allocation of all or the vast majority of the TRQs to two of the WTO Members as implemented by the EU in the measures identified above is inconsistent with GATT 1994 Article XIII:2, including its chapeau, read in conjunction with Article XIII:4, which confirms that the base period for the determination of the TRQs must be selected and special factors must be taken into account so as to allot to Members a TRQ that approaches as closely as possible the shares that they might be expected to obtain in the absence of the TRQs.

(viii) The EU's refusal in consultations with China on 19 May 2014 to consider an adjustment of the allocation of the TRQs based on a change in the base period or a reappraisal of the special factors involved is inconsistent with GATT 1994 Article XIII:4.

(ix) The EU violated GATT 1994 Article II:1 by adopting tariff rates that exceeded the bound tariff rates in its Schedule for the tariff subheadings at issue, as the tariff rates and the TRQs which the EU negotiated and then implemented under Article XXVIII in 2013 are inconsistent with GATT 1994 Articles XIII and XXVIII:2, and are, therefore, ineffectual to replace the EU's bound rates in its Schedules preceding its implementation of the 2012 Modification Package.

(x) In the absence of notification for certification, notification of the date on which the changes to the goods schedule come into force to the WTO Secretariat, and notification of the draft modification to its Schedule, the EU acted inconsistently with the procedures set forth in paragraph 7 of the Procedures for Negotiations under Article XXVIII and paragraph 1 of the Procedures for Modification and Rectification of Schedules and Tariff Concessions. The absence of a notification for certification of the modified schedule and of the certification following notification and the other violations mentioned herein, results in the EU having acted inconsistently with GATT 1994 Articles II:1 and II:2 by affording imports of poultry meat from China less favorable treatment than that provided for in its Schedule.

(xi) The tariff rates and the TRQs negotiated and then implemented by the EU in the measures identified above are inconsistent with GATT 1994 Article I:1 which requires that any advantage, favor, privilege or immunity granted by any WTO Member to any product originating in any other country shall be accorded immediately and unconditionally to the like product originating in the territories of all other WTO Members.

The EU's measures and decision also nullify or impair the benefits accruing to China directly or indirectly under the cited agreements."[17]

3.2. The European Union requests the Panel to reject all of China's claims.

[16] Ibid.
[17] China's request for the establishment of a panel, pp. 3-6.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 20 of the Amended Working Procedures adopted by the Panel (see Annexes B-1, B-2, B-3 and B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Brazil, Canada, the Russian Federation, Thailand and the United States are reflected in their executive summaries, provided in accordance with paragraph 21 of the Amended Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5 and C-6). India did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 21 October 2016, the Panel issued its Interim Report to the parties. On 4 November 2016, China and the European Union each submitted written requests for the Panel to review aspects of the Interim Report. On 11 November 2016, each party submitted comments on the other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out our response to the parties' requests for review of precise aspects of the Report made at the interim review stage. We discuss the parties' requests for substantive modifications below, in sequence according to the sections and paragraphs to which the requests pertain. In addition to the substantive requests that are discussed below, various editorial and drafting improvements were made to the Report.

6.3. The numbering of some of the footnotes in the Final Report has changed from the numbering in the Interim Report. The discussion below refers to the numbering in the Interim Report and, where it differs, includes the corresponding numbering in the Final Report.

6.4. Before proceeding on a section-by-section basis, we note that the European Union raised a cross-cutting issue with reference to **paragraphs 7.380, 7.386, 7.399, 7.402, and 7.406 and 8.1(e)**. The European Union observes that the Panel uses different expressions to indicate apparently the same thing, including "the size of the 'all others' share" (para. 7.380), "amount of the 'all others' share" (para. 7.380), or "the amount of the 'all others' shares" (para. 7.402) and "the size of the TRQ shares to be allocated to countries that were not recognized as substantial suppliers" (para. 7.406). For the sake of clarity, the European Union proposes that the panel replace those expressions with the simpler and clearer expression "the TRQ(s) share(s) allocated to 'all others'", or "the TRQ(s) share(s) to be allocated to ''all others'", as appropriate. China considers that the most accurate expression would be "the size of the TRQ(s) share(s) allocated to 'all others'", or "the size of the TRQ(s) share(s) to be allocated to 'all others'". We note that these different expressions were used to indicate the same thing. In the interest of consistent expression, we have harmonized the expressions used in these paragraphs.

6.1 Factual aspects and General overview of China's claims and horizontal arguments

6.5. China requests the Panel to revise the first sentence of **paragraph 2.2** and the first sentence of **paragraph 7.2** to reflect that the claims brought by China in this dispute are not only about the modification by the European Union of its tariff concessions on certain poultry products, "but also about the administration, allocation in particular, by the European Union through its legislations and other domestic measures of the tariff rate quotas opened as a result of the modification". The European Union does not comment on China's request. We note that these sentences are not intended to provide a thorough description of the scope of China's claims in this dispute. Furthermore, we consider that the terminology proposed by China in its request to revise these sentences, in particular the reference to the "administration" of the tariff rate quotas, does not correspond to the panel request and could potentially prejudge some of the disputed issues in this case. Accordingly, we have not adjusted the wording of these sentences.

6.6. China requests the Panel to revise **paragraph 7.3** by adding the words "by the European Union" after the words "during the reference periods selected", for greater clarity. The European

Union does not comment on China's request. We have adjusted the wording of paragraph 7.3, as requested by China.

6.7. With respect to **paragraph 7.6**, the European Union suggests the following drafting change: "Following a relaxation of the SPS measures by the European Union in July 2008, imports of heat treated poultry products from China into the European Union were allowed ~~increased significantly under some of the tariff lines at issue~~." China considers that these words should not be deleted, because the fact that imports of heat treated products increased significantly under some of the tariff lines is factually correct. Moreover, China considers that the statement supports the analysis of the Panel that China held a substantial supplying interest as regards these tariff lines. We consider that the change requested by the European Union would introduce imprecision into this sentence and potentially alter its meaning, and have therefore left it unchanged.

6.2 The tariff rate quotas and the SPS measures

6.8. The European Union suggests five drafting changes to the description of the SPS measures: (i) with respect to **paragraph 7.85**, first sentence, specifying that the requirements referenced therein are "sanitary" requirements; (ii) adding the words "due to animal health reasons" at the end of the third sentence of **paragraph 7.86**; (iii) clarifying that the decision referred to in **paragraph 7.88** provides for the importation of poultry products subject to a declaration "amongst other sanitary requirements (i.e. heat treatment)"; (iv) revising **paragraph 7.89**, third sentence, to clarify that the importation of the products referred to therein are still subject to heat treatment "B", "amongst other sanitary requirements"; and (v) revising **paragraph 7.92** by replacing the words "at the time of" with the word "until" in the second sentence, and revising the formulation of the condition relating to heat treatment "B" in the last sentence by adding the words "… and fulfil the other applicable sanitary requirements". China does not comment on any of the foregoing drafting suggestions. We have made drafting changes along the lines proposed by the European Union.

6.9. With respect to **paragraph 7.91**, fourth sentence, the European Union suggests deleting the words "under the heat treatment measure". China considers that the words should not be deleted because they are necessary to ensure clarity and completeness, and notes that the European Union has not provided reasons for deleting these words. We consider that the change requested by the European Union would introduce imprecision into this sentence and potentially alter its meaning, and we have therefore left it unchanged.

6.10. China requests the Panel to modify the discussion in **paragraph 7.97** concerning the discrepancies between the 2000-2006 import statistics submitted by the parties for tariff line 1602 39 80. China notes that the Panel generally uses the import statistics provided by China for the reasons set out there, but that for tariff line 1602 39 80, the Panel decides to use the statistics provided by the European Union for 2005 and 2006 based on the following two considerations: (i) China's statistics appear implausibly large (17.6% and 30.5% of the total EU imports), given the SPS measures in place at the time; and (ii) the final statistics that China submitted in Exhibit CHN-52 are inconsistent with the statistics it submitted previously in Exhibit CHN-43. As regards the second consideration, China notes that in both Exhibits CHN-52 and CHN-43, China consistently reported Chinese imports of 101.4 metric tonnes and 201.5 metric tonnes for 2005 and 2006, respectively, and there is thus no discrepancy between the statistics reported in these two Exhibits. China also notes that it obtained the statistics directly from Eurostat, which China understood to be the source of the European Union's statistics as well. China submits that it retrieved trade statistics multiple times from Eurostat during the course of this dispute settlement proceeding, and the data it retrieved are consistent. The European Union recalls that, as explained by the European Union (second written submission, para. 85), the discrepancy is due to the fact that China's statistics include imports into Bulgaria, Romania and Croatia made before those countries became Member States of the European Union, whereas the EU statistics do not include those imports. We have revised paragraph 7.97, along with a consequential change to **footnote 207**, in the light of the parties' comments.

6.3 Terms of reference issues

6.11. Regarding **paragraph 7.106**, the European Union invites the Panel to amend this paragraph by adding some additional text summarizing an additional argument that had been

presented by the European Union on this issue. China does not object to the addition, but offers several drafting suggestions for the new text proposed by the European Union. We have added text along the lines requested by the European Union.

6.12. Beginning with the **title of Section 7.3.2.3**, China requests that it be changed from "China's contention that the European Union violated Article XIII:1 and the chapeau of Article XIII:2 by failing to annually review and reallocate the TRQ shares" to "China's contention that the European Union violated Article XIII with respect to the allocation of the TRQs in the subsequent years" to more accurately describe China's complaint. The European Union "firmly opposes China's attempt to reformulate one of the claims that it has formulated during the litigation, and notably in its second written submission, as clearly demonstrated in paragraph 7.128 of the interim report". The European Union submits that it "is clear from paragraphs 7.128 and 7.130 that the Panel has made an objective reading of China's submission and now China tries to move the focus of its claim to what it now pretends to be the essence of China's complaint". The European Union submits that "[i]n reality, what China is doing is to perpetuate its litigation tactics of formulating its claims in an ambiguous and constantly evolving manner in order to take advantage from this situation, in an attempt to avoid its claims being dismissed". We consider that the title of section 7.3.2.3 precisely reflects our understanding of China's claim. Our understanding of China's claim is based on our analysis of the argumentation presented by China in its submissions in the course of these proceedings. Accordingly, we decline to make the change requested by China.

6.13. China notes the Panel's statement in **paragraph 7.133** that "having carefully reviewed Section I of the panel request, we do not see any reference to the European Union's failure to annually review and reallocate the TRQs from quota year to quota year to take account of trade developments as one of the challenged measures at issue", and the Panel's statement in **paragraph 7.135** that "Section I.B(iv) does not identify, as a measure at issue in this dispute, the failure by the European Union to annually review and reallocate the TRQs from year to year, on its own initiative". China submits that it "appears that the Panel has considered that, in order for China's claim to fall within its terms of reference, China should have explicitly mentioned in Section I of the panel request the European Union's "failure to annually review and reallocate the TRQs from quota year to quota year to take account of trade developments" as a separate and distinct measure at issue." In China's view, however, "[s]uch a standard goes significantly beyond the requirement under Article 6.2 of the DSU, which does not require the complainant to set out the arguments in support of a particular claim in the panel request". In the European Union's view, the comments made by China concerning these paragraphs do not require the Panel to amend its interim report "as they constitute a mere attempt to reargue the case by trying to convince the Panel once again" that the claim discussed in the relevant part of the interim report was within the Panel's terms of reference. Our view is indeed that in order for China's claim that the European Union violated the provisions of Article XIII by failing to annually review and reallocate the TRQs from quota year to quota year to take account of trade developments, the corresponding omission should have been identified, in China's words, as "a separate and distinct measure at issue" in Section I.B(iv) of the panel request. We do not agree with China's view that such a standard goes beyond the requirement under Article 6.2 of the DSU because we do not agree with China that this is properly characterized as an "argument[] in support of a particular claim in the panel request".

6.14. China requests the deletion of **paragraphs 7.136 and 7.137**, in which the Panel suggests that China's arguments in respect of the subsequent allocation by the European Union of the TRQs were "apparently only in response to" the European Union's submission about some kind of "time limit" on the validity of the allocation or a "periodic review mechanism". According to China, this suggestion "has no basis". China states that in its panel request, China claimed that "the allocation of TRQs by the EU, which naturally includes both initial allocation and subsequent allocation, was inconsistent with Article XIII". China submits that although "it might be true that China reinforced arguments to support its challenge against the subsequent allocation when it noticed that the EU overlooked the ongoing nature of the Article XIII obligations", it "does not follow that China did not properly make such a claim in its panel request and that such arguments of China were "apparently only in response to" the EU's submission merely because of sequence of these two events". The European Union submits that paragraph 7.136 "makes an objective description of the evolution of China's claims during the litigation", and that "China does not argue that this description is incorrect". The European Union submits that in paragraph 7.137, the Panel makes clear what understanding it draws from such evolution and concludes that such an understanding reinforces the conclusion, derived from the text of the Panel request, that these are new claims.

The European Union submits that China's observation that the Panel's understanding "has no basis" is therefore unwarranted and "constitutes an attempt to reargue the case". We decline China's request to delete these paragraphs. They set forth an objective description of the evolution of China's claims and argumentation during these proceedings. The basis for that description is our analysis of the panel request and the subsequent argumentation presented by China in the course of these proceedings. To avoid any misunderstanding, we wish to clarify that it was not "merely because of the sequence of these two events" that we reached the conclusion that China did not properly make the relevant claim in its panel request, and that such arguments were made only in response to the European Union's submissions.

6.4 Claims under Article XXVIII:1 of the GATT 1994

6.15. China requests the Panel to revise its statement in **paragraph 7.178** 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'", and the statement that "there is no issue regarding the 10% benchmark *per se* that we are called upon to resolve in the present dispute". China recalls that it has argued that what is a substantial interest in one case might not be a substantial interest in another case, and that a 10% import share benchmark cannot be used as a "bright line". With reference to its arguments in paragraphs 74-84 of its second written submission as well as paragraphs 16-17 and 19 of its response to Panel question No. 68, China states that it "submitted and continues to consider that the application of a bright line test of 10% violates Article XXVIII when - as was done by the EU in the present instance - the circumstances of the case were not considered". China requests the Panel "to consider the issue whether there is a 10% bright line benchmark, no matter it is an actual share or a counter-factual share, in determining a substantial supplying interest, and to consider this issue separately from the issue of the existence and impact of discriminatory quantitative restrictions". The European Union responds that this paragraph "neither states nor suggests in any way that the 10% import threshold should be considered as a bright line test to assess whether a Member holds a substantial supplying interest for the purposes of Articles XXVIII and XIII GATT". Rather, the European Union submits that this paragraph provides "a description of the evolution of China's arguments concerning the 10% import threshold in the context of China's claims, as well as of the European Union's arguments". According to the European Union, that description is correct and based on the parties' submissions, and here again "China tries to move the focus of its claims pointing to certain paragraphs of its submissions and ignoring others". In the light of China's comments on the interim report, which implies that China now considers that the use of a 10% benchmark is an *ipso facto* violation of Article XXVIII and Article XIII, we have revised paragraph 7.178 to clarify the basis for our understanding 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'".

6.16. China submits that there is an inconsistency between the statements made by the Panel in **paragraphs 7.195 and 7.201.** China notes that paragraph 7.195 states that the cited passage from *Canada – Wheat Exports and Grain Imports* "supports the proposition that the term 'discrimination' may be interpreted relatively narrowly, so as to cover only unjustifiable distinctions, or relatively broadly, so as to also cover distinctions that are legitimate and justifiable. To that extent, we agree that the word 'discrimination' may be given different meanings depending on the context in which that word appears, and depending on the context, may have a broad meaning that covers legitimate and justifiable distinctions". China submits that this is inconsistent with the Panel's statement in paragraph 7.201 that "when the term 'discrimination' is accompanied by the qualifying terms 'arbitrary or unjustifiable' (or comparable terms) and 'where the same conditions prevail' (or comparable terms) in certain provisions, these additional terms serve the purpose of bringing greater precision to how the general concept and legal standard of 'discrimination' is to be applied in a given provision or context. These qualifying terms do not, in our view, serve the purpose of narrowing the ordinary meaning of the term 'discrimination' in the manner suggested by China." China submits that there is an inconsistency between these statements because "language that brings greater precision of necessity eliminates certain possible interpretations that a more general term may allow and is therefore necessarily narrowing". In addition, China finds an inconsistency "between the Panel stating that the sole word 'discrimination' may have a broad meaning and then to say that the absence of qualifying terms may mean that it does not have a broad meaning". The European Union does not comment on China's observation. We do not apprehend the alleged inconsistency between the propositions presented in paragraph 7.195 (read together with paragraph 7.196) and paragraph 7.201. Among

other things, we do not equate the notion of "*bringing greater precision* to how the general concept and legal standard of 'discrimination' is to be applied in a given provision or context" to the notion of "*narrowing* the ordinary meaning of the term 'discrimination'". Accordingly, we have made no change to these paragraphs.

6.17. China requests the Panel to add a new sentence at the beginning of **paragraph 7.202** to more accurately summarize its argument, stating that "[i]n addressing the European Union's argument that China and a third country that was not subject to similar import prohibitions/restrictions are not similarly situated, China submits that in determining if two countries are similarly situated, only the conditions that are relevant for the purpose of the provision concerned should be considered." China submits that this would more accurately summarize the arguments presented at paragraphs 29-31 of its oral statement at the first meeting. The European Union believes that the Panel has summarized correctly China's position. In any event, the European Union disagrees with the phrasing of the additional sentence proposed by China. The European Union reiterates that all third countries are subject to the same sanitary regulatory requirements; if all third countries are not "similarly situated", it is because their sanitary situation is different and not because they are "not subject to similar import restrictions/prohibitions". We have not added the additional text requested by China. The focus of this paragraph, and the one that follows, is not on China's argument about the meaning and application of the "similarly situated" standard; rather, the focus of these paragraphs is on China's argument that the term "discriminatory" must be interpreted in the context of Article XXVIII:1 and paragraphs 4 and 7 of its accompanying Ad Note, which in no way prohibit or require the elimination of any measure characterized as a "discriminatory quantitative restriction" within the meaning of those provisions. However, in the light of China's comment, we have added a reference to paragraph 31 of China's opening statement at the first meeting, and also revised paragraph 7.203, to clarify the focus of these paragraphs. Furthermore, we have added a reference to paragraphs 29-31 of China's opening statement at the first meeting in paragraph 7.204, which is where we address China's argument regarding the meaning of "similarly situated".

6.18. Regarding the statement in **paragraphs 7.205 and 7.206** that "China has not attempted to argue that imports from any other similarly situated country were not subject to the same restrictions", China reiterates that it "is of the view that the sanitary situation is not the condition that is *relevant* for the purpose of the provisions concerned in this dispute, i.e. Article XXVIII:1 and its accompanying Ad Notes, and thus would not permit to conclude [sic] whether China and other countries are or are not similarly situated for the purpose of these provisions". In China's view, for the purpose of these provisions, "the fact that Chinese poultry meat products and poultry meat products originated in other countries are like products is the condition that is relevant and this fact is sufficient to establish that China and other countries are similarly situated". In view of this, China considers that it is incorrect for the Panel to find that China "has not attempted to argue that imports from any other similarly situated country were not subject to the same restrictions". On the contrary, China has submitted that "given that Chinese poultry meat products and poultry meat products originated in other countries are like products, they are similarly situated". As a result, China submits that "because poultry meat products originating in other countries were not subject to the same or similar restrictions, the restrictions were discriminatory". China therefore requests the Panel to modify the sentence quoted above. China requests that, to the extent that the Panel intends to say that China has not attempted to argue that imports from any other country that is in the *same sanitary situation* were not subject to the same restrictions, "it is appropriate for it to explicitly say so". The European Union believes that the Panel has summarized correctly China's position, and disagrees with China's request. The European Union reiterates that all third countries are subject to the same sanitary regulatory requirements. The European Union states that if all third countries are not "similarly situated", it is because their sanitary situation is different and not because they are "not subject to similar import restrictions/prohibitions". We agree with China that the clarity of the analysis would benefit from drawing out the Panel's assessment of China's argument on the notion of "similarly situated" more explicitly. We have done so by revising paragraphs 7.204, 7.205, and 7.206.

6.19. Regarding **paragraph 7.206**, China requests the Panel not to exercise judicial economy with respect to the parties' disagreement as to: (i) whether the scope of the terms "discriminatory quantitative restrictions" in the context of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1 covers only unjustifiable distinctions, or is broad enough to also cover justifiable distinctions; (ii) whether the SPS measures at issue constitute "quantitative restrictions"; and (iii) what share of imports into the European Union market China could reasonably be expected to have had, in the

absence of the SPS import prohibitions, over period 2002-2008. China requests the Panel "to engage [in] analysis in these respects even on an *arguendo* basis". The European Union does not comment on China's request. We note that it is well established that a panel has "the discretion to address only those arguments it deems necessary to resolve a particular claim" (Appellate Body Report, *EC – Poultry*, para. 135). We consider that a panel "may be guided by a range of different considerations when deciding whether to address arguments beyond those strictly necessary to resolve the matter, and the manner in which a panel may do so, including the scope and nature of any such other alternative findings, may also vary depending on the issues before the panel" (Panel Report, *India – Solar Cells*, para. 7.76). We are not convinced that addressing the above issues on an *arguendo* basis will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Accordingly, we decline China's request.

6.20. China considers that, contrary to the Panel's assessment in **paragraph 7.219**, there is no lack of clarity in China's argumentation regarding "the scope and nature of an obligation of re-appraisement". With reference to its response to Panel question No. 23 and paragraph 40 of its opening statement at the second meeting, China states that its view "has consistently been that if the negotiations / consultations last beyond six months, the Member withdrawing the concession should *assess* whether a re-appraisement should be made", and that a "re-appraisement need not necessarily be made after each period of six months, but must occur when material trade developments have occurred that influence the supplying interest status of the WTO Members". The European Union does not comment on China's request. We have adjusted paragraph 7.219 and its accompanying footnotes in the light of China's comment.

6.21. With regard to **paragraphs 7.224-7.227**, China states that the Panel gives a cursory conclusion in the first sentence of paragraph 7.227 by stating that "[i]t appears to us that, if anything, prior practice does not support China's contention that there is a legal obligation of re-appraisement". China observes that the Panel "fails to determine on which basis this conclusion was taken". In addition, China states that the Panel "fails to consider and respond to China's full argumentation and in particular to that set forth in its response to the Panel's question 106". The European Union does not comment on China's request. We have revised paragraph 7.227 to clarify the basis for this assessment.

6.22. China makes several interrelated requests relating to the Panel's discussion, in **section 7.4.3.3**, of whether the European Union's refusal to recognize China as a Member holding a supplying interest was justified by the timing of China's claim. First, China requests that the Panel rule on whether the European Union's decision not to recognize China as a Member holding a principal or substantial supplying interest was justified in the absence of a claim of supplying interest by China within the 90-day period. China states that this "is particularly because China considers that the Panel should revise its analysis on the existence of discriminatory quantitative restrictions and on the re-appraisement of the interest based on the latest import data for the reasons mentioned above". The European Union does not comment on China's request. We recall that it is well established that a panel has the discretion to address only those arguments it deems necessary to resolve a particular claim. We are not convinced that addressing the above issues on an *arguendo* basis will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Accordingly, we decline China's request.

6.23. With regard to **paragraph 7.233** in particular, China requests that the Panel clarify that paragraph 4 of the Procedures for Negotiations under Article XXVIII and paragraphs 2 and 5 of the Understanding on the Interpretation of Article XXVIII are not couched in mandatory terms. China submits that the current paragraph is phrased as if this 90-day is mandatory, which in China's view it is not. The European Union does not comment on China's request. We do not see the basis for China's comment in the text of paragraph 7.233, as this paragraph refers to the 90-day "guideline". Accordingly, we have not amended this paragraph.

6.24. China requests that **paragraph 7.234** be revised to state in clear terms that China's claim of a substantial supplying interest for the First Modification Package was filed within the 90-day period. The European Union does not comment on China's request. We have made the change requested by China.

6.5 Claims under Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding on Article XXVIII of the GATT 1994

6.25. Regarding **paragraph 7.261**, China states that "[f]irst of all, in making its analysis, the Panel has omitted to take into account and should do so that the global TRQs for several tariff lines do not reflect the future trade prospects of the WTO Members". In this regard, China refers to paragraph 106 of its second written submission and to paragraph 50 of the China's opening statement at the second substantive meeting. China submits that it "has therefore shown that the total amount of imported poultry products into the European Union from all sources would have been greater had a representative period been chosen", and "requests the Panel to take this data into account". The European Union observes that the calculations cited by China purport to show that the amount of compensation provided by the European Union was below the compensation that would have resulted from the application of the formulae of paragraph 6 of the Understanding on the basis of a different reference period, but that those calculations "do not prove that the total trade during the reference period used by the European Union would have been larger in the absence of the SPS measures applied to China". We have revised paragraph 7.261 to more clearly draw out the premise that, assuming that the amount of imports supplied from China would have been greater in the absence of the SPS measures, there may well have been a corresponding decrease in the amount of imports supplied from other sources in the absence of any change in overall demand.

6.26. With respect to **paragraph 7.272**, China requests the Panel to identify the legal ground on which it concludes that "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". China states that "[i]f, as the Panel admits, the benchmark must not necessarily be fixed in advance of the negotiations, then, there is no legal ground on which to claim that it must be a three-year period or year preceding the negotiations". China further states that the wording of paragraph 6 of the Understanding on the Interpretation of Article XXVIII "is what it is" and requires the use of "the most recent" three-year period or year "and that, as mentioned above, is the period preceding the replacement of the tariff concession by the tariff quota". China adds that "to adjust the benchmark year-to-year is not as complicated as the Panel seems to believe", and this "is the result of a simple mathematical formula applied to import statistics". The European Union does not comment on China's request. We have revised paragraph 7.272 to more clearly draw out the problem that we see with requiring the Members engaged in the negotiations to change the benchmark defined in that provision from year to year until the negotiations have been concluded.

6.27. China additionally requests that the Panel clarify the basis on which it drew the conclusion, in the accompanying footnote to this paragraph (**footnote 412 of the Interim Report, footnote 426 of the Final Report**), that the fact that the European Union agreed not to base the calculation of the compensation on calendar year 2005, but rather to base it on a more recent twelve-month period of July 2005 to June 2006, does not lend support to the conclusion that the most recent period can be the most recent period preceding the conclusion of the negotiations. The European Union does not comment on China's request. We have rephrased footnote 412 of the Interim Report (**footnote 426 of the Final Report**) in the light of China's request.

6.28. Regarding **paragraph 7.275**, China states that the Panel appears to support "without analysis and without reference to the data and analysis submitted by China the assertion of the EU that the amount of trade covered by each of the TRQs in the Second Modification Package exceeds largely the greatest of the amounts that would result from each of the three formulae of paragraph 6 of the Understanding on the Interpretation of Article XXVIII". China requests the Panel to provide an analysis on why it supports this assertion by the European Union, and to consider and take into account China's data showing that the global TRQs for several tariff lines do not reflect the future trade prospects of the WTO Members. Reference is made to paragraph 106 of China's Second Written Submission, to paragraph 50 of the China's opening statement at the second substantive meeting, and to China's response to Panel question No. 71. The European Union recalls that it has rebutted China's arguments in its second written submission (at paras. 77-85). We note that the purpose of the statement that is the subject of China's comment was not to make a finding on the question of whether the amount of trade covered by each of the TRQs in the Second Modification Package "exceeds largely the greatest of the amounts" that would result from each of the three formulae of paragraph 6 of the Understanding on the Interpretation of Article XXVIII. The point was simply to illustrate, with actual examples, that paragraph 6 of the

Understanding establishes the basis for determining the *minimum* amount of compensation that must be provided, and that it is always open for the Members involved in negotiations under Article XXVIII to agree on compensation that exceeds the minimum amount required. We have deleted this sentence in the light of China's comment.

6.29. With reference to **paragraphs 7.291 and 7.293**, China submits that the arguments developed by the Panel do not respond to China's argument that "it would not make any sense to fix a global TRQ taking into account overall future prospects without taking into account future trade prospects at the level of the separate TRQs in which the global TRQ is broken down", and that to do otherwise "would result in over-compensation for some and under-compensation for others, thereby creating discrimination" (China's first written submission, para. 138; China's second written submission, para. 110). The European Union does not comment on China's request. We have added a reference to this argument in paragraph 7.291. We have added additional language in paragraph 7.299 to more explicitly address this argument.

6.30. China offers several observations on **paragraph 7.301**. First, China states that "[i]n response to the Panel's question in paragraph 7.301, China refers to paragraph 43 of its Opening Statement at the Second Substantive Meeting. China submits that the Panel has not responded to the example given in that case which addresses the issue raised by the Panel in paragraph 7.301." Second, China takes issue with the statement that "China *has not explained* why it would be the case that, in a situation where a Member replaces an unlimited tariff concession with a TRQ that is not allocated among supplying countries, it could be presumed that the value of that compensation for each single Member would be equivalent to the value, for that Member, of the concession prior to its modification or withdrawal" (emphasis added). The European Union does not comment on China's request. We do not see how paragraph 43 of China's opening statement at the second meeting is relevant to the focus of paragraph 7.301. However, we have rephrased paragraph 7.301 in the light of the second point made by China.

6.31. Regarding **paragraph 7.302**, China requests the Panel "to complete its analysis on an *arguendo* basis that Article XXVIII:2 and paragraph 6 of the Understanding apply to the allocation of TRQ shares among supplying countries". China disagrees with the Panel's statement that "China's claims of violation relating to the allocation of the TRQs are for the most part based on the same grounds as its claims relating to the total amount of the TRQs. Having rejected China's claims of violation relating to the total amount of the TRQs, the same conclusions would apply *mutatis mutandis* to these additional claims insofar as they are the same". Specifically, China states that it does not consider that "the same conclusions would apply *mutatis mutandis* to these additional claims insofar as they are the same". China gives two examples of reasoning by the Panel that "applies solely with regard to the total amount of the TRQs" and not to the share of TRQs assigned to China or "all others". The European Union does not comment on China's request. We recall that it is well established that a panel has the discretion to address only those arguments it deems necessary to resolve a particular claim. We are not convinced that addressing the above issues on an *arguendo* basis will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Accordingly, we decline China's request. However, in the light of China's comment, we have rephrased this paragraph and we have deleted the statement referred to above.

6.6 Claims under Article XIII:2(d) of the GATT 1994

6.32. With respect to **paragraph 7.320**, China requests the Panel to indicate the factual basis for the statement that negotiations on the total amount of the TRQs under Article XXVIII "frequently occur simultaneously" with negotiations on the allocation of the TRQs under Article XIII:2(d). The European Union does not comment on China's request. The basis for our statement is cited in the accompanying footnote, namely Canada's observation in its third-party submission that "[i]f Article XXVIII is being used, it is very likely that allocation under Article XIII will occur coincident with the establishment of a TRQ under Article XXVIII." However, in the light of China's comment, we have rephrased the wording of this sentence to clarify that the Panel is not making any factual finding on the frequency with which negotiations under Article XXVIII and XIII:2(d) occur simultaneously.

6.33. With reference to **paragraphs 7.332 and 7.333**, China requests the Panel to clarify why the fact that the import restrictions may have included WTO-inconsistent measures in *EEC – Apples (Chile I)* or the fact that import restrictions in the form of WTO-consistent SPS measures

"has any link with the assessment of whether a representative period was selected". China notes that, as mentioned by the Panel, Article XIII:2(d) does not have a qualification of "discriminatory quantitative restrictions" and hence, whether or not the import restrictions are discriminatory or not or whether they are WTO-consistent or not, has no relevance in the view of China. The European Union does not comment on China's request. We consider that although the WTO-consistency of any import restrictions in place during a period selected is not a decisive factor for the purpose of determining whether that period is "representative", it is a relevant consideration. Therefore, we have clarified this point in paragraph 7.333.

6.34. China also requests that the Panel clarify its analysis in **paragraph 7.337**, as China does not see the link that the Panel attempts to establish between the fact that the objective of the EU measures was to make sure that domestic and foreign suppliers respect the same sanitary requirements, and the issue of whether these SPS measures are "special factors" or not. The European Union considers that "unless a measure is WTO inconsistent or it can be said to be out of the ordinary, unusual, exceptional for some other reasons, than it cannot be characterised as a special factor". The European Union recalls the dictionary definition of "special": "Of an abstract concept, immaterial thing, etc.: out of the ordinary, unusual; exceptional in quality or degree" or "Of a material thing, event, etc.: out of the ordinary; excelling in some (usu. positive) quality". We have clarified this point in paragraph 7.337 in the light of China's comment.

6.35. China requests clarification of the Panel's suggestion in **paragraph 7.350** that the consideration of "special factors" would be redundant if a TRQ allocation must as a rule always be based on a representative period immediately preceding the opening of the TRQ. In this regard, China submits that the determination of "a previous representative period" and of "special factors" are separate determinations and it must be determined whether a previous representative period was affected by special factors. In China's view, there is "no automatism between a period preceding the allocation of the TRQ and the existence of special factors". The European Union does not comment on China's request. We did not intend to suggest that consideration of "special factors" would be redundant if a TRQ allocation must as a rule always be based on a representative period immediately preceding the opening of the TRQ. In order to clarify that our interpretation of the terms "special factors" in Article XIII:2 does not rest on that premise, we have modified this paragraph in the light of China's comment.

6.7 Claims under the chapeau of Article XIII:2 of the GATT 1994

6.36. The European Union observes that paragraphs 7.313, 7.379, and 7.388 all convey the idea that the Panel's findings in relation to China's claims under the chapeau of Article XIII:2 are made in the alternative to the findings that the panel reached (in the first place) on China's claims under Article XIII:2(d). However, the European Union considers that when one reads the finding of the Panel in **paragraph 7.406** and the conclusion in **paragraph 8.1(e)**, that idea is not clearly conveyed. For the sake of clarity, the European Union suggests that the Panel recall in paragraph 7.406 and again in the conclusion in paragraph 8.1(e) that those findings and conclusion are made in the alternative to the findings concerning China's claims under Article XIII:2(d), i.e. they are relevant to the extent that the conclusion reached by the panel in paragraph 7.378 and recalled in paragraph 8.1(d) would be incorrect. The European Union submits in this regard that if the Panel is right in concluding that the European Union violated Article XIII:2(d) by not recognising China as a Member holding a substantial interest in supplying the products under tariff lines 1602 39 29 and 1602 39 80 and by failing to seek agreement with China, then the European Union cannot be faulted at the same time for not having allocated a greater "all others" share under the same tariff lines. China sees no reason to make the amendments requested by the European Union, "precisely because the Panel's findings and conclusions are clear". We consider that our findings and conclusions are sufficiently clear, and we therefore see no need to amend these paragraphs as suggested by the European Union.

6.37. The European Union notes that **paragraph 7.409** states that "… establishing an 'all others' share in a TRQ without regard to the actual import shares held over a previous representative period would, unless agreed by all substantial suppliers, be at odds with the general rule that TRQ shares should be allocated in a way that approaches 'as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions'." The European Union observes, however, that in the Panel's view the general rule of the chapeau of Article XIII:2 applies also when allocation of the TRQ is agreed with all substantial suppliers. Accordingly, the European Union suggests that the Panel qualify the phrase "unless agreed by all substantial

suppliers" or delete it altogether. The European Union notes that this applies *mutatis mutandis* to **paragraph 7.418**. China does not comment on the European Union's suggestion. We have deleted the reference to "unless agreed by all substantial suppliers" in paragraphs 7.409 and 7.418.

6.38. With respect to **paragraph 7.418**, China notes the Panel's assessment that nowhere in the statements invoked by China from *EC – Bananas III* did the Panel or the Appellate Body mention or imply the obligation to reserve a share in the TRQ to "all other" suppliers of any specific magnitude. However, China states that "the issue that China brought up is not about the specific magnitude of the share" reserved for "all others", but rather "the fact that there should not be a permanent allocation of tariff rate quotas". The European Union comments that China "again tries to alter the claim it presented during the Panel proceedings, by arguing that it did not bring up the issue of a minimum size of the TRQ share to be allocated to 'all others'. However, this was precisely one of China's claims (see para. 7.407 which contains a reference to China's submissions and it is not contested by China) which was discussed at length during the Panel's meetings with the parties." Moreover, the European Union considers that the Panel has also adequately addressed China's argument that without a minimum "all others" share the TRQs allocation would be frozen (see paragraph 7.419). Therefore, the European Union considers that whilst objectively speaking there is no need to amend this point of the panel interim report, it does not oppose any clarification that the Panel may consider appropriate in this respect. We have rephrased paragraph 7.418 in the light of China's comment.

6.39. China asks the Panel to revise **paragraph 7.419**, which states in relevant part: "As the European Union observes, the objective of preventing a long-term freeze of the allocation cannot necessarily be prevented by reserving a given share to 'all others' in the TRQ, but may instead require other means, such as setting a time limit to the validity of the allocation (or a periodic review thereof). As we explained elsewhere in our Report, China's response to this argument was to claim that the European Union violated Article XIII:1 and XIII:2 by failing to annually review and reallocate the TRQ shares based on the most recent trade developments." Specifically, China requests the deletion of the final sentence. China submits that, as noted above in the comments made with regard to paragraphs 7.136 and 7.137, China's arguments in respect of the subsequent allocation by the European Union of the TRQs "were not in response to the EU's relevant argument". The European Union responds that, for the same reasons explained above concerning China's comments to paragraphs 7.136 and 7.137, the European Union does not agree with China's request to delete the last sentence of this paragraph. However, the European Union adds that "it could be helpful if the Panel referred to the precise points of China's submissions where this claim is presented as a response to the European Union's argument", including paragraph 102 of China's first oral statement (reference is also made in this connection to the EU second written submission, para. 144). We decline China's request to delete this sentence. As noted above, it sets forth an objective description of the evolution of China's claims and argumentation during these proceedings. The basis for that description is our analysis of the panel request and the subsequent argumentation presented by China in the course of these proceedings. We have added an additional reference to China's submissions to sustain the conclusion presented.

6.8 Claims under Article XIII:1 of the GATT 1994

6.40. Regarding the discussion of China's claim under Article XIII:1 (**paragraphs 7.422-7.437**), China submits that the Panel's analysis on Article XIII:1 is incomplete "inasmuch as it does not address the arguments that China advanced in its response to the Panel's question 64(b) and in particular to the section on Article XIII:1 therein". China recalls that it "raised therein the arguments and examples of an allocation of shares in a TRQ that would meet the requirements of Article XIII:2(d) but still violate Article XIII:1". China requests the Panel to also "complete its analysis" on this point. The European Union states that it does not understand the purpose of China's request to the Panel to examine the two abstract examples it formulated in its response to Panel question No. 64(b). Moreover, the European Union states that those two examples have nothing to do with the facts of the present case, so it is really hard to grasp their relevance for solving the present dispute. The European Union observes that "China itself, also in its comments on the interim report, is unable to explain the relevance of those examples for the present dispute and it does not suggest how any possible position that the Panel might take in replying to them would impact on its findings". In these circumstances, the European Union believes that the Panel's thorough analysis contained in this section is complete as it addresses all the arguments raised by the parties "that are objectively relevant to respond to the claim raised by China". We

note that our findings summarize the parties' arguments to the extent necessary to facilitate understanding of our own assessment and reasoning, and do not aim to fully reproduce the parties' arguments as set forth in their submissions. We consider that paragraph 7.435 provides an adequate exposition of China's argumentation on the relationship between Article XIII:1 and Article XIII:2.

6.41. Regarding **paragraph 7.434**, China requests the Panel to modify the statement that "[a]ll of China's argumentation under Article XIII:1 relates to the amount of the TRQ shares allocated to 'all others'". In this regard, China recalls that it also claims that the European Union acted inconsistently with Article XIII:1 "by allocating country-specific shares only to Brazil and/or Thailand but not to China which was also a substantial supplier". Reference is made to paragraph 127 of China's second written submission, and to the fact that the Panel itself also acknowledges this at paragraph 7.423 of its Interim Report. The European Union does not comment on China's request. We have revised the wording of this paragraph in the light of China's comment.

6.9 Claims under Article I:1 of the GATT 1994

6.42. Regarding **paragraph 7.448**, China requests the Panel to clarify why it surmises from China's response to the Panel's question 59(c) that whether a TRQ allocation is "disproportionate" under Article I:1 is to be assessed on a basis that is different from the TRQ rules set forth in Article XIII:2. In this respect, China notes that "all China stated was that its claim under Article I:1 does not depend on the outcome of claims under Article XIII or XXVIII". And in support, China referred to paragraph 344 of the Appellate Body's decision in *EC – Bananas III (Article 21.5 – Ecuador II)* in which it is stated that the ACP duty-free quota is not a limitation on a tariff preference that is subject only to Article I:1 but a tariff quota subject also to Article XIII. In addition, China observes that the Panel claims that China has not elaborated its argument that the TRQ allocation to Brazil and Thailand is "disproportionate". China nevertheless refers to its response to Panel question No. 59 and to paragraph 207 of its second written submission and requests the Panel to take this into account. According to the European Union, China's comments "appear to be the result of a hasty reading of the interim report". The European Union notes that the Panel's reasoning is explained in clear terms in this paragraph, and China's arguments (developed in Panel question 59 and in paragraph 207 of its second written submission) are properly summed up in this section of the interim report. Accordingly the European Union does not see the need to amend this paragraph of the interim report. We consider that paragraph 7.448 already sets forth the basis upon which "it might be surmised" that, in China's view, whether a TRQ allocation is "disproportionate" under Article I:1 is to be assessed on a basis that is different from the TRQ allocation rules set forth in Article XIII:2. In addition, having reviewed China's response to Panel question No. 59 and to paragraph 207 of its second written submission, we still do not find any additional substantial elaboration of its argument beyond stating that the TRQ allocation is "disproportionate". Accordingly, we have not revised paragraph 7.448.

6.43. Regarding **paragraph 7.449**, China requests the Panel to add ", while other substantial suppliers such as China are not" at the end of the first sentence to accurately reflect China's arguments as acknowledged by the Panel at paragraph 7.438 of the Report. The European Union does not comment on China's request. We have adjusted the wording of this paragraph, as requested by China. We have also added an accompanying citation to paragraph 208 of China's second written submission.

6.10 Claims under Article XIII:4 of the GATT 1994

6.44. The European Union considers that given that import figures postdating December 2013 are irrelevant for the present dispute, they should be deleted from the tables contained in the panel report (**paragraph 7.466**). China objects to such deletion, and observes that these import figures were provided in response to questions from the Panel; they are part of the record and should, as a result, remain in the tables contained in the report to accurately reflect the data supplied by China and the European Union. We note that our findings under Article XIII:2 and XIII:4 are not based on import statistics post-dating December 2013. However, we do not see why it follows that those figures should be deleted from the tables contained in the panel report. Accordingly, we have not deleted the data from the tables.

6.45. Regarding **paragraph 7.491**, China notes the Panel's statement that "China's request to enter into consultations under Article XIII:4 does not contain a reference to the specific tariff lines upon which its request is based." China observes that the request to enter into consultations is contained in Exhibit CHN-39. The Note Verbale refers to Council Regulation (EC) No. 1218/2012, through which a new tariff regime on the tariff items concerned had been adopted. In the Note Verbale, China referred to "the tariff lines" concerned, as the tariff lines that were affected by Council Regulation (EC) No. 1218/2012. China submits that it was therefore abundantly clear to the European Union, on 19 December 2013, that China had requested to enter into consultations on all the tariff lines affected by Council Regulation (EC) No. 1218/2012. China requests the Panel "to clarify whether its analysis took into account the fact that Exhibit CHN-39 contains an explicit reference to the document containing information on the tariff lines that China sought to consult on". Moreover, if the Panel confirms that it took Exhibit CHN-35 into account in its analysis, China requests the Panel "to clarify whether it considers that the request to enter into consultations under Article XIII:4 *itself* should contain an explicit reference to the relevant tariff lines and whether a reference to the document directly implementing the changes to those tariff lines is insufficient". The European Union states that China "tries once again to amend its arguments and claim at this stage of the proceedings". The European Union observes that "the interim report recalls, in its comments to the EU response to question 123 of the panel, China recognised that its request was addressing tariff lines 1602 39 29 and 1602 39 85". The European Union observes that now China argues instead that the European Union should have understood that its request was addressing all of the tariff lines concerned by Council Regulation (EC) No. 1218/2012, because its Note Verbale contains a cross reference to that Regulation. Hence, the European Union considers that not only is China trying to reargue the case by attempting to amend its claim", but it is also explicitly admitting that its request to enter into consultations with the European Union under Article XIII:4 did not identify "in a clear and unequivocal manner the specific tariff line(s) upon which that request was based, as in order to guess what those tariff lines are one should refer to other documents mentioned in that request". Furthermore, the European Union observes that as recalled by the Panel in paragraph 7.492, in its Note Verbale China claimed to have "a substantial supplying interest in several of the tariff items concerned" by Council Regulation (EC) No. 1218/2012 (emphasis added). Therefore, the European Union submits that "this Note Verbale made clear one thing only i.e. that China did not claim an SSI on all the tariff lines concerned by Council Regulation (EC) No. 1218/2012, but on several of those tariff lines, without specifying which ones". The European Union states that this "contradicts openly" China's new argument to the effect that it was abundantly clear to the European Union, on 19 of December 2013, that China had requested to enter into consultations "on all the tariff lines affected by that Regulation". We have adjusted paragraphs 7.491 and 7.492 in the light of the parties' comments.

6.46. Regarding **paragraph 7.492**, China observes that the Panel continues its analysis by observing that China took an "all inclusive" approach with respect to its claims of interest in supplying the products covered by the First and Second Modification Packages. China requests the Panel to clarify its understanding of an "all inclusive" approach, which the Panel refers to again in the eighth sentence of this paragraph. China also requests the Panel to clarify how a WTO Member can ensure that it meets the Panel's proposed standard of "specificity" regarding which tariff lines and special factors were concerned, other than by referring to the very document that implemented the changes to the tariff regime. We have adjusted paragraph 7.492 to clarify what we mean by an "all inclusive" approach. We have also revised paragraph 7.492 to clarify that there is no general standard of "specificity" that we are reading into Article XIII:4.

6.11 Claims under Article II:1 of the GATT 1994

6.47. China observes, in relation to **paragraph 7.527**, that WTO Members and in particular the European Union distinguish between the "entry into force" and the "application" of legal instruments, with the entry into force being capable of preceding the application by several years. China respectfully requests the Panel "to consider this in the context of its analysis in paragraph 7.527 and to determine whether and how this impacts its analysis". The European Union does not comment on China's request. We have considered the distinction referred to by China, but we do not see how it impacts on our analysis in paragraph 7.527 or this section more generally. Accordingly, we have made no change as a consequence of China's comment.

7 FINDINGS

7.1 General

7.1.1 General overview of China's claims and horizontal arguments

7.1. This section aims to provide a general overview of several horizontal arguments that underlie China's claims in this dispute. The measures at issue, and the distinct claims that China advances, are elaborated in greater detail in the subsequent sections of this Report.

7.2. The claims brought by China concern the modification by the European Union of bound duties inscribed in its Schedule of concessions on certain poultry products pursuant to negotiations with Brazil and Thailand held under Article XXVIII:5 of the GATT 1994. A first negotiation exercise (the "First Modification Package"), which was initiated in 2006 and saw the negotiations concluded in 2006, resulted in the European Union replacing its ad-valorem duties with tariff rate quotas (TRQs) on poultry products classified under three tariff items. A second negotiation exercise (the "Second Modification Package"), which was initiated in 2009 and according to the European Union concluded at negotiators' level in late-2011[18], resulted in the European Union replacing its ad-valorem bound duties with TRQs for poultry products classified under seven other tariff items.

7.3. In each negotiation exercise, the European Union determined that Brazil and Thailand were the only WTO Members that held a "principal supplying interest" or "substantial interest", within the meaning of Article XXVIII:1, in any of the tariff concessions at issue and entered into negotiations under Article XXVIII:5 with these Members. The European Union based its determination of which Members held a principal or substantial supplying interest on actual import data covering the three-years preceding the initiation of each of the two negotiation exercises (i.e. 2003-2005 for the First Modification Package, and 2006-2008 for the Second Modification Package). It is not in dispute that, during the reference periods selected by the European Union, imports of the poultry products concerned from China into the European Union were negligible.

7.4. Each of the TRQs agreed with Brazil and Thailand provides for an in-quota tariff at a rate that is equal to or lower than the European Union's previously bound rate of duty, together with an out-of-quota tariff rate that is in all cases higher than the European Union's bound rate of duty before the modification. Under all of the TRQs resulting from the First Modification Package, Brazil and/or Thailand are each allocated their own country-specific share, with an "all others" share set aside for all other countries. The situation is similar for all of the TRQs resulting from the Second Modification Package, whereby Brazil and/or Thailand are each allocated their own country-specific share, with an "all others" share set aside for all other countries (except for one tariff line (HS1602 3921) where there is no "all others" share and the entirety of the TRQ is allocated to Thailand). The majority of each TRQ, and in some cases the vast majority (or all) of the TRQ, is allocated to Brazil and/or Thailand (the "all others" TRQ share is below 20% in all cases).

7.5. The total volume of each TRQ and the allocation of TRQ shares among supplying countries was determined, with some exceptions, on the basis of actual import data for the three-year period preceding the initiation of each of the two negotiation exercises (i.e. 2003-2005 for the First Modification Package[19], and 2006-2008 for the Second Modification Package). As noted above, during these reference periods, imports of the poultry products concerned from China into the European Union were negligible.

7.6. As elaborated in greater detail later in our Report, the European Union had applied several SPS measures throughout the period concerned by the two Article XXVIII negotiations, i.e. 2003-2008. Following a relaxation of the SPS measures by the European Union in July 2008, imports of heat treated poultry products from China into the European Union increased significantly under some of the tariff lines at issue. This increase was taking place while the European Union's negotiations with Brazil and Thailand in relation to the Second Modification Package were still ongoing. The European Union did not update the reference period selected for the purpose of determining which Members to negotiate with regarding the modification of its

[18] See footnote 128 below.

[19] EU's first written submission, para 32, page 9. In the case of the TRQs for tariff lines 0210 9939 and 1602 3219, the European Union agreed, at the request of Brazil and Thailand, to use a different reference period. See paras. 33-35.

concessions, or for the purpose of calculating the total volume of the TRQs or the respective TRQ shares allocated to different countries. With respect to the TRQs under the Second Modification Package, the European Union made no adjustment to the TRQ allocations to reflect more recent data and the increase in China's share of imports.

7.7. Against this background, China claims that the European Union acted inconsistently with various articles of the GATT 1994 by basing the above determinations on actual import levels over the periods 2003-2005 and 2006-2008. China advances distinct claims of violation under Article XXVIII:1, Article XXVIII:2 in conjunction with paragraph 6 of the Understanding on the Interpretation of Article XXVIII, Article XIII:1, the chapeau and paragraph (d) of Article XIII:2, Article XIII:4, Article II:1, and Article I:1. In these findings, the Panel will consider China's claims and arguments on a provision-by-provision basis, so as to ensure that due account is taken of the applicable legal standard and subject-matter of each provision. However, there is significant degree of overlap in China's argumentation under these provisions, and many of its claims under these provisions rest on one or more of the same grounds. Therefore, it is helpful to provide an overview of three fundamental arguments that underlie China's claims in this dispute. Each argument relates in one way or another to the European Union's use of data regarding actual import levels over the periods 2003-2005 and 2006-2008.

7.8. First, China argues that the European Union was prohibited from basing its determinations on actual import levels during the periods 2003-2005 and 2006-2008 on the grounds that, throughout both of these periods, there were SPS measures in place that prohibited or significantly restricted the importation of poultry products from China into the European Union. According to China, the European Union was obligated to base its determinations under these provisions on either a different reference period, or on an estimate of the import shares that China would have had in the absence of those SPS measures. China argues that in determining the share that China would have had absent the import ban, the European Union should have taken into account factors such as China's production capacity and investment in the affected products, estimates of export growth, and forecasts of demand in the European Union. China provides information on the level of its poultry exports before, during and after the ban, both to the European Union and other countries, to support its contention that China could reasonably be expected to have had a significant share of the EU market in the absence of the SPS measures that were in place. China claims that by not basing its determinations under these provisions on an estimate of the import shares that China would have had in the absence of those SPS measures, the European Union violated Article XXVIII:1, Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding, Article XIII:1, and the provisions of Article XIII:2.

7.9. Second, China argues that the European Union was required to use the most recent reference period of 2009-2011 as the basis for its determinations in the context of the Second Modification Package. As noted above, the negotiations under the Second Modification Package were initiated in 2009, but did not conclude at the negotiators' level until September 2011, according to the European Union, and the completion of the negotiations was not notified to the WTO until December 2012. During that period, China's share of imports under several tariff lines increased following the relaxation of the SPS measures. China submits that the European Union was under an obligation to base its determinations on the most recent three-year period preceding the conclusion of the negotiations (2009-2011), not the three-year period preceding the initiation of the negotiations (2006-2008). China claims that by not doing so in respect of its initial TRQ allocations, the European Union violated Article XXVIII:1, Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding, and Article XIII:2(d) and the chapeau of Article XIII:2. China further claims that by subsequently making no adjustment to the TRQ allocation following a request for reappraisal by China in 2013, the European Union violated Article XIII:4.

7.10. Third, China argues that the European Union was obligated to set aside an "all others" share of at least 10% when allocating the TRQs among supplying countries, regardless of the actual level of imports and whatever the reference period selected. According to China, the amount set aside for "all others" must be sufficient to allow at least one other Member going forward to achieve a substantial interest as a supplier of the products subject to the TRQs. In this case, the European Union recognised Members as holding a substantial supplying interest if they accounted for 10% share of imports in the tariff line concerned. Accordingly, China claims that by not setting aside an "all others" rate of at least 10% within each TRQ, the European Union violated Article XIII:1 and Article XIII:2.

7.11. In addition to these three horizontal arguments, China advances various additional claims and arguments under Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding, Article XIII:1, Article II:1, and Article I:1. These are elaborated in the context of analysing China's claims under those provisions.

7.1.2 Order of analysis

7.12. A panel enjoys a degree of discretion to structure the order of its analysis as it deems appropriate.[20] In exercising that discretion, a panel may decide to follow, but is not bound by, the manner in which the complainant presented its claims.[21]

7.13. We begin by examining China's claims that the European Union violated Article XXVIII:1 by failing to recognize China as a Member with a principal or substantial supplying interest for purposes of the negotiations under Article XXVIII. We then examine China's claims that the compensation provided by the European Union, including the total amount of the TRQs and their allocation among supplying countries, is inconsistent with Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding on the Interpretation of Article XXVIII.

7.14. We will then examine China's claims under Article XIII regarding the European Union's allocation of TRQs among supplying countries. We first consider China's claims under the provisions of Article XIII:2, as both parties agree that Article XIII:2 refers specifically to the allocation of TRQs.[22] After addressing China's claims regarding the initial TRQ allocation under the provisions of Article XIII:2(d) followed by China's claims under the chapeau of Article XIII:2, we will then proceed to address China's claims regarding the initial TRQ allocation under Article XIII:1 and Article I:1. After we have addressed China's claims regarding the initial TRQ allocation, we will then turn to China's claim that, following the entry into force of the TRQs under the Second Modification Package, the European Union violated Article XIII:4 by failing to enter into meaningful consultations with China regarding the need for an adjustment of the TRQ shares allocated among supplying countries.

7.15. Finally, we address China's claims that the European Union violated Article II:1 by applying the modifications agreed in the Article XXVIII negotiations prior to those changes being incorporated into the text of its Schedule of concessions through the certification process.

7.1.3 Function of the Panel

7.16. According to Article 11 of the DSU, the function of a panel is "to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements." The same Article provides that a panel is to make an "objective assessment of the matter before it", including:

> [A]n objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

7.17. Regarding the requirement to conduct an "objective assessment" of the facts, the Appellate Body has stated that it is not for panels to undertake a *de novo* review, nor to show total deference to the findings of the national authorities.[23] On the specific subject of the assessment of evidence, the Appellate Body has stated that:

> [I]n accordance with Article 11 of the DSU, a panel is required to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence". It must further provide in its report "reasoned and adequate explanations and coherent reasoning" to support its findings. Within these parameters, "it is generally within the discretion of the [p]anel

[20] Appellate Body Report, *Colombia – Textiles*, para. 5.20.
[21] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277. See, e.g., Panel Report, *US – Large Civil Aircraft (2nd complaint)*, footnote 1005.
[22] See e.g. China's response to Panel question No. 29(b), para. 147.
[23] Appellate Body Report, *EC – Hormones*, para. 117.

> to decide which evidence it chooses to utilize in making findings". Although a panel must consider evidence before it in its totality, and "evaluate the relevance and probative force" of all of the evidence, a panel is not required "to discuss, in its report, each and every piece of evidence" put before it, or to "accord to factual evidence of the parties the same meaning and weight as do the parties".[24] (footnotes omitted)

7.18. A panel's obligation to make an objective assessment of the matter also refers to the legal assessment, that is, the analysis of the consistency or inconsistency of the challenged measures with the applicable provisions.[25] To that end, a panel is free "to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration."[26]

7.1.4 Interpretation of the GATT 1994

7.19. Article 3.2 of the DSU states that the WTO dispute settlement system serves to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". The "customary rules of interpretation of public international law" referred to by the DSU include Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (the Vienna Convention).

7.20. Article 31(1) of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[27] It is well established that a treaty interpreter must "read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously".[28]

7.21. Under the terms of Article 31(2) of the Vienna Convention, the context for the purpose of the interpretation of a treaty shall comprise the text of the relevant agreement, including its preamble and annexes, along with agreements or instruments made in connection with the conclusion of the treaty. The text of the GATT 1994 includes not only the articles contained therein, but also the Ad Notes contained in Annex I of the GATT. In this connection, we recall that the articles of the GATT and the accompanying Ad Notes "have equivalent treaty status in that both are treaty language which was negotiated and agreed at the same time", and that they must "be read together in order to give them proper meaning".[29] By virtue of paragraph 1(c)(vi) of the GATT 1994, the Understanding on the Interpretation of Article XXVIII of the GATT 1994 (the Understanding) is also an integral part of the GATT 1994. Thus, there can be no question that Article XXVIII of the GATT 1994, and any related provisions, must be interpreted harmoniously with the relevant Ad Notes and the Understanding.

7.22. In their submissions, the parties have referred to the Procedures for Negotiations under Article XXVIII[30] and the Procedures for Modification and Rectification of Schedules.[31] Both of these procedures were adopted in 1980, in the context of the GATT 1947. In these proceedings, diverse views have been presented by the parties and third parties on the proper legal characterization of these procedures. However, it is common ground between the parties and third parties expressing

[24] Appellate Body Reports, *US – COOL*, para. 299.
[25] Appellate Body Report, *EC – Hormones*, para. 118.
[26] Appellate Body Report, *EC – Hormones*, para. 156.
[27] With respect to good faith, the Appellate Body has indicated that "[t]hat means, *inter alia*, that terms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations and will exercise its rights so as to cause injury to the other party" (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China),* para. 326).
[28] Appellate Body Report, *Korea – Dairy*, para. 81.
[29] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 24.
[30] Procedures for Negotiations under Article XXVIII, adopted by the Council on 10 November 1980, C/113 and Corr. 1, BISD 27S/26-29.
[31] Decision of 26 March 1980, Procedures for Modification and Rectification of Schedules of Tariff Concessions, GATT document L/4962, BISD S27/25

a view on the matter that, at a minimum, both procedures qualify as "decisions", "procedures" or "customary practices" within the meaning of Article XVI:1 of the WTO Agreement.[32]

7.23. Article XVI:1 instructs that:

> Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

7.24. The Appellate Body has stated that "Article XVI:1 of the WTO Agreement … bring[s] the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system", and "acknowledges the continuing relevance of that experience to the new trading system served by the WTO".[33]

7.25. We agree with the parties and third parties that both sets of procedures qualify as "decisions", "procedures" or "customary practices" within the meaning of Article XVI:1 of the WTO Agreement. First, we see no basis to question that these procedures qualify either as "decisions", "procedures" or "customary practices" within the meaning of Article XVI:1 of the WTO Agreement. Second, it is clear that both sets of procedures were "followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947" since their adoption in 1980. Third, neither the WTO Agreement nor the GATT 1994 made provision for any new procedures to supersede these procedures. To the contrary, the Procedures for Negotiations under Article XXVIII continue to serve as the basis for all negotiations under Article XXVIII.[34] These same procedures are expressly referred to, in whole or in part, in several WTO instruments.[35] The Procedures for Modification and Rectification of Schedules continue to apply under the WTO as well. This is evidenced, inter alia, by the fact that they have been applied in several prior disputes by WTO panels and the Appellate Body.[36]

7.26. Article XVI:1 states that "the WTO" shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947. This reference to the WTO would include the Dispute Settlement Body, and we therefore see no reason why the sphere of application of Article XVI:1 would not extend to a dispute settlement panel. Accordingly, we consider that we are under a duty ("shall be guided by") to take account of these procedures in our interpretation of the relevant provisions of the GATT 1994.

7.27. In this case, diverse views have been presented on whether one or both of these procedures might additionally be characterized as "decisions of the CONTRACTING PARTIES to GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994[37], as a "subsequent agreement

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[32] China's response to Panel question No. 10, paras. 62, 70; EU's response to Panel question No. 10, para. 33. In response to Panel question No. 1 to the third parties, Argentina, Brazil, Canada, Russia, and Thailand expressed the view that both procedures fall within the scope of Article XVI:1 of the WTO Agreement.

[33] Appellate Body Report, *Japan— Alcoholic Beverages* II, p. 14.

[34] EU's first written submission, para. 99.

[35] For example, see paragraphs 2 and 5 of the Understanding on the Interpretation of Article XXVIII; paragraph 4 of the Understanding on the Interpretation of Article XXIV; paragraph 6 of the Marrakesh Protocol to the GATT 1994; and the decisions adopted by the General Council for introducing Harmonized System changes into the Schedules (i.e. the Decision of 30 November 2011, WT/L/831, footnote 3; the Decision of 18 July 2001, WT/L/407, footnote 10; the Decision of 15 December 2006, WT/L/673, footnote 4).

[36] For example, see Panel Report, *Russia – Tariff Treatment*, para. 7.52; Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 7.452; Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 451.

[37] China considers that the Procedures for Negotiations under Article XXVIII do not fall within the scope of paragraph 1(b)(iv) of the GATT 1994, whereas the Procedures for Modification and Rectification of Schedules do fall within the scope of paragraph 1(b)(iv) of the GATT 1994 (China's response to Panel question No. 10, paras. 61, 64-70). The European Union considers that neither of these procedures falls within the scope of paragraph 1(b)(iv) (EU's response to Panel question No. 10, paras. 34-39, and to No. 102(b)). In response to Panel question No. 1 to the third parties, Argentina and the United States expressed the view that both procedures fall within the scope of paragraph 1(b)(iv) of the GATT 1994; Canada and Russia expressed the view that the Procedures for Negotiations under Article XXVIII do not, whereas the Procedures for Modification

between the parties regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the Vienna Convention, or form the basis for "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31(3)(b) of the Vienna Convention.[38] Recalling that there is no disagreement that both procedures fall within the scope of Article XVI:1 of the WTO Agreement, and thus no disagreement that the Panel should take them into account in its examination of China's claims under the GATT 1994, we see no need to decide on whether any of the foregoing may constitute additional legal justifications for taking the two procedures into account.[39] We note that there have been several prior cases in which panels and the Appellate Body referred to these procedures without elaborating on their legal status.[40]

7.28. We recall that Article 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including the "preparatory work" of the treaty and "the circumstances of its conclusion", in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable.[41] The Appellate Body has stressed that Article 32 does not define exhaustively the supplementary means of interpretation, so that an interpreter has a certain degree of flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.[42]

7.1.5 Burden of proof

7.29. The DSU does not contain any express provision governing the burden of proof. However, by application of general principles of law the WTO dispute settlement system has recognized that the burden of proof lies with the party asserting a fact, whether that party is the complainant or the responding Member.[43]

7.30. The burden of proving that a challenged measure is inconsistent with the relevant provisions of the covered agreements lies with the complaining party. Once the complaining party has made a *prima facie* case of such inconsistency, the burden shifts to the defending party, which must then refute the alleged inconsistency.[44] Precisely how much and precisely what kind of evidence will be

and Rectification of Schedules do; Thailand expressed the view that neither of the procedures falls within the scope of paragraph 1(b)(iv).

[38] China considers that both procedures constitute "subsequent agreements" within the scope of Article 31(3)(a) of the Vienna Convention (China's response to Panel question No. 10, paras. 63, 71). The European Union considers that it is "debatable whether they can be regarded as a 'subsequent' agreement within the meaning of Article 31(3)(a)" of the Vienna Convention, and that "[g]iven that, in any event, the Procedures fall clearly within the scope of Article XVI:1 of the WTO Agreement, it seems that the Panel need not reach this issue" (EU's response to Panel question No. 102(c), para. 74). Without reference to Article 31(3)(b) of the Vienna Convention, the European Union observes in respect of the Procedures for Negotiations under Article XXVIII that "[a]ll renegotiations under Article XXVIII are now being conducted under those procedures" (EU's first written submission, para. 99).

In response to Panel question No. 1 to the third parties, Argentina and Thailand expressed the view that neither of the procedures falls within the scope of Article 31(3)(a) or 31(3)(b) of the Vienna Convention; Canada expressed the view that the Procedures for Negotiations under Article XXVIII constitute a subsequent agreement in the context of Article 31(3)(a) of the Vienna Convention, and that because Members have followed the Procedures "they have created a significant body of subsequent acts that Canada submits constitute subsequent practice" under Article 31(3)(b) of the Vienna Convention; Russia stated that the Procedures for Modification and Rectification of Schedules may constitute a "subsequent agreement" within the meaning of Article 31(3)(a) or (b) of the Vienna Convention.

[39] If a claim of violation of either of these procedures was properly before the Panel, it would then be necessary to resolve whether either of these procedures is part of a "covered agreement" as defined in Appendix 1 to the DSU. To resolve that issue, we would need to arrive at a conclusion as to whether either of these procedures are "decisions of the CONTRACTING PARTIES to GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994. However, for the reasons set out further below in section 7.3.3.1, we do not consider any such claim to be properly before the Panel in this case.

[40] See footnote 36.

[41] Appellate Body Report, *EC – Chicken Cuts*, para. 282.

[42] Appellate Body Report, *EC – Chicken Cuts*, para. 283.

[43] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 12-16.

[44] Appellate Body Report, *EC – Hormones,* para. 98.

required for the complaining party to establish its case will necessarily vary from measure to measure, provision to provision and case to case.[45] In any event, it should be borne in mind that:

> A *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.[46]

7.31. In the matter before us, the burden is on China to persuade the Panel that the measures at issue are inconsistent with the provisions of the GATT 1994 allegedly violated.

7.32. In this dispute, China claims that all ten of the TRQs arising from the First and Second Modification Packages are inconsistent with the GATT 1994 and for that reason, in order to meet its burden of proof, China is required to prove its claims in respect of each of the TRQs at issue. The European Union requests the Panel to make, "in respect of each claim, a separate finding with regard to each of the TRQs at issue".[47] By this, we understand the European Union to mean that "China should not be allowed to make its case in respect of a TRQ on the basis of argument or evidence pertaining to another TRQ".[48] We do not understand the European Union to suggest that our Report should be structured so as to present a separate, individualized analysis of each of the TRQs at issue under each of the different GATT provisions at issue. Leaving aside the degree of repetition that this would involve in a case involving ten different TRQs that share many common features[49], neither party has structured its own submissions in that way. Of course, where claims or arguments are specific to only one or a few of the TRQs, our analysis will make that clear.

7.1.6 Request for enhanced third-party rights

7.33. On 17 December 2015, Brazil, Canada and Thailand each requested the Panel to grant enhanced third-party rights in these proceedings. The scope of the rights requested by these three third parties was similar, but not identical. The rights requested were the following: (i) the right to be present for the entirety of all substantive meetings with the parties[50]; (ii) the right to receive all submissions and statements of the parties, including responses to questions from the Panel, throughout the proceedings[51]; (iii) the right to respond to questions from the Panel[52]; and, (iv) the right in the substantive meetings to ask questions, at the invitation of the Panel, to the parties or the other third parties without any obligation to respond on the part of the parties or the other third parties.[53]

7.34. Brazil and Thailand based their requests on the understanding that the measures challenged by China concern the TRQ shares that were allocated to them by the European Union. Furthermore, they note that these TRQs were adopted by the European Union to implement the separate bilateral agreements reached with Brazil and Thailand as a result of negotiations to

[45] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[46] Appellate Body Report, *US – Gambling,* para. 140. (emphasis original, footnotes omitted)
[47] EU's first written submission, para. 2. See also EU's opening statement at the first meeting of the Panel, para. 9.
[48] EU's first written submission, para. 2.
[49] Panels may structure their reports in a manner that avoids repetition. This is commonly achieved by grouping together measures or claims that raise the same issues. See e.g. Panel Reports, *Guatemala – Cement II*, para. 7.5; *EU – Footwear,* para. 7.114. Naturally, care must be taken to ensure that such grouping does not lead to important differences being obscured. Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, para. 142.
[50] Request by Brazil (Letter from Brazil dated 17 December 2015, p. 2), request by Canada (Letter from Canada dated 17 December 2015, p.2) and request by Thailand (Letter from Thailand, p. 7).
[51] Request by Brazil (Letter from Brazil dated 17 December 2015, p. 2), request by Canada (Letter from Canada dated 17 December 2015, p.2) and request by Thailand (Letter from Thailand dated 17 December 2015, p. 7). Thailand also requested the right to receive the exhibits related to all submissions and statements by the parties.
[52] Brazil requested the right to respond to questions from the Panel "whenever it finds appropriate" (Letter from Brazil dated 17 December 2015, p. 2). Thailand requested the right to respond to questions from the Panel "during the proceedings, up to immediately prior to the issuance of the interim report" (Letter from Thailand dated 17 December 2015, p. 7).
[53] Request by Thailand (Letter from Thailand dated 17 December 2015, p. 7).

modify the European Union's concessions pursuant to Article XXVIII of the GATT 1994.[54] Brazil additionally points out that China's panel request specifically referred to these bilateral agreements in the context of identifying the measures at issue.[55] Brazil and Thailand consider that any possible modification or withdrawal of the TRQs negotiated with the European Union as a result of the Panel's rulings could negatively affect their economic interests, as well as their legal rights pursuant to these bilateral agreements.[56] In addition, both Brazil and Thailand noted that the negotiations under Article XXVIII of the GATT 1994 were related to the European Union's implementation of the DSB's recommendations and rulings in *EC – Chicken Cuts*, a prior dispute brought against the European Union by Thailand and Brazil. Finally, Thailand and Brazil submit that they are significant exporters of poultry products, both globally and to the European Union.[57] In these circumstances, Brazil argued that it had "a direct and concrete interest in participating appropriately in this dispute"[58], and Thailand likewise argued that it "ha[d] a unique economic and legal interest" in these proceedings.[59]

7.35. Canada requested enhanced third-party rights on the basis that the dispute raises important issues for the modification of tariff commitments and the administration of TRQs. Since Canada administers TRQs in the agriculture sector, it argued that "the outcome of this dispute could have important legal and policy implications for Canada".[60]

7.36. The European Union did not object to Brazil's, Canada's and Thailand's requests for enhanced third-party rights.[61] However, China considered that the circumstances of this dispute did not warrant the grant of enhanced third-party rights, as requested by Brazil, Canada or Thailand.[62] China noted that previous panels have only granted requests for additional third-party rights when the requesting third party could show "specific reasons" that differentiated it from other third parties to the proceedings, all of which may be presumed to have a "substantial interest" in the proceedings before a panel.[63] According to China, a potential and indirect impact of a panel ruling on the economic interests of the third party making a request for enhanced rights, as in the present case, is not a sufficient reason to grant those rights.[64]

7.37. The Panel considered the requests of Brazil, Canada and Thailand, and the views of the parties. On 3 February 2016, the Panel informed the parties and third parties that it had decided to grant the following enhanced rights to all third parties in these proceedings:

a. the right to be present and observe the entirety of the first and second substantive meetings with the parties; and

b. the right to receive the parties' first and second written submissions, written responses to questions and comments thereupon, and related exhibits.[65]

7.38. In its communication, the Panel indicated that it would provide its reasoning on this matter in its Report. Our reasons are as follows.

7.39. The Panel recalls that Articles 10.2 and 10.3 of the DSU and paragraph 6 of Appendix 3 of the DSU provide for the rights of third parties in panel proceedings. Pursuant to these provisions, third parties have the right to receive the parties' first written submission to the panel, and to present their views orally to the panel during the first substantive meeting. It is well established

[54] Letter from Brazil dated 17 December 2015, p.1; Letter from Thailand dated 17 December 2015, paras. 2.2, 2.3 and 4.6.
[55] See China's request for the establishment of a panel, Section I, items (i) and (ii).
[56] See letter from Brazil dated 17 December 2015, pp. 1-2; Letter from Thailand dated 17 December 2015, para. 4.6.
[57] Letter from Brazil dated 17 December 2015, p. 2; Letter from Thailand dated 17 December 2015, para. 4.2.
[58] Letter from Brazil dated 17 December 2015, p. 2.
[59] Letter from Thailand dated 17 December 2015, para. 1.1.
[60] Letter from Canada dated 17 December 2015, p. 1.
[61] Letter from the European Union dated 12 January 2016.
[62] Letter from China dated 19 January 2016, para. 1.
[63] Letter from China dated 19 January 2016, para. 3, citing to Panel Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 7.16.
[64] Letter from China dated 19 January 2016, para. 7.
[65] Letter from the Panel to the parties and third parties dated 3 February 2016.

that a panel may exercise the discretion afforded to it under Article 12.1 of the DSU[66] to grant enhanced third-party rights in a dispute, provided that the additional rights are consistent with the provisions of the DSU and the principles of due process.[67] Panels have exercised this discretion where there were special circumstances that justified the grant of enhanced third-party rights. We consider that decisions on whether to grant enhanced third-party rights should be made on a case-by-case basis, and that any such decision should be informed by the factors considered in previous disputes.[68] We also recall the need to maintain the distinction drawn in the DSU between the rights afforded to parties and those afforded to third parties.[69]

7.40. One of the special circumstances that have led previous panels to grant enhanced third-party rights was when "third parties enjoyed certain economic benefits that were directly implicated by the measure at issue".[70] This was the basis for granting enhanced third-party rights in the proceedings in *EC – Bananas III* and *EC – Tariff Preferences*.

7.41. We consider that, for present purposes, there are significant similarities between the measures at issue in *EC – Bananas III* and the measures at issue in the current dispute. In *EC – Bananas III*, the measures at issue included the allocation of a TRQ to certain countries, with ACP countries benefitting from a relatively large share of the lower in-quota rate.[71] The complainants claimed that the TRQ shares were determined and allocated in a discriminatory manner, and violated the European Union's obligations under Article XIII of the GATT 1994.[72] The panel agreed to grant a request for enhanced third-party rights made by the countries benefitting from the TRQ allocation on the basis that, among other considerations, "the economic effect of the disputed EC banana regime on certain third parties appeared to be very large", and "the economic benefits to certain third parties from the EC bananas regime were claimed to derive from an international treaty between them and the European Communities".[73] The international treaty referred to was the Bananas Framework Agreement signed between the European Communities and certain ACP countries that established a TRQ with respect to the importation of bananas and the country-specific allocation of the TRQ.[74]

7.42. We consider that, for present purposes, there are also some significant similarities between the measures at issue in *EC – Tariff Preferences* and the measures at issue in the current dispute. In *EC – Tariff Preferences*, certain third parties were beneficiaries of the tariff preference scheme at issue in that case. They requested enhanced third-party rights because, according to them, the tariff preferences in dispute determined the conditions of access of their exports to the European market.[75] The panel granted those rights considering, among others factors, the economic impact of the tariff preference programmes on third-party developing countries. The panel found it significant that "those third parties that are beneficiaries under the EC's [tariff preferences] and those that are excluded have a significant economic interest in the matter before the Panel."[76]

7.43. The TRQs at issue in this dispute, as is generally the case for all TRQs, comprise a two-tiered tariff rate in which the in-quota tariff rate is lower than the out-of-quota tariff rate. The TRQs have been allocated by the European Union in varying amounts among supplying countries. More precisely, under most of the TRQs at issue, Brazil and Thailand have each been allocated their own country-specific share of the TRQ, whereas all other Members are able to export at the lower in-quota tariff rate only within the "all others" share that is provided for under the relevant

[66] Article 12.1 of the DSU provides that "[p]anels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute."

[67] Appellate Body Reports, *US – 1916 Act*, para. 150, *EC – Hormones*, para. 154, and *US – FSC (Article 21.5 – EC)*, para. 243.

[68] See Panel Report, *China – Rare Earths*, para. 7.7.

[69] Panel Reports, *US – 1916 Act (EC)*, para. 6.33, and *US – 1916 Act (Japan)*, para. 6.33, and *EC – Export Subsidies on Sugar (Australia)*, para. 2.5.

[70] Panel Report, *China – Rare Earths*, para. 7.8. Other circumstances mentioned by that panel are "(ii) the economic and social impact of the measures in third countries; (iii) whether enhanced third-party rights had been granted in previous disputes relating to the measure; (iv) the impact of the dispute on other Members maintaining similar measures; (v) the similarity of the dispute to related disputes; and/or (vi) the imperative of avoiding repetition" (para. 7.8).

[71] Panel Report, *EC – Bananas III*, para. 7.64.

[72] Panel Report, *EC – Bananas III*, paras. 4.9, 4.10.

[73] Panel Report, *EC – Bananas III*, para. 7.8.

[74] Panel Report, *EC – Bananas III*, para. 3.30.

[75] Panel Report, *EC – Tariff Preferences*, Annex A, para. 1.

[76] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7.

TRQs. What this means is that Brazil and Thailand are entitled to export the volumes set out in their country specific shares at the lower, in-quota tariff rate, as compared with other Members. In this case, therefore, Brazil and Thailand enjoy economic benefits that are directly implicated by the measures at issue. China directly challenges the allocation of shares under the TRQs at issue. In this regard, China's panel request claims that the tariff rates and the TRQs that the European Union negotiated with Brazil and Thailand violate several provisions of the GATT 1994, and contains ten different claims of violation of the GATT 1994 arising from "[t]he allocation of all or the vast majority of the TRQs to two of the WTO Members" (i.e. Brazil and Thailand).[77]

7.44. In the Panel's view, the foregoing is sufficient to establish that Thailand and Brazil enjoy certain economic benefits that are directly implicated by the measures at issue. In addition, these benefits are derived from international agreements entered into between these Members and the European Union. We also note that one of the disputing parties indicated that it had no objection to the Panel granting enhanced third-party rights. We consider that the foregoing constitutes a *prima facie* basis for concluding that there are special circumstances that support the grant of enhanced third-party rights to Brazil and Thailand in these proceedings.

7.45. China sought to distinguish the present case from the circumstances in *EC – Bananas III* and *EC – Tariff Preferences*. China noted that in both cases, the measure at issue was "a preferential scheme the withdrawal of which would have a direct and automatic impact on the TRQs afforded by the European Union to other exporting countries".[78] China further argued that unlike the claims in *EC – Bananas III*, China in the current proceedings is not challenging Brazil's and Thailand's "share in the EU TRQ allocation as such". Rather, China states that it "considers that the EU should have negotiated or consulted with China as [a] country with principal or substantial supplying interests and that in the determination of the global TRQ and the attribution of the TRQ to China individually or as part of the all other countries, the impact of the EU's SPS measures on Chinese poultry meat products should have been taken into account".[79]

7.46. In our view, China has not explained how or why the modification or withdrawal of the TRQs, or their allocation among different supplying countries, would not have a "direct and automatic impact" on the TRQ shares allocated to Brazil and Thailand. Furthermore, although China states that it is not challenging Brazil's and Thailand's "share in the EU TRQ allocation as such", as we have already noted, China's panel request contains a number of claims based on "the allocation of all or the vast majority of the TRQs to two of the WTO Members" (Brazil and Thailand). We have no intention, in the context of deciding on the preliminary procedural question of whether to grant enhanced third-party rights, of either prejudging the merits of China's claims, or opining on how the European Union might potentially bring its measures into conformity with the GATT 1994 should China's claims be upheld. However, given the way that China has defined the alleged violations, it stands to reason that compliance would likely entail either a reduction of the share of the TRQs currently allocated to Brazil or Thailand in order to allow for a country-specific share for China or a relatively larger share of the "all others" category to accommodate China's exports, the withdrawal of country-specific shares and the opening of the TRQ on a global basis, or even the complete withdrawal of the TRQs. In any of those scenarios, there would be a "direct and automatic impact" on the TRQ shares allocated to Brazil and Thailand.

7.47. In light of the foregoing, the Panel decided that there were special circumstances that warranted the granting of enhanced third-party rights in these proceedings. In accordance with previous practice and as a matter of due process[80], the Panel decided to extend the enhanced rights to all third parties to this dispute. For this reason, combined with the fact that Canada did not request any enhanced third-party rights going beyond those requested by Brazil or Thailand, the Panel did not consider it necessary to separately examine Canada's request for enhanced third-party rights.

[77] See China's request for the establishment of a panel, pp. 3-5, items A(iii), A(iv), A(v), A(vi), A(vii), and B(iii), B(iv), B(v), B(vi) and B(vii).

[78] Letter from China dated 19 January 2016, para. 8.

[79] Letter from China dated 19 January 2016, paras. 13, 16.

[80] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7. See also Panel Report, *EC – Export Subsidies on Sugar*, para. 2.7 and Panel Report, *Dominican Republic — Safeguard Measures*, para. 1.8 (enhanced third-party rights not granted in that case).

7.48. As noted above, the Panel decided to grant all third parties the right to be present and observe the entirety of the first and second substantive meetings with the parties, and the right to receive the parties' first and second written submissions, written responses to questions and comments thereupon, and related exhibits. The Panel considered that in the circumstances of this case, the granting of these additional rights to third parties would not impose additional burdens on the parties, the Panel or the Secretariat, and would not result in any delays.

7.49. However, the Panel declined to grant third parties the right in the substantive meetings to ask questions to the parties or the other third parties. In the Panel's view, granting such a right to third parties would risk blurring the distinction between third parties and parties established in the DSU. Nor did the Panel consider it necessary to grant third parties the right to respond to written questions from the Panel during the proceedings, up to the issuance of the interim report. In the Panel's view, this would be redundant in light of paragraph 11 of the Working Procedures, which already states that "[t]he Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting."[81]

7.2 The tariff rate quotas and the SPS measures

7.2.1 The First Modification Package

7.50. On 7 June 2006, the European Union notified WTO Members of its intention to modify its concessions on certain poultry products, pursuant to Article XXVIII:5 of the GATT 1994.[82] The notification covered the products classified in the following tariff lines: (i) 0210 99 39[83] (salted poultry meat); (ii) 1602 31 (prepared turkey meat); and (iii) 1602 32 19 (cooked chicken meat).[84] In this notification, the European Union stated that it was "prepared to enter into negotiations and consultations with the appropriate Members under Article XXVIII for the modification of concessions with respect to the above-mentioned tariff lines".[85] The European Union's notification indicated that it intended to "replace with tariff rate quotas" the concessions on the above-mentioned tariff lines.[86] The notification provided import statistics by country of origin, for the period 2003-2005, for each of the tariff lines covered by the notification. These statistics indicated that Brazil accounted for the largest share of imports into the European Union of products under tariff lines 0210 99 39 and 1602 31[87], and that Thailand accounted for the largest share of imports to the European Union of products under tariff line 1602 32 19.[88]

7.51. On 24 July 2006, Brazil reserved its rights under Article XXVIII of the GATT 1994 to enter into negotiations or consultations with the European Union for the modifications of these concessions, claiming a principal supplying interest on tariff lines in Harmonized System headings 0210 and 1602.[89] On 11 August 2006, Thailand requested to "enter into negotiations on compensatory adjustments" with the European Union, claiming a principal supplying interest in products falling under tariff lines 0210 99 39 and 1602 32 19.[90]

7.52. The European Union agreed to enter into negotiations with Brazil and Thailand, recognizing that Brazil held a principal supplying interest in tariff lines 0210 99 39 and 1602 31 and a substantial supplying interest in tariff line 1602 32 19, and recognizing that Thailand held a

[81] Panel's Working Procedures, para. 11.

[82] Article XXVIII:5 Negotiations, Schedule CXL – European Communities, G/SECRET/25, circulated on 15 June 2006 ("G/SECRET/25")(Exhibit CHN-15). In its legislation, the European Union distinguishes between fresh poultry meat and poultry meat products (EU's first written submission, para. 71). In this Report, we use the term "poultry meat" to cover these two categories.

[83] The notification indicated that item 0210 90 20 was "now 0210 99 39".

[84] The descriptions of the products are taken from Council Regulation (EC) No 580/2007 of 29 May 2007 concerning the implementation of the Agreements in the form of Agreed Minutes between the European Community and Brazil, and between the European Community and Thailand, pursuant to Article XXVIII of GATT 1994 amending and supplementing Annex I to Regulation (EEC) 265/87, OJ L 138/1 of 30.05.2007 (Exhibit CHN-22).

[85] G/SECRET/25, p. 2 (Exhibit CHN-15).

[86] G/SECRET/25, p. 2 (Exhibit CHN-15).

[87] G/SECRET/25, pp. 3-4 (Exhibit CHN-15).

[88] G/SECRET/25, p. 5 (Exhibit CHN-15).

[89] Letter from the Permanent Mission of Brazil to the United Nations in Geneva to Ambassador Trojan, Permanent Representative of the European Communities to the WTO, dated 24 July 2006 (Exhibit EU-1).

[90] Letter from the Permanent Mission of Thailand to the WTO to Ambassador Trojan, Permanent Representative of the European Communities to the WTO, dated 11 August 2006 (Exhibit EU-2).

principal supplying interest in tariff line 1602 32 19 and a substantial supplying interest in tariff lines 0210 99 39 and 1602 31.[91]

7.53. On 6 September 2006, China requested the European Union to enter into bilateral negotiations on the proposed modifications. China claimed to hold a substantial supplying interest.[92] The European Union informed China that it did not recognize its claim of substantial supplying interest, "given that China [did] not have a significant share in the trade affected by these concessions".[93] China subsequently requested the European Union to reconsider its position, arguing that its smaller share in the European poultry market was due to the imposition by the European Union of an import ban on China's poultry products over the last five years.[94] The European Union reiterated its refusal to recognize China's claim of substantial interest, noting that China did not "have a significant share in the trade affected by the modification of the concessions on these products".[95]

7.54. On 26 October 2006, the European Union concluded an agreement with Brazil pursuant to Article XXVIII of the GATT 1994.[96] On 23 November 2006, the European Union concluded an agreement with Thailand, also pursuant to Article XXVIII of the GATT 1994.[97] These agreements were approved by the European Council in Council Decision 2007/360/EC[98] and implemented through several regulations:

i. Council Regulation (EC) No 580/2007[99], which amends the tariff legislation of the European Union and supplements it with the duties and volumes resulting from the agreements with Brazil and Thailand;

ii. Commission Regulation (EC) No 616/2007, which opens the TRQs for the products covered by the First Modification Package originating in Brazil, Thailand, other third countries, and provides for their administration[100]; and

iii. Commission Regulation (EC) 1549/2007, which amends Commission Regulation (EC) No. 616/2007.[101]

[91] EU's first written submission, paras. 20-25 and Council Decision 2007/360/EC of 29 May 2007 on the conclusion of Agreements in the form of Agreed Minutes between the European Community and the Federative Republic of Brazil, and between the European Community and the Kingdom of Thailand pursuant to Article XXVIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) relating to the modification of concessions with respect to poultry meat, OJ L 138/10 of 30.5.2007, 3rd preamble (Exhibits CHN-20 and CHN-21 and Exhibit EU-34).

[92] Note Verbale from China to the EU, 6 September 2006 (Exhibit CHN-16). See also China's opening statement at the second meeting of the Panel, para. 25.

[93] Letter from Amb. Trojan to Amb. Sun (18 October 2006) (Exhibit CHN-17).

[94] Letter from Amb. Sun to Amb. Trojan (16 November 2006) (Exhibit CHN-18); see also Letter from Vice Minister Yi to David O'Sullivan, Director-General for Trade, European Commission (19 April 2007) (Exhibit CHN-19).

[95] Letter from David O'Sullivan to Vice Minister Yi (8 May 2007) (Exhibit EU-28). The EU referred the rules set out in Article XXVIII of the GATT 1994 and stated that "China is not in the same situation as certain other WTO Members (Brazil, Thailand) who historically have delivered substantial quantities of chicken meat into the European Union and were therefore invited to negotiate compensation in return for lost market access resulting from the tariff increase."

[96] Agreed Minutes initialled in Geneva by J.L Demarty (Commission of the EC) and Roberto C. De Azevedo (Delegation of Brazil), 26 October 2006 (Exhibit EU-3); EU's first written submission, para. 21. This agreement was revised on 6 December 2006 (EU's first written submission, para. 21 and Agreed Minutes initialled in Geneva by J.L Demarty (Commission of the EC) and Roberto C. De Azevedo (Delegation of Brazil), 6 December 2006 (Exhibit EU-5).

[97] Agreed Minutes initialled in Bangkok by F. Coturni (Commission of the EC) and B. Chutima (Delegation of Thailand), 23 November 2006 (Exhibit EU-4).

[98] Exhibits CHN-20 and CHN-21 and Exhibit EU-34.

[99] Exhibit CHN-22.

[100] Commission Regulation (EC) No 616/2007 of 4 June 2007 opening and providing for the administration of Community tariff quotas in the sector of poultry meat originating in Brazil, Thailand and other third countries, OJ L 142/5 of 5.6.2007 (Exhibit CHN-23).

[101] Commission Regulation (EC) No 1549/2007 of 20 December 2007 amending Regulation (EC) 616/2007 opening and providing for the administration of certain Community tariff quotas in the sector of poultry meat originating in Brazil, Thailand and other third countries, OJ L 337/75 of 21.12.2007 (Exhibit CHN-24).

7.55. These measures opened the TRQs for the importation of products classified under the three tariff lines covered by the First Modification Package, and provided for their administration. These TRQs replaced the tariff rates previously applicable to these products.[102]

7.56. The total amount of the TRQs and their allocation were determined by the European Union in agreement with Brazil and Thailand in the context of the negotiations held pursuant to Article XXVIII:5 of the GATT 1994. According to the European Union, it sought to calculate the total amounts of the TRQs "on the basis of the guidelines provided in paragraph 6 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994, using as a reference period the three-year period immediately preceding the notification of the European Union's intention to modify the concessions, i.e. 2003-2005".[103]

7.57. With respect to tariff line 0210 99 39, the European Union agreed, at the request of Brazil and Thailand, to calculate the total amount of the TRQ on the basis of the average import volume for the period 2000-2002, increased by the annual average growth rate for the same period. This period was chosen instead of the period 2003-2005, as this was a period during which the imports of products originating from Brazil and Thailand were restricted.[104] The European Union allocated that TRQ among supplying countries on the basis of the average import shares held by Brazil, Thailand, and other supplying countries during the period 2000-2002.[105] The total amount of the TRQ applicable to products classified under tariff line 1602 31 was calculated using the reference period 2003-2005, based on the import volume for calendar year 2005 increased by 10%.[106] The European Union allocated that TRQ among supplying countries on the basis of the import shares for 2005.[107] The total amount of the TRQ applicable to tariff line 1602 32 19 was calculated "on the basis of the import volume for the last twelve-month period, instead of the last calendar year, preceding the initiation of the negotiations (i.e. July 2005-June 2006) increased by the growth rate of imports during the same period".[108] According to the European Union, Thailand requested the use of this formula, which led to a TRQ amount that is greater than the amount that would have resulted from the application of the formulas in paragraph 6.[109] The European Union allocated that TRQ among supplying countries on the basis of the import shares for the same period, July 2005-June 2006.

7.58. The tariff rates, the total volume of the TRQs and their allocation among supplying countries are as follows[110]:

Tariff line	Prior tariff rate	New in-quota tariff	New out-of-quota tariff	TRQ volume (metric tons)	Allocation (metric tons)	Allocation share
0210 99 39	15.4%	15.4%	1,300 EUR/MT	264,245	Brazil: 170,807 Thailand: 92,610 Others: 828	Brazil: 64.64% Thailand: 35.05% Others: 0.031%
1602 31	8.5%	8.5%	1,024 EUR/MT	103,896	Brazil: 92,300 Others: 11,592	Brazil: 88.84% Others: 11.16%
1602 32 19	10.9%	8.0%	1,024 EUR/MT	250,953	Brazil: 79,477 Thailand: 160,033 Others: 11,443	Brazil: 31.67% Thailand: 63.77% Others: 4.56%

[102] China's first written submission, para. 136; EU's first written submission, para. 30.
[103] EU's first written submission, para. 32.
[104] EU's first written submission, para. 33. The restrictions applicable to these products resulted from the changes to the EU's customs classification, which were the subject of the *EC – Chicken Cuts* disputes.
[105] EU's first written submission, para. 33.
[106] EU's first written submission, para. 34.
[107] EU's first written submission, para. 34.
[108] EU's first written submission, para. 35.
[109] EU's first written submission, paras. 35-36.
[110] EU's first written submission, Table EU-2: Old and New Tariff Bindings in the First Modification Package (para. 30) and Table EU-3: Agreed TRQs in the First Modification Package (para. 31).

7.59. The TRQs under the First Modification Package entered into force on 4 June 2007.[111] Two years later, on 27 May 2009, the European Union notified the WTO that it had concluded its negotiations for the modification of concessions under Article XXVIII of the GATT 1994.[112] The notification referred to the bilateral agreements concluded with Brazil and Thailand, indicated the bound rates that were to be modified on the products, and contained the final report of negotiations under Article XXVIII of the GATT 1994. The notification was circulated to WTO Members on 29 May 2009.[113] The European Union explained that the delay in notifying the completion of the negotiations and the bilateral agreements with Brazil and Thailand, which were concluded in 2006, was "largely due to an administrative oversight".[114]

7.60. In the notification, the European Union stated that it also held consultations with Argentina, China, and the United States. However, the European Union determined that these Members "did not have either Initial Negotiating Rights, principal supplying interest or substantial interest in any of the products that the EC had notified in its proposal for modifying existing bindings", and therefore "there was no need to hold substantive Article XXVIII negotiations" with them.[115] The notification states that "[s]ince no other WTO Member expressed its interest to enter into negotiations, the EC considers its negotiations under Article XXVIII to be completed."[116]

7.61. On 24 March 2014, the European Union communicated for certification a revised schedule of concessions which contained "consolidations, modifications and rectifications in this Schedule, in relation to the previous certified CXL schedule of the EU" (Schedule CXL − EC15).[117] The draft schedule of the European Union (Schedule CLXXIII − EU25) was circulated to the WTO Membership on 25 April 2014, in document G/MA/TAR/RS/357.[118] The European Union confirmed in these proceedings that the modifications resulting from the First Modification Package are included in this draft schedule.[119] At the time of this Report, the draft schedule has not yet been certified.[120]

7.2.2 The Second Modification Package

7.62. On 11 June 2009, the European Union notified WTO Members of its intention to modify its tariff concessions applicable to a number of other poultry products pursuant to Article XXVIII:5 of the GATT 1994.[121] The products covered by the notification were those classified in tariff lines: (i) 1602 20 10 (goose duck or liver); (ii) 1602 32 11 (processed chicken meat, uncooked, containing 57% or more by weight of poultry meat or offal); (iii) 1602 32 30 (processed chicken meat, containing 25% or more but less than 57% by weight of poultry meat or offal); (iv) 1602 32 90 (processed chicken meat, containing less than 25% by weight of poultry meat or offal); (v) 1602 39 21 (processed duck, geese, guinea fowl meat, uncooked, containing 57% or more by weight of poultry meat or offal); (vi) 1602 39 29 (processed duck, geese, guinea fowl meat, cooked, containing 57% or more by weight of poultry meat or offal); (vii) 1602 39 40 (processed duck, geese, guinea fowl meat, containing 25% or more but less than 57% by weight of poultry meat or offal); and (viii) 1602 39 80 (processed duck, geese, guinea fowl meat, containing less than 25% by weight of poultry meat or offal).[122]

[111] Commission Regulation (EC) No 616/2007 of 4 June 2007 opening and providing for the administration of Community tariff quotas in the sector of poultry meat originating in Brazil, Thailand and other third countries, OJ L 142/5 of 5.6.2007 (Exhibit CHN-23).
[112] G/SECRET/25/Add.1, 29 May 2009 (Exhibit EU-6).
[113] G/SECRET/25/Add.1., 29 May 2009 (Exhibit EU-6).
[114] EU's response to Panel question No. 53, para. 156.
[115] G/SECRET/25/Add.1, 29 May 2009, page 6 (Exhibit EU-6).
[116] G/SECRET/25/Add.1, 29 May 2009, page 6 (Exhibit EU-6).
[117] G/MA/TAR/RS/357, 25 April 2014, page 1.
[118] A corrigendum (G/MA/TAR/RS/357/Corr.1) was circulated on 19 February 2015, an addendum (G/MA/TAR/RS/357/Add.1) was circulated on 1 September 2016, and a corrigendum to the addendum was circulated on 19 September 2016.
[119] EU's response to Panel question No. 54, para. 158.
[120] The European Union confirmed that the certification process of the changes to the draft schedule communicated on 24 March 2014 is ongoing (EU's first written submission, para. 299).
[121] Article XXVIII:5 Negotiations, Schedule CXL − European Communities, G/SECRET/32, dated 11 June 2009 and circulated 16 June 2009 ("G/SECRET/32") (Exhibit CHN-25).
[122] The product descriptions of tariff lines 1602 32 11, 1602 32 30, 1602 32 90, 1602 39 21 and 1602 39 29 are taken from Exhibits CHN-28 and CHN-35, as well as China's second written submission, para. 6. The product description of tariff line 1602 20 10 is taken from the European Union's Customs Code available at http://ec.europa.eu.

7.63. In the notification, the European Union noted that it was "prepared to enter into negotiations and consultations with the appropriate Members under Article XXVIII for the modification of concessions with respect to the above-mentioned tariff lines".[123] The notification provided import statistics by country of origin, for the period 2006-2008, for each of the products classified under the tariff lines covered by the notification. These statistics indicated that Thailand accounted for the largest share of imports into the European Union of products under tariff lines 1602 32 90, 1602 39 21, 1602 39 29, 1602 39 40, and 1602 39 80[124], and that Brazil accounted for the largest share of imports into the European Union of products under tariff lines 1602 32 11 and 1602 32 30.[125]

7.64. On 18 August 2009, Thailand requested to enter into negotiations with the European Union, claiming a "principal" supplying interest in products classified under five tariff lines (1602 32 90, 1602 39 21, 1602 39 29, 1602 39 40 and 1602 39 80), and a "substantial interest" in products classified under one tariff line (1602 32 30).[126] On 8 September 2009, Brazil sent a letter to the European Union claiming a principal supplying interest in products classified under two tariff lines (1602 32 11 and 1602 32 30), and a substantial interest in products falling under tariff line 1602 32 90.[127] Brazil reserved its rights to enter into negotiations or consultations with the European Union regarding the modification of these concessions.

7.65. The European Union held bilateral negotiations with Brazil and Thailand. According to the European Union, negotiations were completed "at the negotiators' level" on 23 September 2011.[128] The agreement resulting from the Article XXVIII negotiations with Thailand was initialled on 22 November 2011, and the agreement resulting from the Article XXVIII negotiations with Brazil was initialled on 7 December 2011.[129] The two agreements were authorised for signature by the Council of the European Union on 23 April 2012.[130]

7.66. On 9 May 2012, China requested to enter into negotiations with the European Union under Article XXVIII on the basis that it was a Member with a principal supplying interest "with respect to relevant tariff lines".[131] China also provided statistics on imports into the European Union from China of products classified under four tariff lines (1602 20 10, 1602 39 29, 1602 39 40 and 1602 39 80) for the years 2009, 2010 and 2011.

[123] G/SECRET/32, p. 1 (Exhibit CHN-25).
[124] G/SECRET/32, pp. 2-3 (Exhibit CHN-25).
[125] G/SECRET/32, p. 2 (Exhibit CHN-25).
[126] Letter from the Permanent Mission of Thailand to the Ambassador of the Permanent Mission of the European Communities to the WTO, 18 August 2009 (Exhibit EU-7).
[127] Letter from the Ambassador of the Permanent Mission of Brazil to the WTO to the Ambassador of the Permanent Mission of the European Communities to the WTO, 8 September 2009 (Exhibit EU-8).
[128] EU's first written submission, para. 40; EU's response to Panel question No. 107(b), para. 85. China does not consider that the negotiations were concluded in September 2011 (China's opening statement at the second meeting of the Panel, para. 7; China's response to Panel question No. 107, paras. 96-98). In this regard, China does not contest the European Union's explanations that negotiations were completed "at the negotiators' level" on 23 September 2011, or that the agreements with Thailand and Brazil were initialled at the time that the European Union claims. Rather, China argues that because the European Union did not complete its internal processes to give legal effect to changes agreed with Thailand and notify other WTO Members of the completion of the negotiations until December 2012, it is legally incorrect to characterize the negotiations as having been concluded prior to that time. Further, China suggests that because China claimed a principal supplying interest in May 2012, and the European Union never entered into negotiations with China under Article XXVIII, the European Union's negotiations under Article XXVIII were never actually completed (China's opening statement at the second meeting of the Panel, para. 7).
[129] EU's response to Panel question No. 107, para. 83. See also Council Decision 2012/231/EU of 23 April 2012 on the signing on behalf of the EU of the Agreement in the Form of an Exchange of Letters between the EU and Brazil pursuant to Article XXVIII of the GATT 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994, and of the Agreement in the Form of an Exchange of Letters between the EU and Thailand pursuant to Article XXVIII of the GATT 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994 (O.J. L 117, 1 May 2012, p. 1) (Exhibit CHN-27).
[130] Exhibit CHN-27.
[131] Letter from China to the EU requesting to enter into negotiations under Article XXVIII (9 May 2012) (Exhibit CHN-50).

7.67. On 1 June 2012, the European Union informed China that it did not recognize China's claims of a principal supplying interest or substantial interest under Article XXVIII.[132] More specifically, the European Union informed China that:

> Following the Understanding on the Interpretation of the Article XXVIII GATT and the Procedures for the Negotiations under Article XXVIII GATT adopted on 10 November 1980 (BISD27S/26-28), a principal supplying interest is recognised only for the WTO Member which had, for a given concession and in the most recent representative period prior to the notification of a WTO Member's intention to modify concessions included in its tariff schedule, the largest share in the market of the WTO Member seeking to modify concessions. Likewise, substantial supplying interest is recognised only for those WTO Members which had in that period a significant share, i.e. at least 10 per cent according to continuous practice of WTO Members, in the market of the WTO Member seeking to modify concessions.
>
> The European Union's notification G/SECRET/32 dated 16 June 2009 included import data for the 2006-2008 period, during which imports from China did not correspond to 10 per cent or more of total imports. Therefore, the European Union is not in a position to recognize China's claims under Article XXVIII GATT.[133]

7.68. The European Union signed the agreement resulting from the negotiations under Article XXVIII with Thailand on 18 June 2012, and it signed the agreement with Brazil on 26 June 2012.[134]

7.69. On 2 October 2012, China reiterated its request to enter into consultations with respect to "relevant tariff lines of poultry products" as notified by the European Union.[135] China contested the European Union's reliance on import statistics covering the period 2006-2008 to determine which Members held the right to participate in consultations and negotiations pursuant to Article XXVIII, stating that:

> China believes that 2006-2008 period does not constitute the representative three-year period in this case. Before 2008, the EU prohibited imports from China for SPS reasons, which completely stopped any exports of poultry from China. However, since the release of the SPS measures against China in 2008, China's export of poultry has increased rapidly. According to the EU statistics, from 2009-2011, China has become the biggest supplier in a certain number of poultry products in the EU market, the percentage of which has exceeded 10%, with some products even reaching 86%. All above-mentioned facts and evidences show that 2006-2008 period is inconsistent with the provisions on the most recent representative three-year period as stipulated in the *Understanding on the Interpretation of Article XXVIII of the GATT 1994*.[136]

7.70. On 12 October 2012, the European Union responded that it had already provided explanations of why China's claims could not be recognized, in writing as well as in bilateral meetings. The European Union also noted that it had not received a claim of interest from China within ninety days following the June 2009 notification of its intention to modify its concessions, contrary to the time-period provided in paragraph 4 of the Procedures for Negotiations under Article XXVIII. The European Union further stated that:

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[132] Letter from the EU to China responding to China's request for negotiation (1 June 2012) (Exhibit CHN-31).

[133] Letter from the EU to China responding to China's request for negotiation (1 June 2012) (Exhibit CHN-31).

[134] EU's response to Panel question No. 107, para. 83. See also Council Decision 2012/792/EU of 6 December 2012 on the conclusion of the Agreement in the form of an Exchange of Letters between the EU and Brazil pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994, and of the Agreement in the form of an Exchange of Letters between the EU and Thailand pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT) 1994 relating to the modification of concessions with respect to processed poultry meat provided for in the EU Schedule annexed to GATT 1994, OJ L 351/44 of 20.12.2012 (Exhibit CHN-34).

[135] Letter from China to the EU (2 October 2012) (Exhibit CHN-30). See also China's opening statement at the first meeting of the Panel, para. 37.

[136] Exhibit CHN-30. See also China's opening statement at the first meeting of the Panel, para. 37.

> The statistics contained in communication G/Secret/32 have been defined in accordance with paragraph 4 of the procedures for the negotiations under Article XXVIII which provides that "*the notification or request 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*". In this case, the "*last three years*" preceding the notification dated 16 June 2009 are 2006, 2007, 2008. The argument developed by China in its letter of 2 October 2012 according to which the "*2006-2008 period does not constitute the representative three year period*" is therefore in contradiction with the procedures for the negotiations under Article XXVIII. The statistics of the period 2009-2011 -posterior to the notification- cannot be taken into consideration. Using a different period for China would not only be in breach of Article XXVIII but would also result in a discriminatory treatment vis-a-vis the other WTO Members.[137] (emphasis original)

7.71. The European Union Council approved the agreements with Brazil and Thailand on 6 December 2012.[138] The agreements were implemented through several regulations:

i. Council Regulation (EU) 1218/2012[139], which amends the tariff legislation of the European Union to add the new duties applicable to the poultry products and amends and supplements the TRQ legislation of the European Union[140] with the duties and volumes resulting from the agreements with Brazil and Thailand;

ii. Commission Regulation (EU) 1246/2012[141], which amends Commission Regulation (EC) No 616/2007, and opens the TRQs for the products covered by the Second Modification Package originating from Brazil, Thailand and other third countries, and provides for the administration of the TRQs;

iii. Notice of entry into force of the Agreement in the form of an Exchange of Letters between the European Union and Brazil, and between the European Union and Thailand pursuant to Article XXVIII of the GATT 1994, which provides that the agreements signed with Thailand and Brazil will enter into force on 1 March 2013[142]; and,

iv. Commission Regulation (EU) No 302/2013[143], which also amends Commission Regulation (EC) No 616/2007.

7.72. These measures opened the TRQs on the importation of the products classified under the tariff lines covered by the Second Modification Package, and provided for their administration. The TRQs replaced the tariff rates previously applicable to these products.[144]

7.73. The total amounts of the TRQs and their allocation were determined by the European Union in agreement with Brazil and Thailand, using import data for the period 2006-2008. The European Union allocated the TRQs based on the average import shares for the same period.[145]

7.74. The tariff rates, the volume of the TRQs and their allocation among supplying countries are as follows[146]:

[137] Letter from the EU to China (12 October 2012) (Exhibit CHN-32).
[138] Exhibit CHN-34 and EU's response to Panel question No. 107, para. 83.
[139] Exhibit CHN-28 and Exhibit CHN-35.
[140] Regulation (EEC) No 2658/87, Part Three, Section III, Annex 7 (Exhibits CHN-28 and CHN-35).
[141] O.J. L 352, 21 December 2012, p. 16 (Exhibit CHN-36).
[142] O.J. L 56, 28 February 2013, p. 2. (Exhibit CHN-38).
[143] O.J. L 90, 28 March 2013, p. 86 (Exhibit CHN-37).
[144] China's first written submission, para. 136; EU's first written submission, para. 56.
[145] EU's first written submission, paras. 59-60.
[146] EU's first written submission, Table EU-6: Old and New Tariff Bindings in the Second Modification Package (para. 56) Table EU-7: Agreed TRQs in the Second Modification Package (para. 57).

Tariff line	Prior tariff rate	New in-quota tariff rate	New out-of-quota tariff rate	TRQ volume (metric tons)	Allocation (metric tons)	Allocation share
1602 32 11	867 EUR/MT	630 EUR/MT	2,765 EUR/MT	16,140	Brazil: 15,800 Others: 340	Brazil: 97.89% Others: 2.11%
1602 32 30	10.9%	10.9%	2,765 EUR/MT	79,705	Brazil: 62,905 Thailand: 14,000 Others: 2,800	Brazil: 78.92% Thailand: 17.56% Others: 3.51%
1602 32 90	10.9%	10.9%	2,765 EUR/MT	2,865	Brazil: 295 Thailand: 2,100 Others: 470	Brazil: 10.3% Thailand: 73.3% Others: 16.4%
1602 39 21	867 EUR/MT	630 EUR/MT	2,765 EUR/MT	10	Thailand: 10	Thailand: 100%
1602 39 29	10.9%	10.9%	2,765 EUR/MT	13,720	Thailand: 13,500 Others: 220	Thailand: 98.4% Others: 1.6%
1602 39 40	10.9%	10.9%	2,765 EUR/MT	748	Thailand: 600 Others: 148	Thailand: 80.21% Others: 19.79%
1602 39 80	10.9%	10.9%	2,765 EUR/MT	725	Thailand: 600 Others: 125	Thailand: 82.76% Others: 17.24%

7.75. Tariff line 1602 20 10 was included in the European Union's notification to modify the concessions under the Second Modification Package, but this tariff line was not the subject of subsequent negotiations with Brazil and Thailand.[147] China confirmed that it is not challenging any measure related to this tariff line.[148] Two of the tariff lines included in the Second Modification Package, 1602 39 40 and 1602 39 80, were merged into a single tariff line, 1602 39 85 (processed duck, geese, guinea fowl meat, containing less than 57% by weight of poultry meat or offal) effective on 1 January 2012.[149] Although these two tariff lines were merged, the European Union has explained that it opened and continues to apply two separate TRQs for the products previously covered by tariff lines 1602 39 40 and 1602 39 80.[150]

7.76. On 17 December 2012, the European Union notified the WTO that it had concluded its negotiations pursuant to Article XXVIII:5.[151] The notification referred to the bilateral agreements concluded with Brazil and Thailand, indicated the bound rates that were to be modified on the products, and included the final report of negotiations under Article XXVIII. It was circulated to WTO Members on 20 December 2012.[152] The notification states that Argentina contacted the European Union to enter into consultations. The European Union, however, "did not hold consultations with Argentina as Argentina did not have Initial Negotiating Rights, a principal supplying interest or a substantial interest in any of the products" covered by the Second Modification Package.[153] The notification also states that:

[147] EU's first written submission, footnote 25. The European Union noted that "there were no imports under that subheading during the reference period" (2006-2008).
[148] China's response to Panel question No. 4, para. 12.
[149] EU's response to Panel question No. 63 (c), para. 4.
[150] EU's response to Panel question No. 63 (c), para. 6.
[151] G/SECRET/32/Add.1, circulated 20 December 2012 (Exhibit EU-9).
[152] G/SECRET/32/Add.1 (Exhibit EU-9).
[153] G/SECRET/32/Add.1, p. 7 (Exhibit EU-9).

> No other WTO Member expressed its interest to enter into negotiations in accordance with the provisions of Article XXVIII GATT 1994 within the 90 day period referred to in paragraph 4 of the Guidelines on Procedures for Negotiations under Article XXVIII (documents C/113 and Corr.1 of 10 November 1980); therefore, the EU considers its negotiations under Article XVIII to be completed.[154]

7.77. At the time of this Report, the European Union has not yet submitted for certification the changes to its schedule of concessions resulting from the Article XXVIII:5 negotiations relating to the Second Modification Package. The European Union explained that as the Second Modification Package was concluded in 2012, after the enlargement of the European Union to 27 member States, it was considered "more appropriate to submit for certification the changes included in that package as part of the draft schedule EU27" which will be submitted "as soon as the draft EU25 schedule is certified".[155]

7.78. The TRQs negotiated under the Second Modification Package entered into force on 1 March 2013.[156]

7.79. On 19 December 2013, China requested to enter into consultations with the European Union pursuant to Article XIII:4 of the GATT 1994.[157] In its request, China noted that the European Union had "adopted a new tariff regime [...] whereby the duties rates are increased significantly while a tariff rate quota is open for each item" and allocated the "majority and even all shares of the tariff quotas to Brazil and/or Thailand" and "very limited shares to other Members, including China."[158] China recalled that it had previously raised concerns with regard to these modifications, and had requested the European Union to enter into negotiations or consultations with China, under Article XXVIII, on 9 May 2012 and 2 October 2012. In its letter, China stated:

> China has a substantial supplying interest in several of the tariff items concerned, as evidenced by the statistics of imports of the European Union from China in the most recent years prior to the adopting of the new tariff regime ...
>
> As required by Article XIII:4 of GATT 1994, a Member applying a tariff quota shall, upon the request of any other Member having a substantial supplying interest, consult promptly with the other Member regarding, inter alia, the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved. Without prejudice to China's rights under other provisions of GATT 1994 as well as other covered agreements, China hereby requests the European Union to enter into consultations with China in accordance with Article XIII:4.[159]

7.80. On 21 February 2014, the European Union responded that:

> [T]he European Union has recently completed a tariff re-binding exercise, in accordance with Article XXVIII of the GATT. Representatives of the European Union have discussed trade in processed poultry meat with representatives of China on a number of occasions, at technical and senior official level as well as in the Committee on Agriculture. Some of these discussions included representatives of the Chinese industry. There has also been extensive correspondence on this matter. We conclude that China did not meet the conditions for participation in the relevant negotiations.[160]

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[154] G/SECRET/32/Add.1, 20 December 2012 p. 7 (Exhibit EU-9).

[155] EU's response to Panel question No. 54(c), para 160.

[156] O.J. L 56, 28 February 2013, p. 2. (Exhibit CHN-38). In its response to Panel question No. 107(b), the European Union notes that: "[i]nitially, the implementing EU domestic legislation provided that the TRQs would enter into force on 1 January 2013. But, due to a delay in the completion of the internal procedures in Brazil, the entry into force was post-poned until 1 March 2013" (para. 86).

[157] Letter of 19 December 2013 requesting consultation under Article XIII:4 of the GATT 1994 (Exhibit CHN-39).

[158] Letter of 19 December 2013 requesting consultation under Article XIII:4 of the GATT 1994 (Exhibit CHN-39).

[159] Letter of 19 December 2013 requesting consultation under Article XIII:4 of the GATT 1994 (Exhibit CHN-39).

[160] Response letter from the EU to China dated 21 February 2014 (Exhibit CHN-40).

7.81. The European Union informed China that it was willing to continue the discussions with China in a spirit of cooperation and good faith, "without prejudice to the position of the European Union as regards the interpretation or application of Articles XIII or XXVIII of the GATT". On 19 May 2014, a meeting was held between China and the European Union.[161] In its panel request, China claims that during the meeting the European Union refused to adjust to TRQs, as had been previously requested by China.[162]

7.2.3 The SPS measures applicable to poultry products from China

7.82. China's claims in this dispute are related to a number of SPS measures[163] adopted by the European Union which have restricted or prohibited the importation of certain poultry products from China. The SPS measures applied to a number of products, including those poultry products included in the First and Second Modification Packages.

7.83. At the outset, the Panel notes that China is not challenging the consistency of the SPS measures with any provision of the covered agreements. The panel request does not include any claims of violation relating to the SPS measures, and China stated in these proceedings that "it is not China's intention nor the focus of this dispute to examine the SPS measures taken by the EU in relation to imports of poultry meat products".[164] The SPS measures are relevant to this dispute because China argues that the European Union should have taken these SPS measures into account when making its determinations of: which Members held a principal or substantial interest in supplying in the products covered by the First and Second Modification Packages; the amount of compensation under Article XXVIII:2; and the allocation of TRQ shares among supplying countries. Essentially, China claims that the European Union should not have relied on import statistics based on time periods during which the SPS measures were in effect, as they had a negative impact on the importation of poultry products from China. According to China, the two reference periods used by the European Union in its notifications of modification of concessions under Article XXVIII:5 (2003-2005 for the First Modification Package and 2006-2008 for the Second Modification Package) were not representative, since these periods were "tainted"[165] by the existence of the SPS measures affecting the importation of poultry products from China.

7.84. In this section, we will briefly describe the SPS measures that were applicable, and which in some instances are still applicable, to the poultry products at issue in this dispute. We focus on three SPS measures that were in place during the periods at issue and which, according to China, should have been taken into account by the European Union. As elaborated below, these measures are the "heat treatment measure", the "residues measure" and the "avian influenza measure". We describe these SPS measures to the extent that they are relevant to our assessment of the arguments of the parties in this case.

7.85. According to the European Union, in order to ensure that imported poultry products "comply with the same or equivalent sanitary requirements as domestic products", the imported products must originate from a country included in a list of approved countries and must satisfy sanitary requirements, including a heat treatment measure.[166] The heat treatment measure that applies to the products originating from the listed countries differs in terms of the severity of requirements. In the case of China, the importation of poultry products into the European Union was authorised on the condition that the products undergo the most severe heat treatment known as "treatment B".[167] According to the European Union, the requirement that poultry products from China undergo

[161] China's first written submission, para. 48; EU's first written submission, para. 54.
[162] China's request for the establishment of a panel, Section II.B.(viii), p. 5.
[163] Throughout these proceedings, various terms have been used by the parties to refer to these measures. Both parties agree that it is appropriate in this Report to refer to them as "SPS measures" (China's response to Panel question No. 81, para. 44; EU's response to Panel question No. 81, para. 40).
[164] China's first written submission, para. 31. See also China's opening statement at the first meeting of the Panel, para.5; China's second written submission, paras. 46; China's response to Panel question No. 6, para. 23; China's response to Panel question No. 81, para. 43).
[165] China's first written submission, paras. 78, 80, 194, and 246.
[166] EU's first written submission, para. 69. See also paras. 70-71.
[167] Part 4 of Annex II of Commission Decision 2007/777/EC distinguishes 6 categories of heat treatment: one non-specific treatment (called treatment "A" under which any specific heat treatment is not required) and five specific treatments, from "B" to "F", in descending order of severity. Treatment "B", which is the most severe heat treatment measure, is defined as "treatment in a hermetically sealed container to an Fo value of three or more" (Exhibit CHN-8 and Exhibit EU-13) and China's first written submission, footnote 24.

"treatment B" had been in force since 1997.[168] The heat treatment measure applicable to the importation of meat products into the European Union is currently provided in Commission Decision 2007/777/EC (as amended).[169] In addition to the heat treatment measure, "if there is evidence that imported products from a listed country no longer comply with the same or equivalent sanitary requirements as those prescribed for the EU products, the European Commission may adopt protective measures restricting those imports"[170], including the two types of SPS measures as described below.

7.86. On 30 January 2002, the European Union suspended the importation of all products of animal origin from China, including poultry products.[171] The measure applied to animal products intended for human consumption or animal feed use, and was adopted to protect against the risks posed by deficiencies in the regulation of veterinary medicine and the control of residues in China.[172] This prohibition initially provided for a derogation for certain animal products, but these products did not include the poultry products at issue in this dispute, due to animal health reasons. All products classified under the tariff lines included in the First and Second Modification Packages originating from China were prohibited under this measure.[173] We refer to this measure, which was specific to China, as the "residues measure".

7.87. On 6 February 2004, the European Union suspended the importation of fresh poultry meat, meat preparations and meat products consisting of or containing any parts of poultry originating from China and several other Asian countries.[174] This measure was adopted in response to an outbreak of avian influenza in the region.[175] This prohibition applied in addition to the above-noted prohibition imposed due to residue concerns, and it also covered all products falling under the tariff lines included in the First and Second Modification Packages. A derogation applied to the products of certain countries, but not to the products from China.[176] We refer to this measure, which was not specific to China, as the "avian influenza measure".

[168] EU's first written submission, footnote 65; Commission Decision 97/222/EEC, of 28 February 1997, laying down the list of third countries from which the Member States authorize the importation of meat products, OJ L 89/39 of 4.4.1997 (Exhibit EU-25); Commission Decision 2005/432/EC, of 5 June 2005, laying down the animal and public health conditions and model certificates for imports of meat products for human consumption from third countries and repealing Decisions 97/41/EC, 97/221/EC and 97/222/EC, OJ L 151/3 of 14.6.2005 (Exhibit EU-24). During the same period, treatment A applied to the products of Thailand. The heat treatment measure applicable to the products of China was amended in 2008, as described in paragraph 7.89.

[169] Exhibit CHN-8 and Exhibit EU-13. See Commission Decision 2008/640/EC of 30 July 2008 amending Decision 2005/692/EC concerning certain protection measures in relation to Avian Influenza in several third countries (O.J. L 207, 5 August 2008, p. 32) (Exhibit CHN-10 and Exhibit EU-22).

[170] EU's first written submission, para. 72.

[171] Commission Decision 2002/69/EC of 30 January 2002 concerning certain protective measures with regard to the products of animal origin imported from China (O.J. L 30, 31 January 2012, p. 50) (Exhibit CHN-5 and Exhibit EU-15), replaced by Commission Decision 2002/994/EC, of 20 December 2002, concerning certain protective measures with regard to products of animal origin imported from China (Exhibit EU-16). This decision was amended several times. See also China's first written submission, para. 23 and footnote 18; China's second written submission, footnotes 13 and 66; Exhibits CHN-47 and CHN-54; EU's first written submission, paras.74-75; EU's response to Panel question No. 6, para. 7; Exhibit EU-39.

[172] EU's first written submission, para. 73; Exhibit CHN-5 and EU-15, 5th and 6th recitals.

[173] At that time, poultry products from Thailand were authorised, subject to chemical testing and heat treatment "D". See China's second written submission, para. 21; EU's response to Panel question No. 6, paras. 8 *et seq*.

[174] Commission Decision 2004/122/EC of 6 February 2004 concerning certain protection measures in relation to avian influenza in several Asian countries, OJ L 36/59 of 7.2.2004 (Exhibit CHN-6 and Exhibit EU-19).See also China's first written submission, para. 24; EU's first written submission, para.77. Commission Decision 2004/122/EC was replaced by Commission Decision 2005/692/EC of 6 October 2005 concerning certain protection measures in relation to Avian Influenza in several third countries (O.J. L 263, 8 October 2005, p. 20) (Exhibit EU-21). It maintained the prohibitions against the importation of products from China and other Asian countries.

[175] China's first written submission, para. 24; EU's first written submission, para. 77.

[176] China pointed out that Thailand also suffered from the outbreak of avian influenza but its products were not subject to the same heat treatment measure (China's first written submission, para. 31). The European Union explained that the imports from Thailand that had undergone treatment "D" were authorised for importation because that treatment was effective against avian influenza (EU's first written submission, paras. 82-83; EU's response to Panel question No. 8, para. 18, Commission Decision 2004/84/EC, of 23 January 2004, concerning protection measures relating to avian influenza in Thailand, OJ L 17/57 of 24.1.2004 (Exhibit EU-20)).

7.88. On 30 July 2008, the European Union "relaxed"[177] the above SPS measures that applied to the importation of poultry products from China. The European Union amended the residues measure which addressed the risks posed by residues in animal products, because an "appropriate residue monitoring plan" had been provided by China and the result of verification was favourable.[178] The amended decision allows for the importation of poultry products from China, provided that the products are accompanied by a declaration of the Chinese competent authority that each consignment has been subjected to a chemical test, among other sanitary requirements (including the heat treatment measure).[179]

7.89. The European Union also modified the heat treatment measure applicable to Chinese poultry products. The specific heat requirement was modified from treatment "B" to the less severe treatment "D" for poultry products originating from the province of Shandong, on the basis that the competent authority of the province of Shandong complied with the specific animal health requirement.[180] The importation of poultry products originating from the rest of the Chinese territory is still subject to heat treatment "B", among other sanitary requirements. The European Union additionally modified the avian influenza measure and authorized the importation of poultry products from China, subject to the same specific heat treatment measure noted above, on the basis that "such heat treatment is sufficient to inactivate the avian influenza virus".[181]

7.90. The European Union has indicated that "[t]he scope of application of the EU sanitary measures is not defined by reference to CN or HS codes."[182] In order to evaluate the effects of the above-noted SPS measures on the importation of Chinese poultry products, we use the product categories "uncooked" and "cooked", upon which both parties agree.[183]

7.91. The category of "uncooked poultry products" covers tariff item 0210 99 39 (salted poultry meat), 1602 32 11 (processed chicken meat, uncooked, containing 57% or more by weight of poultry meat or offal) and 1602 39 21 (processed duck, geese, guinea fowl meat, uncooked, containing 57% or more by weight of poultry meat or offal).[184] According to China, these "uncooked" poultry products by definition cannot be subjected to a heat treatment measure, and therefore remain subject to an import ban.[185] The European Union has confirmed that these three tariff lines cover uncooked products.[186] The Panel understands from the parties' submissions in this regard that the importation into the European Union of products classified under tariff lines 0210 99 39, 1602 32 11 and 1602 39 21 and originating from China were prohibited under the heat treatment measure at the time of the application of the residue measure in January 2002. The imports of these products from China in the European Union remain prohibited until the present since they were not affected by the lifting of the prohibition under the residue measure, the avian influenza measure and the modification of the heat treatment measure on 30 July 2008.[187]

7.92. The poultry products falling under tariff lines 1602 32 19 (cooked chicken meat) and 1602 39 29 (processed duck, geese, guinea fowl meat, cooked, containing 57% or more by weight of

[177] China's first written submission, para. 93.

[178] Third and fourth recitals of Commission Decision 2008/639/EC of 30 July 2008 amending Decision 2002/994/EC concerning certain protective measures with regard to products of animal origin imported from China, OJ L 207/30, of 5.8.2008 (Exhibit EU-17).

[179] Second recital of Commission Decision 2008/638/EC (Exhibit EU-17).

[180] Third recital of Commission Decision 2008/638/EC of 30 July 2008 (O.J. L 207, 5 August 2008, p. 24) (Exhibit CHN-9 and Exhibit EU-23). See also China's second written submission, para. 21; EU's opening statement at the second meeting of the Panel, para. 83.

[181] Third recital of Commission Decision 2008/640/EC of 30 July 2008 amending Decision 2005/692/EC concerning certain protection measures in relation to Avian Influenza in several third countries (O.J. L 207, 5 August 2008, p. 32) (Exhibit CHN-10 and Exhibit EU-22).

[182] EU's response to Panel question No. 8, para. 20.

[183] China's second written submission, para. 16; EU's response to Panel question No. 77(b), para. 35.

[184] China's response to Panel question No. 5, paras. 17-19 and question No. 8, paras. 37-38; China's second written submission, para. 15.

[185] China's second written submission, paras. 13-15. See also China's response to Panel question No. 8, para. 35; China's opening statement at the first meeting of the Panel, para. 50.

[186] EU's response to Panel question No. 77(b), para. 35.

[187] China's second written submission, para.15. See also China's opening statement at the first meeting of the Panel, para. 50; China's response to Panel question No. 5, paras. 17-19 and question No. 8, paras. 37-38; China's comments on the EU's responses to the Panel' question No. 77(b), para. 22. The Panel also notes the EU's response to Panel question No. 79, at para. 36 that "[i]mports of fresh poultry meat from China are currently not authorised."

poultry meat or offal) are "cooked poultry products".[188] We understand that these products were authorized for importation into the European Union if they had undergone treatment "B", until the application of the residue measure in 2002. Since 30 July 2008, these products are authorized for importation into the European Union if they are accompanied by the required veterinary certification and declaration of chemical testing, and have undergone heat treatment "D" (if the products are from the province of Shandong), or treatment "B" (if the products originate from other parts of China and fulfil the other applicable sanitary requirements).

7.93. The remaining four tariff lines comprise both cooked and uncooked poultry products: these include tariff lines 1602 31 (prepared turkey meat); 1602 32 30 (processed chicken meat, containing 25% or more but less than 57% by weight of poultry meat or offal); 1602 32 90 (processed chicken meat, containing less than 25% by weight of poultry meat or offal) and 1602 39 85 (processed duck, geese, guinea fowl meat, containing less than 57% by weight of poultry meat or offal).[189] We understand that the importation into the European Union of poultry products originating from China that is classified in these tariff lines were and are subject to the SPS measures described above, depending on which category they fall (cooked or uncooked).

7.94. As noted above, it is not in dispute that these measures are SPS measures.[190] China agrees that:

> [T]he EU's SPS measures discussed in this dispute are "sanitary measures" within the meaning of Annex A:1 of the SPS Agreement, and that it would be appropriate to refer to them as "SPS measures" in the Panel Report. Without conducting a detailed examination of the EU's SPS measures given that the measures are not the subject of this dispute, China would like to briefly note that the EU's measures are applied (1) "to protect human life or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs", as described in Annex A:1(b), and (2) in the form of regulations, as provided in the second paragraph of Annex A:1.[191]

7.2.4 Import statistics

7.95. The parties have each provided the Panel with information on the import shares held by Brazil, China, Thailand, and other countries over the period 1996-2015. China has provided the percentages in Exhibit CHN-52, and the European Union has provided these percentages in Exhibit EU-43.[192] The European Union also separately provided, in Exhibit EU-44[193], the volumes of imports from different countries under tariff lines 1602 39 40 and 1602 39 80 up until the merger of these two tariff lines into tariff line 1602 39 85, effective 1 January 2012. This exhibit does not however present data expressed in percentages of shares.

7.96. We note the existence of multiple discrepancies between the import shares submitted in Exhibit CHN-52 and Exhibit EU-43, and also with the information in Exhibit EU-44. For the most part, it appears that these discrepancies are not material to our analysis of China's claims in this dispute. We further note that the data on import percentages provided to the Panel by both parties (in Exhibits CHN-52 and EU-43) appear to be derived from data covering EU28 imports, which includes "the imports into Romania, Bulgaria and Croatia made into those countries before they joined the European Union."[194] However, as discussed later in our Report, we understand from the parties that the use of EU28 data may be expected to have a negligible impact on the overall import shares.[195]

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[188] China's second written submission, para. 17.
[189] Tariff line 1602 39 85 results from the merger of tariff line 1602 39 40 (processed duck, geese, guinea fowl meat, containing 25% or more but less than 57% by weight of poultry meat or offal) and tariff line 1602 39 80 (processed duck, geese, guinea fowl meat, containing less than 25% by weight of poultry meat or offal) effective 1 January 2012.
[190] See above, footnote 163.
[191] China's response to Panel question No. 81, para. 44.
[192] We note that Exhibit EU-43 is mistakenly identified, on its cover page, as EU-44.
[193] We note that Exhibit EU-44 is mistakenly identified, on its cover page, as EU-45.
[194] EU's second written submission, para. 81.
[195] See section 7.5.3.2.3.

7.97. In relation to tariff line 1602 39 80, there is a significant discrepancy between the information provided in Exhibit CHN-52 and the information contained in Exhibit EU-44 regarding the import shares held by different countries over the years 2000-2006. Among other things, the information in Exhibit CHN-52 indicates that in the years 2005 and 2006, China accounted for 17.6% and 30.5% of imports into the European Union under tariff line 1602 39 80. We recall that during this period, the SPS measures generally prohibited importation of poultry products into the European Union from China, and at no point in these proceedings has China indicated that it would have been able to or did export products under 1602 32 80 in significant quantities during that period. We understand that the discrepancy is due to the fact that China's statistics in Exhibit CHN-52 (and Exhibit CHN-43) include imports into Bulgaria, Romania and Croatia made before those countries became Member States of the European Union, whereas the EU statistics do not include those imports. For the foregoing reasons, the figures in the table below for 1602 39 80 for the years 2000-2006 are based on the data provided in Exhibit EU-44.

7.98. The shares of imports into the European Union of Brazil, China and Thailand of the products classified under the tariff lines covered by the First and Second Modification Packages for years 2000-2015 are reproduced below. The year 2000 was the earliest year included by the European Union in one of the reference periods (for tariff line 0210 99 39).[196] Throughout these proceedings, the parties have made reference to the percentage of import shares based on the quantity of imports, as well as the value of imports. Both parties have subsequently confirmed that for the purposes of determining which Member holds a substantial supplying interest, it is more appropriate to examine import shares based on quantity, rather than value.[197] The import shares in the table that follows are based on quantity. The figures in the table below are rounded to the nearest decimal point.

[196] EU's first written submission, para. 33.

[197] EU's response to Panel question No. 61(a), para. 1; China's response to Panel question No. 61(a), para. 4.

First Modification Package: Shares of imports into the EU of Brazil, China, Thailand and other countries, 2000-2015 (in quantity)

Tariff line 0210 99 39[198]																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	52.2%	63.3%	72.9%	64.4%	98.9%	98.8%	98.2%	98.3%	95.8%	94.3%	95%	92.1%	83.1%	75.2%	70.4%	66.5%
China	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Thailand	47.8%	36.3%	26.6%	34.5%	0.0%	0.0%	0.0%	0.0%	0.1%	0.0%	0.0%	0.1%	10.1%	22.6%	28.3%	31.9%
Others	0.0%	0.4%	0.5%	1.1%	1.1%	1.2%	1.8%	1.7%	4.1%	5.7%	5%	7.9%	6.8%	2.2%	1.3%	1.6%
Tariff line 1602 31[199]																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	72.4%	76.4%	85.8%	85.6%	86.4%	89.5%	94.4%	91.3%	87.8%	90.8%	93.3%	93.7%	93.4%	92.3%	94.8%	97.2%
China	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Thailand	0.6%	0.2%	0.1%	0.3%	0.0%	0.0%	0.1%	0.0%	0.0%	0.0%	0.1%	0.0%	0.0%	0.0%	0.0%	0.0%
Others	27.0%	23.4%	14.1%	14.1%	13.6%	10.5%	5.5%	8.7%	12.2%	9.2%	6.6%	6.3%	6.6%	7.7%	5.2%	2.8%
Tariff line 1602 32 19[200]																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	16.9%	20.8%	29.2%	34.7%	32.2%	31.7%	33.2%	32.0%	32.1%	27.8%	23.4%	24.9%	19.9%	23.2%	26.9%	26.7%
China	0.0%	0.2%	0.6%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	1.5%	2.8%	3.7%	3.5%	5.2%	5.9%	4.8%
Thailand	77.2%	73.6%	65.8%	62.4%	64.9%	65.8%	64.6%	65.3%	66.2%	69.1%	72.4%	69.9%	75.2%	70.8%	66.1%	67.0%
Others	5.9%	5.4%	4.4%	2.9%	2.9%	2.5%	2.2%	2.7%	1.7%	1.6%	1.4%	1.5%	1.4%	0.8%	1.1%	1.5%

Second Modification Package: Shares of imports into the EU of Brazil, China, Thailand and other countries, 2000-2015 (in quantity)

Tariff line 1602 32 11[201]																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	77.1%	56.0%	73.3%	55.0%	92.7%	96.7%	99.2%	93.1%	99.2%	99.7%	99.3%	96.7%	96.1%	97.7%	99.6%	99.7%
China	0.0%	0.0%	0.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Thailand	13.5%	22.8%	14.3%	17.8%	2.0%	0.3%	0.2%	0.3%	0.4%	0.1%	0.7%	0.0%	1.5%	0.0%	0.1%	0.0%
Others	9.4%	21.2%	12.2%	27.2%	5.3%	3.0%	0.6%	6.6%	0.4%	0.2%	0.0%	3.3%	2.4%	2.3%	0.3%	0.3%
Tariff line 1602 32 30[202]																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	1.1%	0.3%	0.0%	3.3%	64.1%	92.2%	93.3%	77.3%	75.4%	79.0%	79.5%	72.7%	70.4%	75.6%	75.8%	73.7%
China	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.4%	0.9%	0.9%	0.8%	3.1%	4.2%	5.0%
Thailand	68.5%	96.8%	98.4%	90.7%	33.3%	7.2%	6.0%	21.9%	23.8%	19.9%	19.0	26.0%	28.3%	21.0%	19.9%	21.1%
Others	30.4%	2.9%	1.6%	6%	2.6%	0.6%	0.7%	0.8%	0.8%	0.7%	0.6%	0.4%	0.5%	0.3%	0.1%	0.2%

[198] These figures are based on Exhibit CHN-52. However, Exhibit CHN-52 appears to be missing data for the years 2000-2001 for tariff line 0210 99 39. The information presented in this table for these years is based on the information presented in Exhibit EU-43 for tariff line 0210 99 39.

[199] These figures are based on Exhibit CHN-52. However, Exhibit CHN-52 appears to be missing data for the year 2000 for tariff line 1602 31. The information presented in this table for this year is based on the information presented in Exhibit EU-43 for tariff line "1602 31 11".

[200] These figures are based on Exhibit CHN-52.

[201] These figures are based on Exhibit CHN-52.

[202] These figures are based on Exhibit CHN-52.

Tariff line 1602 32 90[203]																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	28.8%	0.0%	17.3%	28.7%	18.3%	11.1%	8.8%	13.2%	12.0%	4.8%	9.5%	10.6%	8.6%	0.0%	0.3%	0.0%
China	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.2%	0.8%	0.0%	2.8%	1.5%	2.9%	0.8%	0.0%	1.6%	0.0%
Thailand	55.8%	84.0%	39.9%	69.3%	80.3%	85.9%	88.6%	82.8%	84.8%	90.8%	88.5%	86.3%	90.5%	99.9%	98.0%	99.7%
Others	15.4%	16%	42.8%	2.0%	1.4%	3%	2.4%	3.2%	3.2%	1.7%	0.5%	0.2%	0.1%	0.1%	0.1%	0.3%
Tariff item 1602 39 21[204]																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
China	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Thailand	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	0.0%	100.0%	100.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Others	100%	100%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Tariff item 1602 39 29[205]																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	2.6%	0.4%	0.0%	0.1%	2.9%	1.3%	0.8%	0.0%	0.2%	0.0%	0.0%	0.2%	0.1%	0.0%	0.0%	0.0%
China	0.0%	0.0%	0.0%	0.0%	0.6%	0.4%	0.3%	0.2%	0.0%	27.1%	40.7%	52.8%	62.0%	58.4%	59.0%	59.4%
Thailand	91.9%	88.6%	96.3%	96.8%	92.7%	96.6%	97.8%	99.0%	99.6%	72.8%	57.2%	46.7%	37.9%	41.6%	40.9%	40.6%
Others	5.5%	11%	3.7%	3.1%	3.8%	1.7%	1.1%	0.8%	0.2%	0.1%	2.1%	0.3%	0.0%	0.0%	0.1%	0.0%
Tariff item 1602 39 40[206] (merged with 1602 39 80 into tariff line 1602 39 85 effective 1 January 2012)																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	0.0%	94.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	-	-	-	-
China	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	25.3%	-	-	-	-
Thailand	0.0%	0.0%	100.0%	98.3%	96.0%	99.6%	99.3%	90.8%	100.0%	95.1%	100%	74.7%	-	-	-	-
Others	100%	5.9%	0.0%	1.7%	4.0%	0.4%	0.7%	9.2%	0.0%	4.9%	0.0%	0.0%	-	-	-	-

[203] These figures are based on Exhibit CHN-52.

[204] These figures reflect the information contained in Exhibit CHN-52 read in conjunction with the information contained in Exhibit EU-30 for the years 2000 and 2001. According to Exhibit EU-30, there were imports from unspecified Members in 2000 and 2001. We note that according to Exhibit EU-30, there was 1 tonne of imports under 1602 39 21 in the year 2009. According to Exhibit CHN-43, there was 1.2 tonnes of imports from Brazil for that same year. Exhibit CHN-52 also suggests that these imports originated in Brazil. Exhibit EU-43 only indicates the percentage of imports into the European Union held by Thailand for this product.

[205] These figures are based on Exhibit CHN-52.

[206] These figures are based on Exhibit CHN-52.

Tariff item 1602 39 80[207] (merged with 1602 39 40 into tariff line 1602 39 85 effective 1 January 2012)																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	0.0%	4.2%	0.0%	0.0%	0.0%	0.0%	0.0%	2.3%	19.3%	0.0%	0.0%	0.0%	-	-	-	-
China	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	8.7%	17.6%	61.1%	-	-	-	-
Thailand	50.0%	95.8%	50.0%	95.0%	81.4%	99.6%	76.0%	96.6%	72.4%	88.7%	78.8%	38.8%	-	-	-	-
Others	50.0%	0.0%	50.0%	5.0%	18.6%	0.4%	24.0%	1.1%	8.3%	2.6%	3.6%	0.1%	-	-	-	-
Tariff item 1602 39 85[208] (merged from tariff lines 1602 39 40 and 1602 32 80 effective 1 January 2012)																
Share	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Brazil	(0.0%)	(8.5%)	(0.0%)	(0.0%)	(0.0%)	(0.0%)	(0.0%)	(1.6%)	(11.6%)	(0.0%)	(0.0%)	(0.0%)	0.0%	0.0%	0.0%	0.0%
China	(0.0%)	(0.0%)	(0.0%)	(0.0%)	(0.0%)	(0.0%)	(0.0%)	(0.0%)	(0.0%)	(3.9%)	(8.3%)	(52.8%)	82.5%	81.7%	80.9%	86.2%
Thailand	(36.4%)	(87.7%)	(61.4%)	(97.9%)	(91.7%)	(99.6%)	(92.9%)	(95.8%)	(83.5%)	(92.2%)	(90.0%)	(47.1%)	17.1%	11.2%	10.1%	6.4%
Others	(63.6%)	(3.8%)	(38.6%)	(2.1%)	(8.3%)	(0.4%)	(7.1%)	(2.6%)	(4.9%)	(3.9%)	(1.7%)	(0.1%)	0.4%	7.1%	9.0%	7.4%

[207] These figures are based on Exhibit EU-44 for the years 2000-2006, and on Exhibit CHN-52 for the years 2007-2011. We note that the figures provided by the parties generally align for the years 2007, 2008, 2009, 2010, and 2011. As already noted, however, there are significant discrepancies between the information provided in Exhibit CHN-52 and Exhibit EU-44 regarding the share of imports into the European Union under tariff line 1602 39 80 in the years 2000-2006. More specifically: (i) Exhibit CHN-52 indicates that Thailand accounted for 37.9% of imports into the European Union in 2000; however, according to Exhibit EU-44, in 2000, Thailand accounted for 6 of the 12 tonnes imported (i.e. 50%); (ii) Exhibit CHN-52 indicates that Thailand and Brazil respectively accounted for 17.9% and 0.5% of imports into the EU in 2001; however, according to Exhibit EU-44, in 2001, Thailand accounted for 23 of the 24 tonnes imported (i.e. 95.8%) and Brazil accounted for the remaining 4.2%; (iii) according to Exhibit CHN-52, Thailand accounted for 21.1% of imports into the European Union in 2002; however, according to Exhibit EU-44, in 2002, Thailand accounted for 74 of the 128 tonnes imported into the EU (i.e. 57.8%); (iv) Exhibit CHN-52 indicates that Thailand accounted for 37.6% of imports into the European Union in 2003; however, according to Exhibit EU-44, in 2003, Thailand accounted for 134 of the 141 tonnes imported (i.e. 95.0%); (v) Exhibit CHN-52 indicates that Thailand accounted for 38.1% of imports into the European Union in 2004; however, according to Exhibit EU-44, in 2004, Thailand accounted for 162 of the 199 tonnes imported (i.e. 81.4%); (vi) Exhibit CHN-52 indicates that Thailand and China respectively accounted for 46.2% and 17.6% of imports into the European Union in 2005; however, according to Exhibit EU-44, in 2005, Thailand accounted for 266 of the 267 tonnes imported in 2005 (99.6%), and China exported no poultry products under tariff line 1602 32 80 (i.e. 0.0%); and (vii) Exhibit CHN-52 indicates that Thailand and China respectively accounted for 31.5% and 30.5% of imports into the European Union in 2006; however, according to Exhibit EU-44, in 2006, Thailand accounted for 209 of the 275 tonnes imported (76.0%), and China exported no poultry products under tariff line 1602 32 80 (i.e. 0.0%). We understand that the discrepancy may be due to the fact that China's statistics in Exhibits CHN-52 (and Exhibit CHN-43) include imports into Bulgaria, Romania and Croatia made before those countries became Member States of the European Union, whereas the EU statistics do not include those imports.

[208] These figures are based on Exhibit CHN-52. This average is based on Exhibit EU-43, which provides merged statistics for tariff line 1602 39 85 including for years prior to the merger of tariff lines 1602 39 40 and 1602 39 80 (effective 1 January 2012). Exhibit CHN-52 does not provide merged statistics for the tariff lines 1602 3940 and 1602 39 80 prior to their merger effective 1 January 2012.

7.3 Terms of reference issues

7.3.1 Introduction

7.99. According to the European Union, China has advanced certain claims of violation in the course of the proceedings that are not identified in the panel request, and which therefore fall outside of the Panel's terms of reference.

7.100. In its first written submission, the European Union requested that the Panel make a preliminary ruling that the following claims advanced by China in its first written submission fall outside of the scope of the Panel's terms of reference:

a. China's claim that European Union violated the chapeau of Article XIII:2 by allocating small TRQ shares to "all others", at levels that do not allow these countries going forward to achieve substantial supplying interest status[209]; and

b. China's claim that the European Union violated the chapeau of Article XIII:2, and Article XIII:4, by not explicitly identifying the data that it took into account to determine the TRQs.[210]

7.101. During the second meeting of the Panel, and in its responses and associated comments to the second set of questions, the European Union argued that two other issues fall outside of the Panel's terms of reference:

c. China's claims, developed in its second written submission, that the European Union violated Article XIII:1 and the chapeau of Article XIII:2 by failing to annually review and adjust the TRQ allocations on an ongoing basis to reflect recent trade developments[211]; and,

d. any claim by China that the European Union violated paragraph 7 of the Procedures for Negotiations under Article XXVIII or paragraph 1 of the Procedures for Modification and Rectification of Schedules.[212]

7.102. We recall that Article 6.2 of the DSU establishes the requirements that apply to a panel request. Article 6.2 provides that a panel request "shall be made in writing", "shall indicate whether consultations were held", "identify the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

7.103. With respect to each of the issues identified above, the European Union has indicated that China's panel request fails to satisfy the requirements of Article 6.2 of the DSU.[213] However, we understand the European Union to be arguing that the issues raised by China are "new claims" that fall outside of the scope of the panel request, and not that there is any defect in the panel request itself.[214] Thus, the terms of reference issues before us are not about the adequacy of one or more items of the panel request judged against the requirements of Article 6.2, but rather about whether the complaining party has broadened the scope of the measures or claims in the dispute by advancing new claims as compared with those identified in the panel request.

[209] EU's first written submission, para. 7. See also paras. 239-249.
[210] EU's first written submission, para. 8. See also paras. 269-270.
[211] EU's opening statement at the second meeting of the Panel, paras. 33-35. See also the EU's comments on China's response to Panel question No. 121, paras. 58-67.
[212] EU's response to Panel question No. 100, paras. 61-64.
[213] EU's first written submission, paras. 239, 270; EU's response to Panel question No. 100, para. 63; EU's comments on China's response to Panel question No. 121(b), para. 67.
[214] At the first meeting, the Panel asked the European Union to clarify whether it was arguing that one or more items of the panel request itself failed to meet the requirements of Article 6.2 (and if so, to specify which items of the panel request fail to meet which requirement of Article 6.2), or instead that the panel request itself may meet the requirements of Article 6.2, but that China's first written submission challenged new measures or claims that fall outside of the scope of the panel request (Question 1(a) of the set of questions sent to the parties in advance of the first meeting). The European Union responded that China's first written submission developed legal claims that were not mentioned in the panel's request, and therefore constitute "new claims" falling outside of the Panel's terms of reference.

7.104. China considers that some of the issues that the European Union characterizes as new "claims" are arguments in support of claims identified in the panel request. We recall that Article 6.2 of the DSU requires that the claims, but not the arguments in support of those claims, must be identified in the panel request in order to allow the defending party and any third parties to know the legal basis of the complaint.[215] In this regard, the Appellate Body has consistently distinguished between claims of violation and the arguments presented in support of those claims.[216]

7.3.2 The scope of China's claims under Article XIII of the GATT 1994

7.3.2.1 China's contention that the European Union violated the chapeau of Article XIII:2 because it did not set the shares of the TRQs allocated to the "all others" category at sufficient levels

7.105. In its first written submission, China contends that the European Union violated the chapeau of Article XIII:2 because the shares of the TRQs allocated to the "all others" category are not sufficient to allow other WTO Members to obtain a substantial supplying interest going forward in the products covered by the TRQs.[217] According to China, the chapeau of Article XIII:2 requires that the determination of the TRQs be a "dynamic process based on market developments" and not be "cast in stone"[218], as evidenced by the possibility to request adjustments to the base period and reappraisal of special factors under Article XIII:4. For that reason, China argues, the shares of TRQs afforded to the "all others" category must be large enough to ensure that countries which did not receive a country-specific share are able to use their comparative advantages to achieve a substantial supplying interest in the future. China claims that by not allocating an "all others" share of at least 10% for all of the TRQs, the European Union violated the chapeau of Article XIII:2.[219]

7.106. The European Union submits that this is a new claim that falls outside the Panel's terms of reference because it was not identified in China's panel request.[220] The European Union submits that China's panel request only claims a violation of the chapeau of Article XIII:2 in connection with other provisions or paragraphs of Article XIII, including Article XIII:4, by using the expressions "including the chapeau" and "read in conjunction with".[221] According to the European Union, there is no "stand-alone", independent claim of violation of the chapeau of Article XIII:2 in China's panel request based on the purported obligation of a country establishing a TRQ to set aside a share for "all others" at levels sufficient to allow these countries going forward to obtain a substantial supplying interest.[222] The European Union submits that there is nothing in the panel request hinting at that obligation, or at how or why the measure at issue might be considered by China to violate such an obligation, nor is there mention of such a dynamic interpretation of the chapeau.[223] In this regard, the European Union notes that the chapeau "does not impose a clear cut obligation whose contours are easily understandable from its wording", and that China's itself "reads in the chapeau of Article XIII:2 several distinct obligations with a very different content".[224] Moreover, the European Union considers that item (vii) of China's panel request alleges that the chapeau of Article XIII:2, together with Article XIII:4, have been violated because the European

[215] Appellate Body Report, *EC – Bananas* III, paras. 141 - 143.

[216] See, e.g., Appellate Body Reports, *China – Raw Materials*, para. 220; Appellate Body Report, *Dominican Republic — Import and Sale of Cigarettes*, para. 121.

[217] China's first written submission, paras. 208 *et seq*, section IV.3.c., entitled "the EU violated the chapeau of Article XIII:2 because it did not establish the level of the TRQs for all other countries at levels that allow these countries going forward to achieve a substantial interest as suppliers of the products subject to the TRQs." See also China's first written submission, para. 280(8).

[218] China's first written submission, para. 209.

[219] China claims that this also violates Article XIII:1. The European Union has not argued that the claim under Article XIII:1 falls outside of the scope of the Panel's terms of reference.

[220] EU's first written submission, paras. 238-248 and EU's opening statement at the first substantive meeting of the Panel, para. 27.

[221] See China's request for the establishment of a panel, items (v) (vii) of Sections II.A. and II.B. See EU's first written submission, paras. 246-247 and EU's opening statement at the first substantive meeting of the Panel, paras. 38 *et seq*.

[222] EU's first written submission, para. 247; EU's opening statement at the first substantive meeting of the Panel, para. 43.

[223] EU's first written submission, para. 248, EU's opening statement at the first substantive meeting of the Panel, para. 45.

[224] EU's opening statement at the first substantive meeting, paras. 32-33.

Union has not ensured that the base period is selected and special factors are taken into account such as to allot to Members a TRQ that approaches as close as possible the shares that they might be expected to obtain in the absence of the TRQs. Hence, the references to Article XIII:4, to the base period and to special factors are not described in the panel request as mere examples, but constitute defining features of the obligation described in item (vii) of China's panel request, which, according to China, the European Union has violated.[225] China's claim that the European Union violated the chapeau of Article XIII:2 because the shares of the TRQs allocated to the "all others" category are not sufficient to allow other WTO Members to obtain a substantial supplying interest going forward in the products covered by the TRQs is completely independent from the need to make adjustments to the base period selected and reappraise special factors in accordance with Article XIII:4.[226]

7.107. According to China, its contention that the European Union violated the chapeau of Article XIII:2 by failing to allocate an adequate "all others" share sufficient to allow other WTO Members to obtain a substantial supplying interest going forward is an argument in support of the claim presented in item (vii) of Section II.A and item (vii) of Section II.B of its panel request.[227] Item (vii) sets forth the claim that "the allocation of all or the vast majority of the TRQs to two of the WTO Members" is inconsistent with "Article XIII:2, including its chapeau, read in conjunction with Article XIII:4". According to China, the panel request thus makes clear that the consistency of the TRQs with the chapeau of Article XIII:2 is challenged, even if the words "including the chapeau" are used.[228] China also considers that the chapeau of Article XIII:2 contains a single, distinct obligation that requires Members to "aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions."[229] While China recognizes that it has alleged several different violations of the chapeau of Article XIII:2, it explains that this is not because the provision of the chapeau contains several distinct obligations, but because the sole requirement that it contains was violated in several different ways by the European Union.[230]

7.108. The main issue before the Panel is whether China's contention that the European Union violated the obligation in the chapeau of Article XIII:2 by failing to allocate the "all others" shares at a levels sufficient to allow other Members to obtain a substantial supplying interest is properly characterized as a new claim, in which case it would fall outside the Panel's terms of reference, or rather as an argument in support of the claim included in item (vii) of China's panel request.

7.109. We note that China's panel request is divided into two sections. Section I identifies the measures at issue, and Section II identifies the legal basis for the complaint. Section II.A presents the claims of violation in respect of the First Modification Package, and Section II.B presents the claims of violation in respect of the Second Modification Package. Items II.A(vii) and II.B(vii) set forth the following claim:

> The *allocation of all or the vast majority of the TRQs to two of the WTO Members* as implemented by the EU in the measures identified above is inconsistent with GATT 1994 *Article XIII:2, including its chapeau*, read in conjunction with Article XIII:4, which confirms that the base period must be selected and special factors must be taken into account such as to allot to Members a TRQ that approaches as closely as possible the shares that they might be expected to obtain in the absence of the TRQs. (emphasis added)

7.110. First, we observe that item (vii) specifies that the violation arises from "the allocation of all or the vast majority of the TRQs to two of the WTO Members", i.e. to Brazil and Thailand. While the European Union argues that there is nothing in the panel request to suggest a claim that the chapeau of Article XIII:2 contains an obligation to allocate a share of the TRQ to an "all others" category so as to allow other countries going forward to achieve a substantial interest, we consider that item (vii) of China's panel request clearly alleges a violation on the basis of the "allocation of all or vast majority of the TRQs to two of the WTO Members". The contention that the European

[225] EU's opening statement at the first substantive meeting of the Panel, paras. 39-42.
[226] EU's opening statement at the first substantive meeting of the Panel, paras. 43 and 45.
[227] China's response to the EU's request for preliminary rulings, para. 4.
[228] China's response to the EU's request for preliminary rulings, para. 6.
[229] China's response to the EU's request for preliminary rulings, para. 11.
[230] China's response to the EU's request for preliminary rulings, para. 13.

Union did not "allocate a share for 'all other' countries at levels sufficient to allow these countries going forward to achieve a substantial interest" is closely related to the contention that the European Union failed to allocate a sufficiently large amount of the TRQ shares to the "all others" category, and instead allocated "all or the vast majority of the TRQs to two of the WTO Members". In our view, it is an elaboration of *why* China considers that "the allocation of all or the vast majority of the TRQs to two Members" violates the chapeau of Article XIII:2.

7.111. Second, we observe that item (vii) states that the allocation of all or the vast majority of the TRQs to two Members "is inconsistent with GATT 1994 Article XIII:2, including its chapeau". We consider that the claim of violation of "GATT Article XIII:2, including its chapeau, read in conjunction with Article XIII:4" is not a model of clarity in drafting. However, we do not consider that the phrase "read in conjunction with Article XIII:4" negates the express claim based on the chapeau of Article XIII:2. In this regard, we note that item (vii) of the panel request not only references "Article XIII:2, including its chapeau", but also reproduces the actual wording of the obligation that is provided for in the chapeau, namely to "allot to Members a TRQ that approaches as closely as possible the shares that they might be expected to obtain in the absence of the TRQs".

7.112. Third, to the extent that the European Union's objection is grounded on the premise that the chapeau of Article XIII:2 contains multiple, distinct obligations, we disagree. In our view, Article XIII is an example of a provision that contains multiple, distinct obligations as set forth in Article XIII:1, the chapeau of Article XIII:2, the sub-paragraphs of Article XIII:2, the sub-paragraphs of Article XIII:3, and Article XIII:4. However, we read the chapeau of Article XIII:2 as containing a single obligation, namely, that in applying import restrictions to any product, Members "shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions".

7.113. The Panel considers that, based on the wording of item (vii) of the panel request, China's contention that the European Union violated the chapeau of Article XIII:2 by failing to set aside TRQ shares for "all others" at levels that allow other WTO Members to achieve a substantial supplying interest status going forward falls within the scope of the panel's terms of reference.

7.3.2.2 China's contention that the European Union violated the chapeau of Article XIII:2 and Article XIII:4 because it failed to disclose the trade data it used to determine the TRQs

7.114. In its first written submission, China contends that the European Union violated the chapeau of Article XIII:2 and Article XIII:4 by not disclosing the data that it took into account to determine the TRQs. More precisely, China submits that none of the instruments, regulations or decisions adopted by the European Union with respect to the First and Second Modification Packages "describe with any degree of precision the historical trade data" relied upon by the European Union to determine the TRQs allocated to specific countries and the TRQs allocated to all other countries.[231] China contends that there is no indication of how the European Union calculated the amount of the TRQs under paragraph 6 of the Understanding on the Interpretation of Article XXVIII, and that this violates the chapeau of Article XIII:2.[232] China also contends that the European Union violated Article XIII:4 by failing to disclose the representative period taken into account to determine the TRQS, and whether "special factors" were considered.[233]

7.115. The European Union submits that these are new claims that fall outside the scope of the Panel's terms of reference. The European Union argues that nothing in China's panel request, including in the claims listed in items (v) and (vii) of Section II.A regarding the First Modification Package, and the corresponding claims in items (v) and (vii) of Section II.B regarding the Second Modification Package, indicate that the European Union violated the chapeau of Article XIII:2 or Article XIII:4 by failing to disclose the data that it took into account to determine the shares in the TRQs.[234] The European Union submits that the text of the chapeau of Article XIII:2, of Article XIII:4 and of paragraph 6 of the Understanding do not refer to any obligation to disclose

[231] China's first written submission, para. 217.
[232] China's first written submission, para. 218.
[233] China's first written submission, para. 222.
[234] EU's first written submission, para. 268.

the trade data upon which the allocation of the TRQ is made. The European Union argues that "a simple reference to those provisions did not allow the European Union to anticipate that China intended to refer to the violation of the alleged disclosure obligation".[235]

7.116. China responds that these are not new claims, but rather an argument in support of China's claims in items (v) and (vii) of Section II.A and Section II.B of its panel request. In these items of China's panel request, China claims that "the allocation of all or the vast majority of the TRQs to two Members" violates "Article XIII:2 read in conjunction with the Understanding on the Interpretation of Article XXVIII and in particular Paragraph 6 thereof" (item (v) of the panel request), and "Article XIII:2, including its chapeau, read in conjunction with Article XIII:4" (item (vii) of the panel request).[236] China submits that compliance with these obligations "requires disclosure of the basis and data taken into account for the determination of the TRQs".[237] Thus, China considers that its contention that the European Union violated these provisions by failing to disclose the data used to determine the TRQs are properly characterized as arguments in support of its claims under these provisions.

7.117. According to China, its contention that the European Union violated the chapeau of Article XIII:2 and Article XIII:4 because it failed to disclose the data used to determine the TRQs is an argument in support of the claim set forth items II.A(v) and (vii) and II.B(v) and (vii) of the panel request. The main issue before the Panel is whether China's contention that the European Union violated the obligation in the chapeau of Article XIII:2 and Article XIII:4 by failing to disclose the data used to determine the TRQs is properly characterized as a new claim that is outside the Panel's terms of reference, or rather as an argument in support of the claims included in items (v) and (vii) of China's panel request.

7.118. We have already examined item (vii) of the panel request above, in the context of examining the first terms of reference issue raised by the European Union. We recall that item (vii) of the panel request reads as follows:

> The *allocation of all or the vast majority of the TRQs to two of the WTO Members* as implemented by the EU in the measures identified above is inconsistent with GATT 1994 Article XIII:2, *including its chapeau, read in conjunction with Article XIII:4*, which confirms that the base period must be selected and special factors must be taken into account such as to allot to Members a TRQ that approaches as closely as possible the shares that they might be expected to obtain in the absence of the TRQs. (emphasis added)

7.119. Item (v) of the panel request also concerns the "allocation of all or the vast majority of the TRQs to two Members". It reads as follows:

> The *allocation of all or the vast majority of the TRQs to two of the WTO Members* as implemented by the EU in the measures identified above is inconsistent with the *chapeau of GATT 1994 Article XIII:2* read in conjunction with the Understanding on the Interpretation of Article XXVIII and in particular Paragraph 6 thereof, which requires the allocation of a TRQ to approach as closely as possible the shares that the WTO Members might be expected to obtain in the absence of the TRQs. (emphasis added)

7.120. First, we observe that items (v) and (vii) of the panel request make no reference to the disclosure of data, or to any alleged failure by the European Union to disclose historical trade data, or to disclose any other type of information. Rather, items (v) and (vii) both specify that the violation of the cited provisions arises from "the allocation of all or the vast majority of the TRQs to two of the WTO Members", i.e. to Brazil and Thailand. In addition, none of the provisions of the GATT 1994 cited in these items of the panel request make reference to the disclosure of data. Furthermore, the manner in which the panel request summarizes the obligations in the chapeau of Article XIII:2, Article XIII:4 and paragraph 6 of the Understanding makes no reference to any obligation in these provisions, express or implied, to disclose information.

[235] EU's opening statement at the first meeting of the Panel, para. 55.
[236] China's response to the EU's request for preliminary rulings, para. 22; China's response to Panel question No. 91, para. 61.
[237] China's response to the EU's request for preliminary rulings, para. 26.

7.121. In addition, we note that the alleged omission at issue − the failure by the European Union to disclose certain data − is not identified as one of the challenged measures listed in Section I of China's panel request. As noted above, China's panel request is separated into two sections. Section I identifies the measures at issue, and Section II identifies the legal basis for the complaint. The scope of China's claims must be discerned by reading the relevant items in Sections II.A and II.B of the panel request, together with the identification of the measures at issue in Section I of the panel request. We do not see in the measures listed in Section I of China's panel request any reference to the European Union's failure to disclose the historical trade data, the selection of a base period and how special factors were appraised.

7.122. Throughout its submissions in these proceedings, China has presented the alleged failure to disclose data as the action or omission that constitutes the violation of the chapeau of Article XIII:2 and Article XIII:4, and not as an explanation of why some other action or omission is inconsistent with these provisions. In this regard, we observe that the section of China's first written submission developing this claim is entitled "The EU violated the chapeau of Article XIII:2 and Article XIII:4 by not explicitly identifying the data that it took into account to determine the TRQs".[238] In its first written submission, China requests a finding that "By not explicitly identifying the data that it took into account to determine the TRQs, the EU violate[d] the chapeau of Article XIII:2 and Article XIII:4".[239] The corresponding section of its second written submission is entitled, "The chapeau of Article XIII:2 and Article XIII:4 Were Violated By Not Explicitly Identifying The Data That The European Union Took Into Account To Determine The Tariff Rate Quotas".[240] The requirement of disclosure, as advanced by China throughout its submissions, is presented as a constitutive element of its claim of violation under the chapeau of Article XIII:2 and Article XIII:4.

7.123. Based on the foregoing, the Panel considers that China's contentions that the European Union violated the chapeau of Article XIII:2 and Article XIII:4 by failing to proactively disclose the historical trade data, the reference period selected and how special factors were appraised are new claims that fall outside the Panel's terms of reference.

7.124. In any event, the Panel considers that there is no textual basis to conclude that either the chapeau of Article XIII:2 or the provisions of Article XIII:4 impose an obligation on a Member adopting a TRQ to proactively disclose the historical trade data which was relied upon to determine the TRQ allocation, the representative period selected or the special factors considered.

7.125. No such obligation is identified in the text of either provision. Beginning with the obligation in the chapeau Article XIII:2, we note that the text of this provision does not explicitly or implicitly refer to the disclosure of any information. It refers to the obligation applicable to a Member imposing a TRQ "to aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". The Panel cannot read these words to suggest an obligation to proactively disclose the import data used by a Member to determine and allocate TRQs. Article XIII:4 provides for the possibility for a Member holding a substantial interest in supplying a product that is subject to an import restriction to request consultations "regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved". There is nothing in the wording of Article XIII:4 that suggests in any way that the Member imposing a TRQ must "explicitly identify", or proactively disclose, any information. Article XIII:4 rather empowers a Member holding a substantial interest to undertake a certain action, which is to request consultations with the Member imposing the TRQ. It also obliges the Member imposing the TRQ to "consult promptly" upon request. A requirement to proactively disclose certain information relating to the historical trade data, the reference period and the consideration of special factors, if any, is not mentioned in the text of Article XIII:4.

7.126. Turning to the context of these provisions, the Panel notes that other provisions of the GATT 1994 contain express disclosure and publication obligations which are applicable to TRQs. Notably, Article XIII:3(b) states that Members "applying restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value". Article XIII:3(c) requires that

[238] China's first written submission, section IV.B.3.d.
[239] China's first written submission, para. 280(9).
[240] China's second written submission, section IV.D.

Members allocating TRQs among supplying countries "shall promptly inform all other Members having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof". These provisions, which apply to a Member imposing a TRQ, do not refer to any requirement to proactively disclose the historical trade data upon which the TRQ was determined, or of the selection of the base period or consideration of special factors. More generally, Article X:1 obliges Members to ensure that trade regulations pertaining to rates of duty and restrictions on imports "be published promptly in such a manner as to enable governments or traders to become acquainted with them". The existence of these other provisions of the GATT 1994 that expressly require the disclosure or publication of information precludes us from reading disclosure obligations into the chapeau of Article XIII:2 or Article XIII:4, especially insofar as such proactive disclosure obligations would be of a more far-reaching scope than those expressly provided for in Article XIII:3(b) and (c), and Article X:1 of the GATT 1994.

7.127. Based on the foregoing, even if the Panel were to find that the panel request covers these claims, the Panel would be compelled to reject China's claims that the European Union violated the chapeau of Article XIII:2 and Article XIII:4 by failing to proactively disclose the data that it took into account to determine the TRQs in the instruments, regulations or decisions adopted by the European Union with respect to the First and Second Modification Packages.

7.3.2.3 China's contention that the European Union violated Article XIII:1 and the chapeau of Article XIII:2 by failing to annually review and reallocate the TRQ shares

7.128. In its second written submission, China claimed that the failure by the European Union to update and reallocate the TRQ shares annually was inconsistent with Article XIII:1 and Article XIII:2(d).[241] More precisely, China stated that TRQ shares had to be reviewed and adjusted "from time to time"[242]; "before a new quota year starts"[243]; "preceding each allocation"[244]; "when trade developments occur and the allocated shares are no longer representative of the import of a WTO Member in the absence of the TRQs"[245]; and "over time".[246] China explained that in this dispute, it advances two categories of claims regarding the allocation of shares in the TRQs:

> China makes claims under Article XIII challenging the initial allocation of shares in the TRQs in the First and the Second Modification Packages but also challenges the ongoing application thereof from quota year to quota year *without* adjustment in light of trade developments such that the allocated shares in the TRQs no longer reflect the shares WTO Members would have had in the absence of the TRQs. China submits that (i) the allocated shares in the TRQs as applied by the European Union since 2007 and 2012 respectively and going forward during their period of validity must be updated from time to time to reflect the share that each WTO Member could have had without the TRQs and (ii) such updating must be based on trade flows during a representative period preceding the continued application of the allocated shares.[247] (emphasis original)

7.129. At the second meeting with the Panel, the European Union indicated that China's challenge to the ongoing application of the TRQs from quota year to quota year, without adjustment in light of trade developments, is a new claim which "has not been made before, either in China's Panel request, or in its first written submission, or elsewhere. It is therefore manifestly outside the Panel's terms of reference."[248]

7.130. In its responses to the second set of questions[249], China indicated that these claims are covered by items (iii), (iv), (v), (vi), (vii) of Section II.B of the panel request, regarding the Second Modification Package, read together with the footnotes accompanying some of these items. China recalled that "[t]he allocation of all or the vast majority of the TRQs to two of the WTO

[241] China's second written submission, paras. 127 and 175.
[242] China's second written submission, para. 121.
[243] China's second written submission, para. 127.
[244] China's second written submission, para. 137; see also para. 147.
[245] China's second written submission, para. 165.
[246] China's second written submission, para. 196.
[247] China's second written submission, para. 121.
[248] EU's opening statement at the second meeting of the Panel, para. 33.
[249] China's response to Panel question No. 121(b); China's response to the EU's question No. 1(a).

Members as implemented in the measures and decision mentioned above" is the aspect of the measures being challenged. China observed that the allocation of all or the vast majority of the TRQs to two of the WTO Members has remained in place in the years 2013-2015, and that this TRQ share allocation was implemented in the measures and decisions mentioned in Section I.B of the panel request. China notes that the measures identified in that section, e.g. Commission Regulation (EU) No 1246/2012 of 19 December 2012, were in effect in the years 2013-2015 and are still effective now.

7.131. In its comments on China's response[250], the European Union responded, *inter alia*, that the panel request shows that what is challenged is only the initial allocation of the TRQ shares by the European Union at the moment of opening those TRQs, and that the panel request makes no reference to any obligation to periodically review and adjust the allocation.

7.132. Beginning with the text of China's panel request, we note that the claims under Article XIII:1 and Article XIII:2 as set forth in section II.B of the panel request all refer to the "allocation of all or the vast majority of the TRQs to two Members".[251] We consider that the reference to the "allocation of all or the vast majority of the TRQs to two Members", if taken alone, is broad enough to embrace a claim of violation not only in respect the initial allocation of shares in the TRQs in the First and the Second Modification Packages, but also a claim of violation in respect of a failure to annually review and reallocate the TRQs from quota year to quota year to take account of trade developments. The items referring to the "allocation of all or the vast majority of the TRQs to two Members" are not temporally limited in a way that would confine the scope of the claims only to the initial TRQ allocation.

7.133. However, we consider that the scope of China's claims must be discerned by reading the relevant items in Section II.B of the panel request together with the identification of the measures at issue in Section I of the panel request. And, having carefully reviewed Section I of the panel request, we do not see any reference to the European Union's failure to annually review and reallocate the TRQs from quota year to quota year to take account of trade developments as one of the challenged measures at issue. These claims pertain to a measure in the form of an omission, namely, the failure by the European Union to update and reallocate the TRQ shares set forth in the measures identified in Section I of the panel request. This omission is not identified as one of the measures at issue in Section I of the panel request. In our view, the identification of the regulations as the measures at issue does not, by implication, encompass claims relating to the European Union's subsequent failure to modify the TRQ allocations provided for in those instruments.

7.134. China points out that the items in Section II.B advancing claims under Article XIII:1 and Article XIII:2 refer to the "allocation of all or the vast majority of the TRQs to two Members", and are accompanied by a cross-reference back to the following "decision" that is identified in Section I.B(iv) of the panel request:

> Refusal by the EU in consultations held on 19 May 2014 under Article XIII of GATT 1994 to adjust the TRQs on the basis of recent import statistics establishing China's substantial supplying interests as had been requested by letter of Ambassador Yu of 19 December 2013.

7.135. We agree that, by virtue of its inclusion in Section I.B(iv) of the panel request, this alleged refusal to adjust the TRQs in consultations held on 19 May 2014 is a measure at issue in this dispute. We further note that items (iv), (v), and (vi) of Section II.B of the panel request each explicitly refers back to this decision, either in the body text of the item or in an accompanying footnote. However, we do not consider that this supports China's argument that the ongoing application of the TRQs from quota year to quota year, without adjustment, is a claim identified in

[250] EU's comments on China's response to Panel question No. 121(b).

[251] See items (iv), (v), (vi) and (vii) of Section II.A of the panel request, and items (iv), (v), (vi) and (vii) of Section II.B of the panel request. Item (iii) of the panel request states that "[t]he country-specific TRQs allocated by the EU to two of the WTO Members as implemented in the measures and decision mentioned above violate GATT 1994 Article XIII by diminishing for the other WTO Members the market access commitments that the EU undertook to maintain on a non-discriminatory basis". This item contains no reference to any subparagraph of Article XIII, and it is not clear which of the various paragraphs and obligations of Article XIII would be linked to "diminishing for the other WTO Members the market access commitments that the EU undertook to maintain on a non-discriminatory basis".

the panel request. To the contrary, the specific measure identified in Section I.B(iv) is the European Union's refusal, in May 2014, following a request for consultations under Article XIII:4 dated 19 December 2013, to adjust the TRQs on the basis of recent import statistics establishing China's substantial supplying interest. The "recent import statistics" referred to in the 19 December 2013 letter were statistics "in the most recent years prior to the adoption of the new tariff regime".[252] Section I.B(iv) does not identify, as a measure at issue in this dispute, the failure by the European Union to annually review and reallocate the TRQs from year to year, on its own initiative.[253]

7.136. Furthermore, we consider that the evolution of China's claims in its submissions reinforces the conclusion that these are new claims that were developed in the course of the proceedings. In its first written submission, China argued that in order to avoid a long-term freeze in the allocation of TRQ shares among supplying countries, Article XIII:1 and the chapeau of Article XIII:2 should be interpreted as requiring a Member to reserve at least a 10% share of the TRQ allocation to an "all others" category. In its first written submission, China did not refer to any obligation in Article XIII:1 or XIII:2 to annually review and reallocate the TRQs, and did not refer to any violation of those provisions arising from the European Union 's failure to do so in this case. In the context of responding to the argument that China made in its first written submission, the European Union pointed out that allocating a minimum 10% TRQ share to "all others" would not necessarily prevent a permanent freeze in the allocation of TRQ shares among supplying countries, because one or more countries might proceed to capture the entirety of that "all others" share. The European Union explained that the way to avoid a permanent freeze would not therefore be to always allocate an "all others" share at a certain minimum level, as proposed by China, but rather by having some kind of "time-limit" on the validity of the allocation, or a "periodic review mechanism"; the European Union emphasized, however, that there is no such obligation in Article XIII.[254] In its second written submission, China then explained that it is also challenging the absence of any annual review and adjustment of the TRQs at issue by the European Union. China subsequently explained that it "considered it unnecessary to explicitly draw a distinction between its challenges to the initial TRQ allocations and those against the continuous application of these allocations without change in the subsequent periods, until it noticed that the EU overlooked the ongoing nature of the obligations in Articles XIII:1 and XIII:2".[255]

7.137. We understand that a claim or defence being raised for the first time in a party's second written submission is not, in and of itself, grounds for a panel declining to rule on such claim or defence.[256] However, in this case China did not articulate any claims of violation based on the "ongoing" obligations in Article XIII:1 or the chapeau of Article XIII:2 prior to its second written submission, and then did so apparently only in response to the European Union's argument that the only way to avoid a permanent freeze in the allocation of TRQs would be through by having some kind of "time-limit" on the validity of the allocation, or a "periodic review mechanism". The manner in which China' raised its claims regarding an alleged ongoing obligation under Article XIII:1 and XIII:2 to annually reallocate TRQ shares reinforces the conclusion, derived from the text of the panel request, that these are new claims.

7.138. Based on the foregoing, and in particular our analysis of the text of the panel request, we conclude that China's claims that the European Union violated Article XIII:1 and the chapeau of Article XIII:2 by failing to annually update the initial TRQ allocations constitute new claims that are not identified in the panel request, and which therefore fall outside of the panel's terms of reference.

7.139. We note that in the present case, China has advanced several claims under Article XIII in connection with the absence of any adjustment to the initial TRQ allocation following the opening of the TRQs. These claims include, in addition to those under consideration here, China's claim that the European Union violated Article XIII:4 by refusing to enter into "meaningful consultations" with

[252] Letter of 19 December 2013 requesting consultation under Article XIII:4 of the GATT 1994 (Exhibit CHN-39). See paragraph 7.79.

[253] We recall that panels may apply the rule of interpretation *expressio unius est exclusio alterius*, i.e. to express or include one thing implies the exclusion of the other, when determining whether a particular claim is covered by a panel request. See Panel Reports, *China – Publications and Audiovisual Products*, para. 7.60; *China – Raw Materials*, para. 7.49, footnote 91.

[254] EU's first written submission, para. 263.

[255] China's response to the EU's question No. 1(b).

[256] See, e.g., Appellate Body Report, *US – Gambling*, paras. 270-273.

China concerning the need for an adjustment of the TRQ shares, the reference period selected, or the appraisal of special factors.

7.140. It is not in dispute that China's claim under Article XIII:4, regarding the European Union's alleged refusal to enter into "meaningful consultations", falls within the scope of our terms of reference. Accordingly, we address the merits of that claim in our Report.[257] In the course of addressing the merits of that claim, we are confronted with the same fundamental legal issue that we would be confronted with in the event that we were to reach the merits of the claims under consideration here. That issue is whether, in cases where a TRQ has been allocated among supplying countries on the basis of historical market shares in accordance with Article XIII:2(d), there is a legal obligation on the importing Member to reallocate TRQ shares among supplying countries to reflect an updated reference period or a reappraisal of special factors, and if so, whether there is a requirement that such reallocation occur within any particular time-frame.

7.141. In the course of addressing China's claim under Article XIII:4 regarding the absence of "meaningful consultations", we conclude that in cases where a TRQ has been allocated among supplying countries on the basis of historical market shares, there is no legal obligation on the importing Member to reallocate TRQ shares among supplying countries to reflect an updated reference period or a reappraisal of special factors, or at least not within any particular time-frame or with any particular frequency. Therefore, even if we were to find that the panel request includes China's claims that the European Union violated Article XIII:1 and Article XIII:2 by failing to annually update the initial TRQ allocations, we would be compelled to reject those claims on the merits.

7.3.3 The scope of China's claims relating to certification

7.142. China claims that the European Union's application of the higher out-of-quota tariff rates arising from the First and Second Modification Packages are in violation of Article II:1 of the GATT 1994 because they exceed the bound rates currently inscribed in the European Union's schedule of concessions. This is so, China argues, because the changes agreed with Brazil and Thailand in the Article XXVIII negotiations have not yet been incorporated into the text of the European Union's schedule through the certification procedure, and therefore are legally ineffective to replace the existing bound duties. In China's view, the absence of certification means that the bound rates that existed in the Schedule prior to the completion of the Article XXVIII negotiations remain unchanged, from which it follows that the European Union's application of the higher out-of-quota tariff rates violates Article II:1.

7.143. It is not in dispute that the above claim falls within the scope of our terms of reference, and we address the merits of that claim elsewhere in our Report.[258] In the course of presenting its arguments in support of that claim, however, China has made statements that might be construed as advancing additional claims of violation relating to the European Union's alleged failure to respect certain requirements contained in the Procedures for Negotiations under Article XXVIII, and in the Procedures for Modification and Rectification of Schedules. In this section of our Report, we will consider whether any additional claims of violation stemming from the European Union's alleged failure to respect these requirements are properly before the Panel.

7.3.3.1 China's contentions that the European Union did not respect paragraph 7 of the Procedures for Negotiations under Article XXVIII and paragraph 1 of the Procedures for Modification and Rectification of Schedules

7.144. In its panel request and in the course of these proceedings, China has made several statements relating to the European Union not respecting the requirements of paragraph 7 of the Procedures for Negotiations under Article XXVIII, and paragraph 1 of the Procedures for Modification and Rectification of Schedules.

7.145. Paragraph 7 of the Procedures for Negotiations under Article XXVIII provides that:

[257] See section 7.10 below.
[258] See section 7.11 below.

> Contracting parties will be free to give effect to the changes agreed upon in the negotiations as from the first day of the period referred to in Article XXVIII:1, or in the case of negotiations under paragraph 4 or 5 of Article XXVIII, as from the date on which the conclusion of all the negotiations have been notified as set out in paragraph 6 above. *A notification shall be submitted to the secretariat, for circulation to contracting parties, of the date on which these changes will come into force*. (emphasis added)

7.146. Paragraph 1 of the Procedures for Modification and Rectification of Schedules provides 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. *A draft of such change shall be communicated to the Director-General within three months after the action has been completed*. (emphasis added)

7.147. In its panel request, China suggests that the European Union acted inconsistently with Article II as a result of the European Union having acted inconsistently with paragraph 7 of the Procedures for Negotiations under Article XXVIII and paragraph 1 of the Procedures for Modification and Rectification of Schedules.[259] The panel request states in relevant part:

> In the absence of notification for certification, notification of the date on which the changes to the goods schedule come into force to the WTO Secretariat, and notification of the draft modification to its Schedule, *the EU acted inconsistently with the procedures set forth in paragraph 7 of the Procedures for Negotiations under Article XXVIII and paragraph 1 of the Procedures for Modification and Rectification of Schedules and Tariff Concessions*. The absence of a notification for certification of the modified schedule and of the certification following notification and the other violations mentioned herein, results in the EU having acted inconsistently with GATT 1994 Articles II:1 and II:2 by affording imports of poultry meat from China less favorable treatment than that provided for in its Schedule.[260] (emphasis added)

7.148. In its subsequent submissions in these proceedings, however, China did not request any findings of violation under paragraph 7 of the Procedures for Negotiations under Article XXVIII or paragraph 1 of the Procedures for Modification and Rectification of Schedules. Instead, China argued that the European Union violated Article II because the changes agreed to in the Article XXVIII negotiations had not been formally incorporated into the European Union's Schedule of concessions through certification, and were therefore legally ineffective to replace its existing bound duties.[261] In the concluding section of its first written submission, there is no reference to paragraph 7 of the Procedures for Negotiations under Article XXVIII or paragraph 1 of the Procedures for Modification and Rectification of Schedules, and China requested the Panel to make the following findings in relation to the claims under Article II:

> By applying the tariffs and TRQs that have not been certified, have not been given formal effect and are thus ineffectual to replace the EU's obligations under the unmodified schedule, the EU acts in violation of Article II:1 of the GATT 1994;
>
> By applying tariffs in excess of the bound level, the EU acts in violation of Article II:1 of the GATT 1994.[262]

[259] China's request for the establishment of a panel, item (ix) of Section II.A and item (x) of Section II.B.

[260] China's request for the establishment of a panel, item (ix) of Section II.A and item (x) of Section II.B.

[261] China's arguments in relation to this claim were set forth in Section IV.C of its first written submission, under the heading "The EU's Tariffs And TRQs Implemented Under Article XXVIII Of The GATT 1994 Are Inconsistent With Article II Of GATT 1994 Because They Exceed The EU's Current Schedule Of Concessions". Section V of China's second written submission, entitled "The EU's Tariffs and TRQs Implemented Under Article XXVIII Of The GATT 1994 Are Inconsistent With Article II Of GATT 1994 Because They Exceed The EU's Current Schedule Of Concessions".

[262] China's first written submission, para. 280, subparagraphs (14) and (15).

7.149. In its first written submission, China did refer to paragraph 8 of the Procedures for Negotiations under Article XXVIII and to paragraphs 1 and 3 of the Procedures for Modification and Rectification of Schedules, observing that the European Union had not communicated the draft of the changes to its Schedule to the Director-General and that the European Union failed to obtain certification of its modified concessions.[263] China did not, however, explicitly request that the Panel make any finding that the European Union acted inconsistently with any of these provisions under the respective Procedures; nor did it argue that the alleged inconsistency with Article II arose by virtue of any such inconsistency with the Procedures. Rather, the reference to the procedures appeared to be in the nature of factual observations and explanations as to why the changes had not yet been certified.[264]

7.150. In its second written submission, China reiterated that the requirement in the second sentence of paragraph 1 "has in fact not been respected by the European Union either for the First or for the Second Modification Package".[265] However, here again, China did not argue explicitly that this gave rise to the inconsistency with Article II:1; rather, this statement was made in the context of the section of its submission with the heading, "The EU's Tariffs and TRQs Implemented Under Article XXVIII Of The GATT 1994 Are Inconsistent With Article II Of GATT 1994 Because They Exceed The EU's Current Schedule Of Concessions". This statement apparently served to reiterate why the changes resulting from the First and Second Modification Packages have not yet been certified.

7.151. At the second meeting with the Panel, the Panel sought to resolve any ambiguity as to the existence of any claims of violation relating to paragraph 7 of the Procedures for Negotiations under Article XXVIII or paragraph 1 of the Procedures for Modification and Rectification of Schedules, by asking China to clarify whether it was requesting the Panel to find a violation of these provisions. China indicated that it would respond in its written responses to the panel's second set of questions. This prompted the European Union to comment that it was operating on the understanding that no such claims of violation were being made by China in these proceedings, and that depending on China's forthcoming written response to this question, it may have to raise issues relating to the Panel's terms of reference and due process.

7.152. The second set of questions from the Panel to the parties included several questions pertaining to the requirements in paragraph 7 of the Procedures for Negotiations under Article XXVIII and paragraph 1 of the Procedures for Modification and Rectification of Schedules, and the question of whether any claims of violation were being requested under these procedures. In response to a question from the Panel regarding the second sentence of paragraph 7, the European Union indicated that although it had informed all of the Members with a principal or substantial supplying interest of the date of entry into force of the changes arising from the Article XXVIII negotiations, "[t]he date [of] entry into force of those changes has not been notified under paragraph 7 of the Procedures".[266] In its subsequent comments on the EU response, China observed that "[t]he notification to the secretariat is intended to allow the secretariat to notify the date to all WTO Members and not only to the Members holding a PSI or a SSI", and that "[o]ther Members not holding a PSI or SSI were accordingly not informed of the date notwithstanding their immediate interest in the matter".[267] However, China did not request any finding of inconsistency with this provision.

7.153. To the contrary, in its written response to Panel question No. 99, China clarified that:

> For the purpose of finding whether the EU acted inconsistently with Article II, the Panel needs to ascertain whether paragraph 1, read together with paragraph 8, provides certification as a mandatory precondition for the modified concessions come

[263] China's first written submission, paras. 264, 270.

[264] For example, in its response to the first set of questions, China stated that it had previously "noted" that "the three month period set forth in paragraph 1 has in fact not been respected by the EU" (China's response to question No. 50, para. 194).

[265] China's second written submission, para. 199.

[266] EU's response to Panel question No. 97.

[267] China's comments on the 'EU's response to Panel question No. 97.

> into effect. *The Panel is not required nor requested to make a finding that the EU acted inconsistently with paragraph 7 and paragraph 1*.[268] (emphasis added)

7.154. In a response to a question from the Panel, the European Union elaborated on its understanding that China was not making any claims of violation under paragraph 7 of the Procedures for Negotiations under Article XXVIII or paragraph 1 of the Procedures for Modification and Rectification of Schedules. The European Union set forth its understanding that the panel request "did not raise separate claims of violation of either of those two provisions", and that China had not asked the Panel to rule on any such claims in its previous submissions, but rather that China "relied on those provisions in support of its claim under Article II:1". According to the European Union, the fact "[t]hat the Panel considered it necessary to raise this question at this very late stage of the proceedings confirms the lack of clarity of the Panel request on this point", and reiterated that "making those claims for the first time in response to a Panel question after the second hearing would raise issues of due process".[269]

7.155. In its comments on the EU response, China reproduced the text of the items in its panel request referring to paragraphs 7 and 1 of the above-mentioned Procedures, and stated:

> The EU is thus wrong in its response to the above question stating that China made no claims based on the two Procedures. To the contrary, two of China's claims are directly based on these two Procedures, as well as other provisions of the GATT 1994.
>
> China further refers to its response to the Panel's question 99.
>
> Considering that China and the EU hold different views on whether the Modification Procedures qualify as "decisions" within the meaning of paragraph 1(b)(iv) of the GATT 1994, an issue decides directly the legal status of the Modification Procedures where China's claims are hinged upon, China sees no reason for the Panel not to rule on this issue.[270]

7.156. We recall that it was in its response to Panel question No. 99 that China had clarified that the Panel "is not required nor requested to make a finding that the EU acted inconsistently with paragraph 7 and paragraph 1".[271]

7.157. We consider that while the identification of a claim in a panel request is a necessary condition for a Panel to rule on that claim, it is not always a sufficient condition for a Panel to rule on that claim. In some circumstances, a panel may be precluded from ruling on a claim, even where it is included in the panel request, if the complainant does not articulate the claim in a clear and timely manner in its subsequent submissions.

7.158. In *EU – Fasteners (China)* the Appellate Body found that a claim under Article 6.5 of the Anti-Dumping Agreement was identified in the panel request, and thus within the Panel's terms of reference. However, the Appellate Body found that the panel erred in ruling on this claim. After reviewing the manner in which the particular claim was pursued, the Appellate Body explained that:

> [T]he Panel record shows that China asserted its claim … only in response to questions from the Panel, and articulated this claim only after the parties had provided the Panel with written submissions and had attended a substantive meeting. We do not find that assertions made so late in the proceedings, and only in response to questioning by the Panel, can comply with either Rule 4 of the Panel's Working Procedures, or the requirements of due process of law. The late assertion of a claim …, and the absence of proper argumentation and of the provision of relevant evidence in support of this assertion, demonstrates that the European Union was not called upon to respond to China's claim under Article 6.5.[272]

[268] China's response to Panel question No. 99. See also China's response to Panel question No. 100.
[269] EU's response to Panel question No. 100, paras. 61-63.
[270] China's comments on the EU response to Panel question No. 102(a).
[271] China's response to Panel question Nos. 99 and 100.
[272] Appellate Body Report, *EC – Fasteners (China)*, para. 574.

7.159. In *India – Additional Import Duties*, the panel found that a claim under Article III:2 of the GATT 1994 was identified in the panel request, and therefore fell within the scope of its terms of reference. The panel noted that in its submissions to the panel, the complainant had referred to this provision, and even to the alleged inconsistency of the measures with this provision. However, the panel was unable to discern from the complainant's submissions any arguments in support of a separate and independent claim under Article III:2. In addition, the panel noted that the complainant did not request any findings under this provision in the concluding section of its first or second written submissions. The panel noted that the statements alleging a lack of consistency with this provision were embedded in a discussion of a different claim and argument, and that it "would be improper for the Panel *proprio motu* to take these statements out of their specific context and rely on them to rule on an alternative claim" under Article III:2, especially where the complainant "has not requested any findings in relation to a claim" under this provision.[273] In these circumstances, the panel found that the claim under Article III:2 was not properly before it, and made no findings on the merits of any such claim.[274]

7.160. In *US – Steel Plate*, the panel request identified a claim under Article 6.6, Article 6.8 and Annex II(7) of the Anti-Dumping Agreement regarding the failure to exercise special circumspection in using information supplied in the petition. The complainant explicitly abandoned these claims in its first written submission. It subsequently stated its intention, prior to the first meeting with the panel, to pursue one of those claims. Despite the lack of a specific objection by the responding party, the panel found that the complainant could not "resurrect" this claim. The panel considered that "[w]hile it is true that the claim in question was set out in the request for establishment, and is therefore within our terms of reference, we are not persuaded that fact alone requires us to rule on it".[275] The panel found that in the absence of any extenuating circumstances to justify the reversal of its abandonment of this claim, the complainant should not be allowed to resurrect it.

7.161. In the present case, the items of China's panel request alleging a violation of Article II include the statement that "the EU acted inconsistently with the procedures set forth in paragraph 7 of the Procedures for Negotiations under Article XXVIII and paragraph 1 of the Procedures for Modification and Rectification of Schedules and Tariff Concessions". However, in its subsequent submissions, China never requested a finding that the European Union acted inconsistently with either of these provisions, nor did it ever argue that the alleged inconsistency with Article II arose as a result of any inconsistency with paragraph 1 or paragraph 7 of the above-mentioned procedures. To the contrary, we understand that China's claim under Article II is not dependant on the premise that the European Union acted inconsistently with paragraph 1 or paragraph 7.[276] Furthermore, as noted above, in response to a question posed by the panel at the second meeting, China clarified that the Panel "is not required nor requested to make a finding that the EU acted inconsistently with paragraph 7 and paragraph 1".[277]

7.162. Based on the foregoing, we do not understand China to be requesting a finding that the European Union acted inconsistently with paragraph 7 of the Procedures for Negotiations under Article XXVIII or paragraph 1 of the Procedures for Modification and Rectification of Schedule. Insofar as China is making any such claims, then we conclude that such claim has not been made in a sufficiently clear and timely manner, and is therefore not properly before the Panel.

[273] Panel Report, *India – Additional Import Duties*, para. 7.412.
[274] Panel Report, *India – Additional Import Duties*, paras. 7.402-7.418.
[275] Panel Report, *US – Steel Plate*, para. 7.26.
[276] At paragraph 73 of its response to Panel question No. 99, China explained that "China takes the view that in accordance with paragraph 1 of the Procedures for Modification and Rectification of Schedules and Tariff Concessions, read together with paragraph 8 of the Procedures for Negotiations under Article XXVIII, modifications of a schedule of concessions are subject to certification, without which the new modified concessions are not yet given legal effect and the original concessions remain in force. Based on this legal interpretation as well as the fact that the EU's modified concessions have not been certified, China claims that the EU violated Article II of the GATT 1994 by applying customs duties in excess of the current bound rates that are still in effect".
[277] China's response to Panel question Nos. 99 and 100, paras. 74 and 75.

7.3.3.2 China's contention of a possible violation of Article II:1 in the period 2007-2009 arising from the European Union applying new rates prior to notifying all Members of the completion of the negotiations

7.163. Paragraph 6 of the Procedures for Negotiations under Article XXVIII provides that:

> Upon completion of all its negotiations the contracting party referred to in paragraph 1 above should send to the secretariat, for distribution in a secret document, a final report on the lines of the model in Annex C attached hereto.

7.164. As noted earlier, the first sentence of paragraph 7 of those procedures states that in the case of negotiations under Article XXVIII:5, Members "will be free to give effect to the changes agreed upon in the negotiations … as from the date on which the conclusion of all the negotiations have been notified" in accordance with paragraph 6 of those procedures.

7.165. As elaborated later in our Report in the context of addressing the merits of China's claim under Article II:1, China's position is that changes agreed in Article XXVIII negotiations cannot be implemented, insofar as they exceed the bound rates inscribed in a Member's Schedule, until such time as those changes are formally incorporated into its Schedule through certification.[278] The European Union disagrees, and argues that the first sentence of paragraph 7 reflects the right of Members to apply tariff rates in excess of those set forth in the text of the Schedule prior to the changes being formally incorporated through certification.[279] In its second written submission, China notes, in the context of responding to that argument, that the European Union implemented the higher out-of-quota rates over the period 2007-2009, *prior* to notifying other Members of the conclusion of the negotiations on 27 May 2009. Thus, China submits that even if the European Union's position regarding paragraph 7 were correct, which in China's view it is not, then there was still a violation of Article II:1, in respect of the First Modification Package, over that 2007-2009 period.[280]

7.166. We recall that the European Union notified the WTO of the conclusion of the negotiations relating to the First Modification Package on 27 May 2009, and of the conclusion of the negotiations relating to the Second Modification Package on 17 December 2012.[281] We note that it is not in dispute that the European Union implemented the higher out-of-quota rates established by the First Modification Package nearly two years before it notified the WTO Membership of the conclusion of the negotiations on 29 May 2009.[282] In response to a question from the Panel, the European Union explained that this was "largely due to an administrative oversight" on its part.[283]

7.167. We observe that China's panel request does not appear to articulate any claim that the European Union violated Article II:1 on the grounds that it gave effect to the results of the First Modification Package prior to notifying other Members of the completion of the negotiations. The relevant item of the panel request, already reproduced further above, refers to the absence of "notification for certification", "notification of the date on which the changes to the goods schedule come into force", and "notification of the draft modification to its Schedule".[284]

7.168. In any event, even if the panel request could be read as including such a claim, we consider that any violation of Article II:1 arising from the European Union's implementation of the results of the Article XXVIII negotiations prior to notifying Members would have ceased to exist on 29 May 2009, which was more than six years prior to the panel request in these proceedings. In *EC – Chicken Cuts*, the Appellate Body confirmed that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[285] We

[278] China's first written submission, paras. 260-264, para. 268.
[279] EU's first written submission, para. 300.
[280] China's second written submission, para. 200.
[281] See, respectively, G/SECRET/25/Add.1, circulated on 29 May 2009 (Exhibit EU-6) and G/SECRET/32/Add.1., circulated on 20 December 2012 (Exhibit EU-9).
[282] G/SECRET/25/Add.1, 29 May 2009 (Exhibit EU-6).
[283] EU's response to question 53, para. 156.
[284] China's request for the establishment of a panel, item (x) of Section II.A and item (x) of Section II.B.
[285] Appellate Body Report, *EC – Chicken Cuts*, para. 156. For a review of WTO jurisprudence dealing with measures that were withdrawn, repealed, or expired prior to the request for the establishment of a panel, see Panel Report, *China – Electronic Payment Services*, paras. 7.224-7.229.

recognize that there may well be particular circumstances in which a panel would be justified in making findings in respect of a measure that ceased to exist prior to its establishment. However, in this case China has not advanced any argument as to why the Panel should rule on whether the European Union violated Article II:1 by implementing the higher out-of-quota rates over the period 2007-2009.[286]

7.169. Based on the foregoing, we do not understand China to be requesting a finding that the European Union violated Article II:1 by implementing the higher out-of-quota rates over the period 2007-2009, prior to the point in time when it notified other Members of the conclusion of the negotiations (on 29 May 2009). Insofar as China's statement to that effect[287] is to be construed as making such a claim, then for the reasons above we conclude that it is not properly before us.

7.4 Claims under Article XXVIII:1 of the GATT 1994

7.4.1 Introduction

7.170. China claims that the European Union violated Article XXVIII:1 of the GATT 1994 by refusing to recognize China's "principal supplying interest" and "substantial interest" in the concessions at issue in the First and Second Modification Packages.[288] In China's view, the reference periods used by the European Union to determine which Members held a principal or substantial supplying interest were inconsistent with Article XXVIII:1 for two different reasons. First, we understand China to claim that the European Union violated Article XXVIII:1 by not determining which Members held a principal or substantial supplying interest 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. Second, we understand China to claim that the European Union violated Article XXVIII:1 by not re-determining which Members held a relevant supplying interest on the basis of the increase in imports from China over the period 2009-2011.

7.171. The European Union responds that its determinations of which Members held a principal or substantial supplying interest were entirely consistent with the requirements of Article XXVIII:1.[289] The European Union submits that it was under no obligation to determine which Members held a supplying interest 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, or to re-determine which Members held a supplying interest on the basis of the increase in imports from China over the period 2009-2011. In addition, the European Union submits that it was entitled not to take into account China's claims of supplying interest insofar as China did not claim any principal supplying interest in the First Modification Package, and failed to make a timely claim of either principal or substantial supplying interest in respect of the Second Modification Package.

7.4.2 Relevant provisions

7.172. Article XXVIII is entitled "Modification of Schedules". China's claim of violation is based on Article XXVIII:1, which reads as follows:

> 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 Member (hereafter in this Article referred to as the "applicant Member") may, by *negotiation and agreement* with any Member with which such concession was initially negotiated and with any

[286] In response to Panel question No. 53, the European Union acknowledged the delayed notification, but then stated that "the notification to the WTO was made well before the establishment of the present Panel" (para. 157). China did not subsequently advance any counterargument, or raise the issue concerning the 2007-2009 period again.

[287] China's second written submission, para. 64.

[288] China's first written submission, paras. 49-117; China's opening statement at the first meeting of the Panel, paras. 11-55; China's responses to Panel question Nos. 13-20, 22-23; China's second written submission, paras. 31-95; China's opening statement at the second meeting of the Panel, paras. 3-40; China's responses, or comments on EU's responses, to Panel question Nos. 68-70, 72-75, 82-84, 106-110.

[289] EU's first written submission, paras. 86-153; EU's opening statement at the first meeting of the Panel, paras. 10-17; EU's responses to Panel question Nos. 14-16, 18, 21-22, 24; EU's second written submission, paras. 2-59; opening statement at the second meeting of the Panel, paras. 3-40; EU's responses, or comments on China responses, to Panel question Nos. 68-70, 72-75, 82-84, 106-110.

> other Member determined by [the CONTRACTING PARTIES] to have a *principal supplying interest** (which two preceding categories of Members, together with the applicant Member, are in this Article hereinafter referred to as the "Members primarily concerned"), and *subject to consultation* with any other Member 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. (emphasis added)

7.173. Thus Article XXVIII:1 establishes certain conditions as to when modifications of concessions contained in a Schedule can be made, as well as when concessions can be withdrawn. It also indicates which Members are entitled to participate in negotiations or consultations regarding the proposed modification or withdrawal. This includes any Member with which the concession was initially negotiated, any Member determined to have a "principal supplying interest", and any other Member determined to have a "substantial interest" in the concession subject to renegotiation. In this case, the European Union stated that China did not possess initial negotiating rights in any of the concessions at issue under the First or Second Modification Packages. China's claim in relation to the First Modification Package was to be recognized as a Member with a substantial supplying interest in the three tariff lines at issue.[290] With regard to the Second Modification Package, China has claimed a principal supplying interest with regard to all the relevant tariff lines and provided import statistics with respect to four tariff lines.[291] As noted earlier, the European Union did not recognize China as a Member holding a principal or substantial supplying interest in any of the concessions at issue.

7.174. The Ad Note to Article XXVIII:1 provides additional information on which Members should be determined to hold a principal supplying interest and a substantial supplying interest. With regard to the concept of a principal supplying interest, paragraph 4 of the Ad Note sets forth the following objectives:

> The object of providing for the participation in the negotiation of any Member with a *principal supplying interest*, in addition to any Member with which the concession was originally negotiated, is to ensure that a Member with a larger share in the trade affected by the concession than a Member 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… (emphasis added)

Paragraph 4 then sets out the criteria to define the principal supplying interest:

> …. Accordingly, [the CONTRACTING PARTIES] should *only* determine that a Member has a *principal supplying interest* if that Member *has had, over a reasonable period of time prior to the negotiations*, a larger share in the market of the applicant Member than a Member 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 Member. It would therefore not be appropriate for [the CONTRACTING PARTIES] to determine that more than one Member, or in those exceptional cases where there is near equality more than two Members, had a principal supplying interest. (emphasis added)

7.175. Paragraph 4 of the Ad Note to Article XXVIII:1 clarifies several important points. The first is that a Member with a principal supplying interest must "have an effective opportunity to protect the contractual right which it enjoys" under the GATT, but at the same time, the scope of the negotiations should not be such as to make "negotiations and agreement under Article XXVIII unduly difficult nor to create complications in the application" of Article XXVIII. Second, paragraph 4 clarifies that, as a general rule, a Member should only be found to hold a principal

[290] China's response to Panel question No. 17, para. 101 and Exhibit CHN-16.

[291] China's response to Panel question No. 17, para. 102 and Exhibits CHN-29 and CHN-50. In Exhibit CHN-48, China identified the type of supplying interest that it claimed with respect to the ten tariff lines at issue under both of the modification packages.

supplying interest based on its share of the market "over a reasonable period of time prior to the negotiations" or based on the market share it would be expected to have in the absence of "discriminatory quantitative restrictions".

7.176. 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)

7.177. 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.[292] The notion of a significant share of the market is not further clarified in the text of paragraph 7.

7.178. The ordinary meaning of the word significant is "[i]mportant, notable; consequential".[293] 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.[294] 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 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".[295] 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".[296] For its part, the European Union does not argue that the 10% import

[292] The Understanding on the Interpretation of Article XXVIII provides further guidance on the interpretation of the terms "principal supplying interest" and "substantial interest" with regard to three specific issues. Paragraph 1 of the Understanding, elaborating on paragraph 5 of the Ad Note to Article XXVIII:1, broadens the definition of "principal supplying interest" to also include the Member which has the highest ratio of its exports affected by the concession. Paragraph 3 clarifies the conditions under which trade in the affected product that did not take place on an MFN basis should be taken into account when determining which Members hold a "principal supplying interest". Finally, paragraph 4 clarifies how "principal" and "substantial" supplying interest is to be determined in respect of a "new product" for which three years' trade statistics are not available.

[293] *Shorter Oxford English Dictionary*, 5th ed, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2835.

[294] See e.g. Negotiating Rights under Article XXVIII of the GATT, Note by the Secretariat, 2 July 1987, GATT Doc. MTN.GNG/NG7/W/9, pp. 2-3 ("In actual practice, contracting parties which have invoked Article XXVIII, have in their bilateral negotiations interpreted the term 'significant share in the market' to be at least 10 per cent, although nothing would prevent a country from recognizing substantial interest for a lower percentage."); A. Hoda, *Tariff Negotiations under the GATT and the WTO, Procedures and Practices*, Cambridge UP 2001, p. 14 ("[i]n practice, contracting parties (Members) having 10 per cent or more of the trade shares have been recognized as having a substantial interest."); Panel Report, *EC – Bananas III*, paragraphs 7.83-7.85 and footnote 369 (finding that the EC's determinations of which Members held a substantial supplying interest, on the basis of the 10% market share benchmark, was not unreasonable).

[295] China's response to Panel question No. 68(a) and 68(b).

[296] In the course of the proceedings, China stated that what is "a significant share" varies "depending on the market", and that if the Member concerned uses a particular threshold, e.g. 10%, that is higher than the appropriate threshold which reflects "a significant share" in the particular market, e.g. 9%, the Member may violate Articles XXVIII and XIII (China's response to Panel question No. 68(a), para. 17). That might be understood to mean that, in China's view, the use of a 10% import share benchmark for determining which Members hold a "substantial interest" would indeed constitute an *ipso facto* violation of Article XXVIII and Article XIII.. However, China's clarification that it "does not consider that it is an *ipso facto* violation of

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.[297]

7.179. The parties agree on the meaning of the term "consultation" in the context of Article XXVIII:1. The text of this provision specifies that the applicant Member may modify or withdraw a concession "by negotiation and agreement" with any Member with which the concession was initially negotiated and with any Member determined by the Members to have a principal supplying interest[298], and "subject to consultation" with any other Member determined to have a substantial interest in the concession. In this case, the parties agree that the obligation to consult with Members holding a substantial interest is not the same as an obligation to negotiate with Members holding a principal supplying interest (or initial negotiating rights).[299] However, the European Union has not suggested that the exchanges that occurred between the European Union and China amounted to consultation (or, *a fortiori*, negotiation) within the meaning of Article XXVIII:1.[300]

7.180. Both parties also agree that the failure to negotiate or consult with a Member that has a duly justified claim of a principal or substantial supplying interest is cognizable under the DSU. In this regard, the European Union does not question that Article XXVIII:1 imposes, on the Member seeking the modification of a concession, an obligation to recognize any duly justified claim of principal or substantial supplying interest and to negotiate or consult with the parties holding such claims.

Articles XXVIII and XIII for a member to use the 10 percent threshold to determine SSI status" leads us to conclude 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". We note that insofar as any such claim has been made by China, as the party alleging a violation it would have the burden of proof in connection with any such claim. That means that it would be for China to, at a minimum, clearly articulate what alternative percentage import share (e.g. 9%) or other alternative criterion or benchmark should have been used in the market(s) at issue, if not the 10% import share benchmark that was used by the European Union. The fact that China has not done so reinforces our understanding that it is not advancing any such claim, and in any event would mean that China has not discharged its burden of proof in relation to any such claim.

[297] Accordingly, we consider it unnecessary to rule on whether the 10% benchmark constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31(3)(b) of the Vienna Convention, or a "customary practice" within the meaning of Article XVI:1 of the WTO Agreement. The European Union, Brazil, Canada, and Thailand all consider that there is subsequent practice establishing the agreement of Members, within the meaning of Article 31(3)(b) of the Vienna Convention, that an importing Member may rely on a 10% import share benchmark to determine which Members have a "substantial interest" under Article XXVIII. The European Union and these third parties, and also Russia, further consider that this qualifies as a "customary practice" within the meaning of Article XVI:1 of the WTO Agreement. China and Argentina disagree with both conclusions. See China's first written submission, paras. 56, 214-215; China's response to Panel question Nos. 10-11; China's second written submission, paras. 74-78; EU's first written submission, paras. 91, 191, 282; EU's response to Panel question No. 10; responses of Argentina, Brazil, Canada, Russia, Thailand, and the United States to Panel question No. 1 to third parties.

[298] If agreement cannot be reached, paragraph 3(a) of Article XXVIII of the GATT 1994 provides that the Member can still modify or withdraw its concession. However, if it does, the Members primarily concerned (i.e. the Members with initial negotiating rights or a principal supplying interest) can withdraw substantially equivalent concessions initially negotiated with the Member modifying the concession. It must be noted that, even if Members with initial negotiating rights or a principal supplying interest have the right to negotiate, whereas Members with substantial supplying interest have the right be consulted, the latter category of Members is also entitled to withdraw equivalent concessions if they are not satisfied with the proposed modification. See Article XXVIII:3(b).

[299] At paragraph 229 of its first written submission, China contrasts the obligation to negotiate with the obligation to consult, in the context of contrasting Article XXVIII and Article XIII:2(d). See also EU's first written submission, para. 109.

[300] In its response to Panel question No. 18(a), the European Union confirms that "[t]he European Union consulted with China on the justification of its claims of interest. Since the European Union did not recognize those claims, it did not consult with China on the compensation to be provided for the intended modification of concessions." In its response to the same question, China states that "the exchange on whether or not China is a WTO Member with a substantial supplying interest is not the same as consultations on the withdrawal of the concession itself and the maintenance of the balance of concessions."

7.181. Although there is no disagreement between the parties, the United States raised the question of whether that is so because the original text of Article XXVIII:1 of the GATT 1947[301] as incorporated by reference into the GATT 1994 establishes an obligation to negotiate or consult only with those Members "determined by the CONTRACTING PARTIES" to have a principal or substantial supplying interest (and paragraphs 3, 4, 5, and 7 of the original Ad Note to Article XXVIII:1 also contain language to the same effect). Moreover, in the present case, there was no determination by the Council for Trade in Goods or the General Council[302] that China had a principal or substantial supplying interest in the concessions at issue because China never referred the matter to the Council. In the United States' view, the foregoing casts doubt on whether a Member's refusal to recognize such a claim is justiciable before a dispute settlement panel.[303]

7.182. In response to the question raised by the United States, China responds that the "determination by the CONTRACTING PARTIES" could take place through dispute settlement[304], and points out the consequences that would arise from finding that only the Council on Trade in Goods or General Council could make such a determination.[305] The European Union considers that the text of Article XXVIII:1 must be interpreted in the light of paragraph 4 of the Procedures for Negotiations under Article XXVIII, which provides that where a claim of interest is recognized by the Member seeking the withdrawal or modification of a concession, such recognition "will constitute a determination by the CONTRACTING PARTIES in the sense of Article XXVIII:1".[306]

7.183. We are obligated to consider the issue of our jurisdiction on our own initiative.[307] However, we do not consider it necessary to address this issue in any great detail in the absence of any disagreement between the disputing parties. We note that while 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.

7.184. The parties also agree that the applicable provisions that regulate the determination of which Members hold a supplying interest in the context of Article XXVIII negotiations apply both to negotiations under Article XXVIII:1 and "reserved" negotiations under Article XXVIII:5. The tariff renegotiations under the First and the Second Modification Packages were reserved negotiations

[301] We note that Article XXVIII is part of the original GATT 1947, but the text was extensively revised in the 1954-1955 Review Session. See *Analytical Index: Guide to GATT Law and Practice*, 6th edition (1995), pp. 963-964.

[302] Paragraph 2(b) of the Explanatory Note to the GATT 1994 provides that certain functions assigned to the CONTRACTING PARTIES under the GATT 1947, including this one, shall be allocated by the Ministerial Conference. The Panel understands that this function under Article XXVIII:1 would be carried out either by the Council for Trade in Goods or the General Council. In response to Panel question No 14(b), China confirms that it did not refer the European Union's refusal to grant a supplying interest status to China to the General Council or the Council on Trade in Goods. China notes that paragraph 4 of the Procedures for Negotiations under Article XXVIII, which provides that where a claim of interest is not recognized the party making the claim "may refer the matter to the Council", is "permissive but not mandatory"(China's response to Panel question No. 14, paras. 83, 85).

[303] United States' third-party statement, paras. 5-12.

[304] China's response to Panel question No. 14, para. 87.

[305] China's response to Panel question No. 14, para. 88. In China's view, these consequences would include the fact that an importing Member's failure to take "discriminatory quantitative restrictions" into account could never be reviewed in proceedings initiated under the DSU.

[306] EU's response to Panel question No. 14, para. 48. See also China's response to Panel question No. 14 and also parties' responses to Panel question No. 15.

[307] As the Appellate Body has observed, "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it"(Appellate Body Report, *US – 1916 Act*, footnote 30). See also Decision by the Arbitrator, *US – COOL (Article 22.6 – United States)*, paras. 2.6-2.7.

conducted pursuant to Article XXVIII:5, not Article XXVIII:1.[308] The text of Article XXVIII:5 provides that reserved negotiations conducted pursuant to that provision are to be conducted "in accordance with the procedures of paragraph 1 to 3" of Article XXVIII.[309] The parties agree that the initial determination of which Members hold a principal or substantial supplying interest in the context of reserved negotiations conducted pursuant to Article XXVIII:5 is governed by the same provisions that apply in the case of negotiations under Article XXVIII:1. These provisions include, as indicated above, paragraphs 4 and 7 of the Ad Note to Article XXVIII:1.

7.4.3 Analysis by the Panel

7.185. Turning to the issues in dispute, China's claims under Article XXVIII:1 and the arguments of the parties present three main issues. The first issue is whether the SPS measures that restricted Chinese poultry imports over the reference periods used by the European Union in both the First and Second Modification Packages constitute "discriminatory quantitative restrictions" within the meaning of the Ad Note to Article XXVIII:1. The second issue is whether the European Union additionally violated Article XXVIII:1 in the Second Modification Package by not re-determining, prior to the conclusion of the negotiations, which Members held a principal or substantial supplying interest on the basis of the increase in imports from China over the period 2009-2011. The third issue is whether the European Union was entitled to disregard China's claims of a principal and substantial supplying interest on the grounds that they were not presented in a timely manner.

7.4.3.1 Whether the SPS measures at issue constitute "discriminatory quantitative restrictions"

7.4.3.1.1 Main arguments of the parties

7.186. China claims that the European Union violated Article XXVIII:1 by determining which Members held a principal or substantial supplying interest on the basis of the import statistics over the three years preceding the notification of its intention to modify its concessions (2003-2005 for the First Modification and 2006-2008 for the Second Modification Package) when imports from China were subject to the European Union's SPS measures. China submits that the European Union was under a legal obligation to estimate what Members' shares would have been in the absence of the SPS measures restricting poultry imports from China. The reason, according to China, is that the European Union's SPS measures on Chinese poultry imports were "discriminatory quantitative restrictions" within the meaning of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1 and, as such, they should have been taken into account by the European Union when determining which Members had a supplying interest in the concessions subject to renegotiations.

7.187. China interprets the term "discriminatory" so as to include situations where imports from a WTO Member are "treated differently from imports from other WTO Members, irrespective of the ground of such disparate treatment and, in particular, whether such difference in treatment was justified or not".[310] In arguing that the SPS measures are discriminatory, China considers that it is legally irrelevant whether those measures are unjustified, or WTO-inconsistent. In China's view, "discriminatory quantitative restrictions" in the context of the Ad Note to Article XXVIII:1 "covers not only those discriminatory restrictions that are prohibited by the covered agreements, but also others that are justifiable under relevant provisions of the covered agreements".[311]

[308] In the course of the proceedings, China stated that the European Union had provided no evidence to prove that the negotiations resulting in the Second Modification Package were conducted under paragraph 5 of Article XXVIII, and that "[i]ts notification for this negotiation only referred to Article XXVIII in general" (China's second written submission, para. 54 (citing Exhibit CHN-25)). However, we note that both the WTO document circulating the notice of the EU's intention to modify the concessions (Exhibit CHN-25) and the WTO document circulating the communication by the European Union of the results of the negotiations (Exhibit EU-9) refer to "Article XXVIII:5 Negotiations". As additional evidence, the European Union has provided the WTO documents circulating the communications of the European Union reserving its rights under Article XXVIII:5 for the periods 2009-2011 and 2012-2014 (Exhibit EU-41). In the light of the foregoing, we do not see the basis for questioning whether the negotiations were conducted under Article XXVIII:5.

[309] Paragraph 1 of the Procedures for Negotiations under Article XXVIII reiterates that the procedures of Article XXVIII:1 "are also applicable to negotiations under paragraph 5".

[310] China's first written submission, para. 65.

[311] China's first written submission, para. 64.

7.188. The European Union submits that it was entitled to determine 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). It was under no legal obligation to estimate what Members' shares would have been in the absence of the SPS measures restricting poultry imports from China. The reason, according to the European Union, is that the SPS measures at issue are not "discriminatory quantitative restrictions", and therefore the European Union was not required to estimate what Members' imports shares would have been in the absence of those measures. According to the European Union, whether imports from a given country are restricted "will depend on the sanitary situation in each country of origin".[312] The European Union considers that a restriction on imports based on SPS grounds is discriminatory within the meaning of the Ad Note to Article XXVIII:1 "if, and only if, imports from two countries posing similar sanitary risks are not similarly treated".[313] According to the European Union, it follows that if a quantitative restriction on imports is applied consistently with all the relevant provisions of the WTO Agreement (including in particular provisions such as Article XX of the GATT 1994, Article 2.3 of the SPS Agreement or Article 2.1 of the TBT Agreement) it would not be "discriminatory" according to the discrimination test described above.[314]

7.189. Regarding the second element of the term "discriminatory quantitative restrictions", China argues that, as import prohibitions, the SPS measures are clearly "quantitative restrictions" within the meaning of Article XI of the GATT 1994.[315] China submits that even if the SPS requirements are compliant with Article III, it would not follow that the import bans do not fall under the scope of Article XI:1. China submits that various panels and the Appellate Body have found that measures that affected both imported and domestic products, but resulted in an import ban, may fall within the scope of "[import] prohibitions or restrictions, other than duties, taxes or other charges" in violation of Article XI:1.[316]

7.190. In response, the European Union argues that the SPS measures at issue are not quantitative restrictions. The European Union agrees with China that the term "quantitative restrictions", as used in the Ad Note to Article XXVIII:1, must be interpreted in the light of Article XI:1.[317] However, the European Union argues that Article XI:1 must in turn be interpreted in the light of the introductory paragraph to the Ad Note to Article III, which provides that a measure that is applied to an imported product and to the like domestic product, and which is enforced in the case of the imported product at the time or point of importation, "is nevertheless to be regarded as an internal tax or other internal charge subject to Article III". In the present case, the European Union submits that its SPS regime for animal products (including poultry products) "is based on the fundamental principle that imported products must comply with the same or equivalent sanitary requirements as the EU domestic products".[318] The European Union reasons that, in accordance with the Ad Note to Article III, such measures are not "quantitative restrictions" within the meaning of either Article XI:1 or, consequently, of the Ad Note to Article XXVIII:1.

7.191. Proceeding on the premise that the European Union was required to estimate the import share that China could reasonably be expected to have in the absence of the SPS measures, China observes that the Ad Note to Article XXVIII does not clarify how such a determination is to be made. Arguing by analogy on the basis of paragraph 4 of the Understanding, concerning "new products" for which trade statistics from the prior three years are not available, China argues that, to determine the share that China could reasonably be expected to have had absent the SPS import bans, the European Union should have taken into account factors such as production capacity, investment in the product, estimates of export growth, and forecasts of demand in the European Union. China provides information on the level of its poultry exports before, during and

[312] EU's first written submission, para. 118. The European Union adds that "[w]here the sanitary situation in any two countries is the same or equivalent the European Union will treat imports from those two countries in the same manner".

[313] EU's response to Panel question No. 21, para. 63.

[314] EU's response to Panel question No. 21, para. 64.

[315] China's first written submission, para. 60.

[316] China's opening statement at the first meeting of the Panel, paras. 8-12, 14-18; China's second written submission, para. 34.

[317] EU's first written submission, paras. 59-60.

[318] EU's first written submission, para. 117.

after the prohibition − both to the European Union and globally − to support its contention that China could reasonably be expected "to at least have had an SSI in the EU market".[319]

7.192. The European Union disagrees with China on this point as well. The European Union submits that even if the import data relied upon by the European Union had been "tainted" by the application of those SPS measures, the other evidence available at the time when the European Union notified its intention to negotiate the modification of the concessions would not have warranted recognizing that China held either a principal or substantial supplying interest in any of the concessions at issue under both renegotiations. According to the European Union, the existence of a principal or substantial supplying interest cannot be determined on the basis of evidence that was not provided to the European Union at the relevant time in support of China's claims of interest pursuant to paragraph 4 of the Procedures for Negotiations under Article XXVIII, or on the basis of evidence post-dating the opening of the negotiations. Thus, the European Union submits that the import data concerning the period immediately preceding the entry into force of the SPS measure in 2002 is both the most pertinent and the most reliable source of evidence in order to estimate the import share that China would have had in the absence of the SPS measures for both Modification Packages. The European Union submits that during the years preceding 2002, China's import shares in the European Union for all the tariff lines concerned were negligible.[320]

7.4.3.1.2 Findings of the Panel

7.193. The threshold legal issue raised by China's claim is whether the SPS measures that restricted Chinese poultry imports over the reference periods used by the European Union in both the First and Second Modification Packages constitute "discriminatory quantitative restrictions" within the meaning of the Ad Note to Article XXVIII:1. The relevant facts[321] are not in dispute, and the parties' disagreement turns on their opposing interpretations of the terms "discriminatory quantitative restrictions". We will begin our analysis by interpreting the term "discriminatory" in the context of the Ad Note to Article XXVIII:1, taking into account the ordinary meaning of the term "discriminatory", the immediate and wider context in which it appears, and the object and purpose of Article XXVIII.

7.194. In its first written submission, China referred to a passage from the Appellate Body Report in *Canada − Wheat Exports and Grain Imports* to support its contention that the "ordinary meaning" of the concept of "discrimination" may, depending on the context of the provision, be interpreted broadly. The Appellate Body stated:

> When viewed in the abstract, the concept of discrimination may encompass both the making of distinctions between similar situations, as well as treating dissimilar situations in a formally identical manner.[322] The Appellate Body has previously dealt with the concept of discrimination and the meaning of the term "non-discriminatory"[323], and acknowledged that, *at least insofar as the making of distinctions between similar situations is concerned*, *the ordinary meaning of discrimination can accommodate both drawing distinctions per se, and drawing distinctions on an improper basis*.[324] Only a full and proper interpretation of a provision containing a prohibition on discrimination will reveal which type of differential treatment is prohibited.[325] (emphasis added)

7.195. China cites this passage as support for the proposition that "[t]he concept of 'discriminatory' quantitative restrictions covers not only those discriminatory restrictions that are prohibited by the covered agreements, but also others that are justifiable under relevant

[319] China's first written submission, para. 109.
[320] EU's first written submission, paras. 134-140.
[321] See section 7.2.3 above.
[322] (*footnote original*) See the reasoning of the Appellate Body with respect to Article III:4 of the GATT 1994 in its Report in *Korea − Various Measures on Beef*, para. 136, referring to the GATT Panel Report, *US − Section 337*. As this case does not include any claim based on discrimination arising from *formally identical treatment*, we do not address this type of discrimination in our discussion.
[323] (*footnote original*) Appellate Body Report, *EC − Tariff Preferences*, paras. 142−173. In that case, the Appellate Body examined the meaning of the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause.
[324] (*footnote original*) Appellate Body Report, *EC − Tariff Preferences*, para. 153.
[325] Appellate Body Report, *Canada − Wheat Exports and Grain Imports*, para. 87.

provisions of the covered agreements".[326] In our view, the above passage supports the proposition that the term "discrimination" may be interpreted relatively narrowly, so as to cover only unjustifiable distinctions, or relatively broadly, so as to also cover distinctions that are legitimate and justifiable. To that extent, we agree that the word "discrimination" may be given different meanings depending on the context in which that word appears, and depending on the context, may have a broad meaning that covers legitimate and justifiable distinctions.

7.196. However, the passage above and prior Appellate Body jurisprudence establishes that, under both the relatively narrow meaning of "discrimination" and this relatively broad meaning of "discrimination", the outer limit of the ordinary meaning of the term "discrimination" only extends to situations in which differential treatment, whether justified or not, is accorded to entities that are *similarly situated*. In other words, we read the Appellate Body to say that even where the term "discrimination" is to be interpreted relatively broadly, in a way that would cover "both drawing distinctions per se, and drawing distinctions on an improper basis", this would still only be "insofar as the making of distinctions between *similar situations* is concerned".[327]

7.197. In addition to what the Appellate Body stated in the above passage from *Canada – Wheat Exports and Grain Imports* in the context of interpreting the term "discriminatory" in Article XVII:1(a) of the GATT 1994, this was the essence of the prior finding in the Appellate Body Report that was being summarized in *Canada – Wheat Exports and Grain Imports*. In *EC –Tariff Preferences*, the Appellate Body addressed the meaning of the term "discrimination" in the context of footnote 3 of the Enabling Clause. The Appellate Body recognized that the ordinary meaning of the term may include a relatively broad and "neutral" meaning "of making a distinction", or a relatively narrow and "negative" meaning "carrying the connotation of a distinction that is unjust or prejudicial". However, the Appellate Body clarified that under both the broad and the narrow meaning of the term "discrimination", the *sine qua non* is that the different treatment must be accorded to "similarly-situated" entities. This is apparent from the following passage of its Report in *EC – Tariff Preferences*:

> [W]e are able to discern some of the content of the "non-discrimination" obligation based on the *ordinary meanings of that term*. Whether the drawing of distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the *ordinary meanings* of "discriminate" *converge in one important respect*: they both suggest that distinguishing among *similarly-situated* beneficiaries is discriminatory. For example, India suggests that all beneficiaries of a particular Member's GSP scheme are *similarly-situated*, implicitly arguing that any differential treatment of such beneficiaries constitutes discrimination. The European Communities, however, appears to regard GSP beneficiaries as similarly-situated when they have "similar development needs". Although the European Communities acknowledges that differentiating between similarly-situated GSP beneficiaries would be inconsistent with footnote 3 of the Enabling Clause, it submits that there is no inconsistency in differentiating between GSP beneficiaries with "different development needs". Thus, based on the ordinary meanings of "discriminate", India and the European Communities effectively appear to agree that, pursuant to the term "non-discriminatory" in footnote 3, *similarly-situated* GSP beneficiaries should not be treated differently. The participants disagree only as to the basis for determining whether beneficiaries are *similarly-situated*.[328] (emphasis added)

7.198. The Appellate Body explained that "the convergence of those definitions on the fact that *similarly-situated* entities should not be treated differently" finds reflection in the use of the term "discrimination" in general international law.[329] The Appellate Body, applying that interpretation of

[326] China's first written submission, para. 64.
[327] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 87. (emphasis added)
[328] Appellate Body Report, *EC – Tariff Preferences*, para. 153.
[329] Appellate Body Report, *EC – Tariff Preferences*, footnote 318. (emphasis added) As examples, the Appellate Body quoted from R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed. (Longman, 1992), Vol. I, p. 378 ("Mere differences of treatment do not necessarily constitute discrimination … discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way"); and from E.W. Vierdag, *The Concept of Discrimination in International Law*, (Martinus Nijhoff, 1973), p. 61 ("Discrimination occurs when in a legal system an inequality is introduced in the enjoyment of a certain right,

the term "discrimination", concluded that "preference-granting countries are required, by virtue of the term "non-discriminatory", to ensure that identical treatment is available to all *similarly-situated* GSP beneficiaries".[330]

7.199. Based on the foregoing, we consider that the ordinary meaning of the term "discriminatory" is somewhat elastic and may be interpreted narrowly or broadly, depending on the context. However, even if this concept is stretched to include the broader meaning of discrimination, the ordinary meaning of the term "discriminatory quantitative restrictions" would still only cover, in the context of paragraphs 4 and 7 of Note *Ad* Article XXVIII:1, quantitative restrictions that draw distinctions between imports from different countries that are similarly-situated.

7.200. Turning to the context of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1, the concept of "discrimination" appears in numerous provisions of the GATT 1994 and the other covered agreements. The term "discrimination" is used in some WTO provisions accompanied by the associated terms "arbitrary or unjustifiable" (or comparable terms) and "where the same conditions prevail" (or comparable terms).[331] In the context of certain provisions, the term discrimination is accompanied by one of those associated terms, but not the other.[332] In the context of some other provisions, such as paragraphs 4 and 7 of the Ad Note to Article XXVIII:1, the term "discriminatory" or "discrimination" is not accompanied by the qualifying terms "arbitrary or unjustifiable", or by the terms "between countries where the same conditions prevail". China argues that the phrase "discriminatory quantitative restrictions" should therefore be interpreted to cover "both arbitrary or unjustifiable discrimination, as well as non-arbitrary or justifiable discrimination -- regardless of the application to countries where the same conditions prevail".[333]

7.201. We agree with the premise that when the same term is accompanied by qualifying terms that narrow or broaden the ordinary meaning of that term in the context of some provisions, but that same term is used in the context of other provisions unaccompanied by any such qualifying language, then the omission of the qualifying language must be given meaning and, all else being equal, it must be interpreted in accordance with its unqualified ordinary meaning. However, the function of qualifying terms is not always to narrow or broaden the ordinary meaning of the term. To the contrary, qualifying language may serve the purpose of bringing greater precision to how a general concept or legal standard is to be applied in a given provision or context, when the ordinary meaning of that term is general enough to accommodate an interpretative range with different shades of meaning. The foregoing consideration is particularly relevant in the context of interpreting a general concept such as "discrimination".[334] It appears to us that when the term "discrimination" is accompanied by the qualifying terms "arbitrary or unjustifiable" (or comparable terms) and "where the same conditions prevail" (or comparable terms) in certain provisions, these additional terms serve the purpose of bringing greater precision to how the general concept and legal standard of "discrimination" is to be applied in a given provision or context. These qualifying terms do not, in our view, serve the purpose of narrowing the ordinary meaning of the term "discrimination" in the manner suggested by China.

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or in a duty, while there is no sufficient connection between the inequality upon which the legal inequality is based, and the right or the duty in which this inequality is made.")

[330] Appellate Body Report, *EC – Tariff Preferences*, para. 173. (emphasis added) The Appellate Body's interpretation of the ordinary meaning of term "discrimination" in the above cases is consistent with the meaning given to the term in other contexts. For example, as regards the term "discrimination" in the context of Article XX, the Appellate Body has explained that "discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries"(Appellate Body Report, *US – Shrimp*, para. 165).

[331] For example, the chapeau of Article XX of the GATT 1994 refers to "arbitrary or unjustifiable" discrimination between countries "where the same conditions prevail", and the sixth recital of the preamble to the TBT Agreement uses identical terminology, as does the first recital to the SPS Agreement; the chapeau of Article XIV of the GATS refers to "arbitrary or unjustifiable" discrimination between countries "where like conditions prevail"; Article 2.3 of the SPS Agreement refers to "arbitrary or unjustifiable" discrimination between counties "where identical or similar conditions prevail".

[332] For example, Article 5.5 of the SPS Agreement refers to certain "arbitrary or unjustifiable distinctions", insofar as such distinctions "result in discrimination".

[333] China's response to Panel question No. 82, para. 46.

[334] Panel Report, *Canada – Pharmaceutical Patents*, paras. 7.94 and 7.98.

7.202. China argues that the provisions of relevance in this case are Article XXVIII:1 and paragraphs 4 and 7 of its accompanying Ad Note, and points out that these provisions in no way prohibit or require the elimination of any measure characterized as a "discriminatory quantitative restriction" within the meaning of those provisions. China emphasizes that these provisions are simply about the impact that restrictions have had on the imports from supplying WTO Members, and therefore any import restriction that has affected the shares of imports should be taken into account and allowance should be made for such restriction. In its view, "for the purpose of Article XXVIII:1, the similarity or dissimilarity in sanitary situations is not relevant. What is relevant is the existence of import restrictions on some products and not on others whilst all products whichever their origin, are like products".[335]

7.203. The term "discriminatory" must be interpreted in the particular context of Article XXVIII:1 and paragraphs 4 and 7 of its accompanying Ad Note. In our view, characterizing a measure as discriminatory in the context of the Ad Note triggers significant legal consequences. Specifically, when a quantitative restriction is characterized as a "discriminatory quantitative restriction" for the purpose of the Ad Note to Article XXVIII:1, the legal consequence is that actual import shares that Members held over a reference period cannot be used as the basis to determine which Members hold a principal or substantial supplying interest. Rather, such determination must be made either on the basis of a different reference period, or on the basis of a counterfactual estimate of what import shares Members would reasonably be expected to have in the absence of the quantitative restriction. Thus, the broader the interpretation of the term "discriminatory", the wider the universe of measures that would fall into that category of discriminatory quantitative restrictions, and the more complex the ensuing counterfactual analysis.[336] We agree with China that such complexity is not a reason in and of itself for adopting a narrower interpretation of the term "discriminatory".[337] However, such complexity cannot be regarded as insignificant, especially taking into account that one of the objectives of Article XXVIII:1 is to ensure that negotiations and agreement under Article XXVIII are not "unduly difficult" and that "complications in the application of this Article" are avoided.

7.204. 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.[338] Thus, we do not agree with China's view that China and other countries are "similarly

[335] China's oral statement at the first meeting, para. 31.

[336] This is illustrated by China's arguments in the present case. China argues that all of the import bans applying to Chinese poultry imports constitute discriminatory quantitative restrictions. In response to questions from the Panel, China has confirmed that the heat treatment measure, including the limitation on the production areas (see paragraphs 7.85 and 7.91-93), also falls within its definition of "discriminatory quantitative restriction" (China's response to Panel question Nos. 9(b), 19, and 76). If this definition of "discriminatory quantitative restrictions" is accepted, this would mean that all of the tariff lines at issue were subject to "discriminatory quantitative restrictions" even before the import prohibition in 2002, and also after the relaxation of the SPS measures in 2008. The European Union submits that under China's definition of discriminatory quantitative restriction, the European Union would have been obligated to take into account not only the specific SPS measures applied to China which are of concern to China, "but also for the SPS measures applied to many other WTO Members and, more generally, for the entire sanitary regime applied to imports of poultry products" (EU's first written submission, para. 132). The European Union submits that estimating what poultry imports would be without any of the SPS measures "would be an extremely complex task involving the use of highly speculative estimates" (EU's first written submission, para. 131; EU's second written submission, para. 29; EU's response to Panel question No. 74).

[337] China's response to Panel question No. 74(a), para. 15.

[338] In this regard, Annex A:1 of the SPS Agreement explicitly defines SPS measures in relation to the "risks" they seek to prevent. We also note that in the context of the chapeau of Article XX, the Appellate Body has clarified that the assessment of whether or not a measure is applied in a manner that gives rise to discrimination "between countries where the same conditions prevail" may focus on the extent to which the same risks are posed. See e.g. Appellate Body Report, *US – Tuna II (Art. 21.5 – Mexico)*, para. 7.308 (finding that "the prevailing conditions between countries are the risks of adverse effects on dolphins arising from tuna fishing practices").

situated" by virtue of the fact that Chinese poultry meat products and poultry meat products originating in other countries are "like products".[339]

7.205. 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.

7.206. Our interpretation of the terms "discriminatory quantitative restrictions" and the resulting conclusions that we have reached renders it unnecessary to rule on several disputed issues raised by the parties. First, we have concluded that the *sine qua non* of characterizing a measure as a "discriminatory quantitative restriction" is the existence of differential treatment between countries that are *similarly situated*, and that in this case China has not attempted to argue that imports from any other similarly situated country (in the sense referred to above) were not subject to the same restrictions. Accordingly, it is not necessary for us to resolve the parties' disagreement as to whether the scope of the terms "discriminatory quantitative restrictions" in the context of paragraphs 4 and 7 covers only unjustifiable distinctions in treatment accorded to countries that are similarly situated, or is broad enough to also cover justifiable distinctions in treatment accorded to countries that are similarly situated.[340] Second, given that China has not demonstrated that the SPS measures are discriminatory, it is not necessary to rule on the disputed issue of whether these measures constitute "quantitative restrictions". Finally, having found that the SPS measures do not constitute "discriminatory quantitative restrictions" within the meaning of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1, it is not necessary to resolve the parties' disagreement as to what share of imports into the European Union market China could reasonably be expected to have had, in the absence of the SPS import prohibitions, over period 2002-2008.

7.4.3.2 Whether the European Union was obliged to re-determine which Members held a supplying interest to reflect changes in import shares that took place following the initiation of the negotiations

7.207. We now turn to the second ground for China's claim that the European Union violated Article XXVIII:1.

7.208. China argues that in light of the lapsing of substantial time between the notification of its intention to modify its concessions in 2009 and the conclusion of the negotiations three years later in the case of the Second Modification Package, it was necessary for the European Union to engage in a re-determination of which Members held a principal or substantial supplying interest, based on actual imports from the most recent three-year reference period, which in China's view is 2009-2011.[341] According to China, where negotiations and consultations under Article XXVIII extend beyond the six-month period provided for in paragraph 3 of the Ad Note to Article XXVIII:1, the determination of which WTO Members hold a principal or substantial supplying interest must be updated to reflect changes in import shares.[342] China submits that because the Article XXVIII negotiations were not concluded until 2012, the European Union should

[339] China's oral statement at the first meeting, paras. 29-31.

[340] In this regard, the basis for our conclusion is similar to the basis for the conclusion reached by the Appellate Body in *EC – Tariff Preferences*. In deciding to rule on the issues relating to the interpretation of the term "discriminatory" that are necessary to resolve the question before us, our approach is also similar to that followed by the panel in *Canada – Pharmaceutical Patents.* In the context of examining the term "discrimination", that panel observed that "[g]iven the very broad range of issues that might be involved in defining the word", it would "be better to defer attempting to define that term at the outset, but instead to determine which issues were raised by the record before the Panel, and to define the concept of discrimination to the extent necessary to resolve those issues"(Panel Report, *Canada – Pharmaceutical Patents*, para. 7.98).

[341] China's first written submission, para. 88.

[342] China's first written submission, para. 79; China's response to Panel question No. 22.

have re-determined which Members held a principal or substantial supplying interest based on import levels over the most recent period of 2009-2011.

7.209. The European Union submits that it was not required to re-determine which Members had a principal or substantial supplying interest on the basis of import data for a period subsequent to the initial determination. According to the European Union, China's claim has no basis in any provision of Article XXVIII or the Procedures for Negotiations under Article XXVIII, or on past practice, and would undermine the objective pursued by Article XXVIII:1.

7.210. The fundamental legal issue raised by China's claim is whether, in the context of negotiations under Article XXVIII:5, the importing Member is under a legal obligation to reappraise which WTO Members hold a principal or substantial supplying interest to reflect changes in import shares that have taken place following the initiation of the negotiations.[343] The parties have presented a series of arguments in support of their respective positions. The starting point of our analysis is the ordinary meaning of the applicable provisions that regulate the determination of which Members hold a supplying interest in the context of Article XXVIII negotiations. We will then examine these provisions in the light of the parties' arguments concerning the context of those provisions, their object and purpose, and their prior application.

7.211. The text of Article XXVIII:1 itself does not go into detail on the modalities of negotiations to modify concessions, and is silent on the question of when and how determinations of principal and supplying interest are to be made. This is elaborated in its Ad Note. Specifically, paragraph 4 of the Ad Note to Article XXVIII:1 provides that a Member should only be determined to have a principal supplying interest if it "has had, over a reasonable period of time *prior to the negotiations*", the requisite market share (or would have had such a share in the absence of discriminatory quantitative restrictions).[344] Although this applies only to the determination of which Members hold a principal supplying interest, we see no reason why a different approach to the reference period should be followed for the purpose of determining which Members hold a substantial supplying interest.[345]

7.212. 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".[346] 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.[347]

7.213. 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

[343] We recall that the negotiations were conducted under Article XXVIII:5. See footnote 308 above.
[344] Emphasis added.
[345] We note that the paragraph 4 of the Ad Note regarding determinations of which Members hold a principal supplying interest is considerably more detailed than paragraph 7, which concerns substantial supplying interest. Thus, the omission of this particular element from paragraph 7 would not suggest that the drafters intended for a different approach to apply under paragraph 7.
[346] Emphasis added.
[347] See paragraphs 2 and 5 of the Understanding.

taken place following the initiation of the negotiations. The absence of any guidance on that issue is notable for the following reasons.

7.214. First, the identification of the Members having a supplying interest would seem to be a necessary pre-condition for the opening of negotiations. Therefore, such a determination must obviously be made before the initiation of the negotiations. It is also relatively straightforward that such a determination must, given this timing, be made on the basis of a reference period covering a period of time prior to the negotiations. Notwithstanding, the Procedures for Negotiations under Article XXVIII contain the above-mentioned provisions elaborating on the length of that reference period and related trade statistics and on the modalities and time-frame for making a claim of interest. We consider that if Members were under a far less-obvious legal obligation to reappraise and re-determine which other Members hold a principal or substantial supplying interest, one would expect the Ad Note, the Procedures for Negotiations under Article XXVIII, or the Understanding to also provide at least some form of guidance on when and on what basis such a reappraisal is to be made. They do not. This serves as an indication that no such requirement exists.

7.215. Second, this indication is reinforced by the existence of other provisions of the covered agreements that expressly indicate when there may be a requirement to review and reappraise the reference period used to determine the existence of a supplying interest. Notably, Article XIII:4 of the GATT 1994[348] expressly provides for such a mechanism in the context of allocating TRQs, and quantitative restrictions more generally, among supplying countries. This provision indicates what may be reappraised (the reference period selected, special factors, and other points); what procedure is to be followed (a request, followed by consultations); and which Members are be involved (those with a substantial supplying interest). The absence of any provision akin to Article XIII:4 in the context of Article XXVIII is not dispositive. However, it reinforces the impression that emerges from the text of the applicable provisions relating to the determination of supplying interests.

7.216. Turning to the object and purpose of Article XXVIII, which must inform our analysis, we are of the view that the rules applicable to the determination of which Members hold a supplying interest under Article XXVIII should be interpreted in a way that strikes a balance between the several competing objectives that find expression in the text of the Ad Note to Article XXVIII:1. On the one hand, it is important to ensure that negotiations and agreement under Article XXVIII are not "unduly difficult", that "complications in the application of this Article" are avoided, and that the negotiations should "come to an end as quickly as possible".[349] On the other hand, it is equally important to ensure that any Member that holds a principal supplying interest "shall have an effective opportunity to protect the contractual right which it enjoys under this Agreement"[350], and we recognize that Article XXVIII "is not only about an expeditious conclusion of modification negotiations".[351]

7.217. 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 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.[352] On the other hand, we consider that there would be other circumstances in which the balance between these competing objectives would tilt the other

[348] Article XIII:4 provides that:

> With regard to restrictions applied in accordance with [Article XIII:2(d)] or under [Article XI:2(c)] the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the Member applying the restriction; *Provided* that such Member shall, upon the request of any other Member having a substantial interest in supplying that product or upon the request of the [CONTRACTING PARTIES], consult promptly with the other Member or the [CONTRACTING PARTIES] regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

[349] Paragraph 4 of the Ad Note to Article XXVIII:1. EU's first written submission, para. 153; China's response to Panel question No. 22(c), paras. 126-127.

[350] Paragraph 4 of the Ad Note to Article XXVIII:1.

[351] China's second written submission, para. 45.

[352] Canada's response to Panel question No. 4(b) to third parties.

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.[353]

7.218. The issue before the Panel is not, however, whether, in the circumstances of this case, the European Union should have re-determined which Members held a principal or substantial supplying interest. In this regard, both parties agree that this particular issue should not be resolved on the basis of a "reasonableness" standard.[354] Rather, the issue is whether or not there is a legal rule that applies to all cases, putting a Member under a legal obligation, in all cases, to reappraise which WTO Members hold a principal or substantial supplying interest to reflect changes in import shares that have taken place following the initiation of the negotiations. We have already noted the absence of any guidance in the text of the Ad Note and the Procedures for Negotiations under Article XXVIII on when and how a Member might reappraise which WTO Members hold a principal or substantial supplying interest following the initiation of the negotiations. When this silence is read in the light of the need to strike a delicate balance between the different objectives of Article XXVIII, it leads us to the conclusion that we cannot, as treaty interpreters, formulate a general rule on this matter.

7.219. In this regard, we note that there is a lack of clarity in China's own argumentation regarding the scope and nature of such an obligation. China states that whether the three-year period prior to the notification seeking to modify or withdraw a concession is representative, or another representative period must be used, "will depend on the circumstances and the facts of each case".[355] China also suggests that the obligation to re-determine which Members hold a principal or substantial supplying interest following the initiation of negotiations would be triggered where the negotiations were protracted and substantial time lapsed between the notification of the intention to withdraw or amend a concession and the conclusion of negotiations and/or consultations.[356] With reference to paragraph 3 of the Ad Note to Article XXVIII:1, China has argued that if the negotiations under Article XXVIII:5 continue past six months, "the assessment on the WTO Members holding principal or substantial supplying interests and the relevant reference period must be re-assessed", and that the "re-determination should occur after the expiry of the six-month deadline".[357] China then added that, "[a]t the very least", the "re-assessment" should occur as soon as there is evidence of the "developments materially affecting" the determination of who holds a principal or substantial supplying interests or affecting the determination of the future trade prospects.[358] We are not faulting China's argumentation. Rather, we believe that China's argumentation on this issue illustrates the difficulty in fashioning an

[353] In the present case, the European Union points out that "[i]n the case at hand the negotiations were difficult and long because of the demanding requests put forward by Brazil and Thailand for the benefit of all Members. Negotiations would have been even longer if the European Union had been required to discard the results of two years of negotiations with those two Members and to start over again the negotiations on the basis of the claim of a principal supplying interest submitted by China in May 2012, nearly three years after the initiation of the negotiations" (EU's second written submission, para. 153). In its third-party written submission, Brazil states that "it was only after long negotiations with the European Union that it was possible to agree on the shared administration of quotas", and that "[b]oth negotiations proved highly complex and time-consuming, in particular the second process, which took three years to be completed" (Brazil's third-party written submission, paras. 9, 23).

[354] Parties' responses to Panel question No. 106(a).

[355] China's first written submission, para. 76.

[356] China's first written submission, para. 82.

[357] China's response to Panel question Nos. 22 and 23, paras. 125, 128.

[358] China's response to Panel question No. 23, para. 129. In its opening statement at the second meeting, China subsequently stated that "[c]ontrary to the EU's groundless assertion that China believes the determination of Members with a principal or substantial supplying interest would have to occur every six months", China's view is rather that "such redetermination must occur at such periods of time when material trade developments have occurred" that influence the supplying interest status of the WTO Members" (China's opening statement at the second meeting of the Panel, para. 40). In its comments on the Interim Report, China stated that its position is that "if the negotiations / consultations last beyond six months, the Member withdrawing the concession should *assess* whether a re-appraisement should be made", but that a "*re-appraisement* need not necessarily be made after each period of six months, but must occur when material trade developments" have occurred that influence the supplying interest status of the WTO Members (China's comments on the Interim Report, para. 29) (emphasis original).

unwritten rule on this matter, in the absence of any textual guidance and in the light of the competing objectives of Article XXVIII.

7.220. China has argued that even if the negotiations under the Second Modification Package were conducted under Article XXVIII:5, the six-month time-limit for negotiations envisaged in paragraph 3 of the Ad Note, which applies to negotiations under Article XXVIII:1, is nonetheless directly applicable.[359] We observe that the text of Article XXVIII specifies that the modification or withdrawal of concessions can be done at three different points in time.[360] The main difference between the three different kinds of Article XXVIII negotiations relates to the time limits for concluding such negotiations. Paragraph 3 of the Ad Note is explicitly linked to the time limits in Article XXVIII:1 negotiations. In the case of negotiations under Article XXVIII:1, the parties must aim to reach an agreement before the end of the triennial period, and the Member wishing to modify a concession should notify other Members "not earlier than six months, nor later than three months prior to … the termination date of any subsequent period" of its intention to do so.[361] In this context, there is a six-month time-limit. However, in the case of reserved negotiations pursuant to Article XXVIII:5, there are no time-limits specified regarding when such negotiations are to be concluded. Indeed, this is the defining feature of reserved negotiations under Article XXVIII:5.[362] Accordingly, insofar as China is arguing that negotiations under Article XXVIII:5 are subject to the same time-limit that applies in the case of Article XXVIII:1 negotiations, we consider, based on the above explanation, that there is no time-limit specified for reserved negotiations under Article XXVIII:5.

7.221. China further argues that an adjustment of the reference period to take account of changes in import shares following the initiation of the negotiations is "all the more necessary" where the three-year period preceding the notification of the intention to withdraw or amend a concession was tainted by the existence of discriminatory quantitative restrictions, and where data for a more recent period have become available before the end of the negotiations and consultations showing developments for a period that reflects the consequences of the partial lifting of the discriminatory restrictions.[363] We agree that an adjustment of some kind to the 2006-2008 reference period, used in the Second Modification Package, would have been necessary if, as argued by China, import data from this period was tainted by the existence of discriminatory quantitative restrictions. However, we recall that we have already found that China has failed to demonstrate that the SPS measures at issue constitute discriminatory quantitative restrictions within the meaning of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1.

7.222. China advances an additional argument based on paragraph 3 of the Understanding on the Interpretation of Article XXVIII. This provision states that in the determination of which Members have a principal supplying interest or substantial interest, only trade in the affected product which has taken place on a most-favoured-nation (MFN) basis shall be taken into consideration. It adds that 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

[359] China's opening statement at the first meeting of the Panel, para. 52; China's response to Panel question No. 22(a), paras 121-123, China's statement at the second meeting of the Panel, para. 39. China's position is not clear. The Panel asked China to clarify the difference between reserved negotiations under Article XXVIII:5 and Article XXVIII:1 if both are subject to the same time-limit. China responded that "[t]he difference is one of timing. If they reserve their rights to rebinding, WTO Members are not limited to the timing set forth for modifications under Article XXVIII:1. The explicit reference in Article XXVIII:5 to the applicability of the procedures of paragraphs 1 to 3 makes it clear that the negotiations of the modifications under Article XXVIII:1 or Article XXVIII:5 are the same in other respects" (China's response to Panel question No. 109).

[360] These are: (i) on the first day of each three-year period, the first of which began on 1 January 1958 (so-called "open season" negotiations, provided for in Article XXVIII:1); (ii) at any time in special circumstances with the authorization of the CONTRACTING PARTIES (so called "special circumstances" negotiations, provided for in Article XXVIII:4); or (iii) during the three-year period referred to above if the Member concerned has, before the beginning of the period, elected to reserve the right to renegotiate (so-called "reserved" negotiations, provided for in Article XXVIII:5).

[361] In the case of negotiations authorized under Article XXVIII:4, an agreement must be reached within "60 days or any longer period" depending on the number of items to renegotiate (Article XXVIII:4(c) and Ad Article XXVIII:4).

[362] A. Hoda, *Tariff negotiations and renegotiations under the GATT and the WTO, Procedures and Practices*, Cambridge University Press, 2001, at p. 11 (stating that, in the case of reserved negotiations, "there are no time limits at all regarding when they are to be begun or concluded").

[363] China's first written submission, para. 80.

withdrawal of the concession, *or will do so by the conclusion of that negotiation"*.[364] China observes that although this provision applies in the case of the transition of preferential trade to non-preferential trade, it demonstrates that trade levels at the time of the negotiations or by the conclusion of negotiations will be taken into account in the determination of which Members hold a principal or substantial supplying interest.[365]

7.223. From a grammatical perspective, we consider that the wording of paragraph 3 could accommodate China's reading of this provision. However, we also agree with the European Union that, from a grammatical perspective, paragraph 3 can be read to mean that a determination of whether trade in the affected product "has ceased" to benefit from preferences or "will do so" by the conclusion of the negotiations is to be made when the negotiations are opened; and that, if that is the case, the trade to be taken into account is the trade "which has taken place" under the preferences prior to the initiation of the negotiations, rather than the subsequent non-preferential trade.[366] We note that paragraph 3 applies to "the determination of which Members have a principal supplying interest (whether under paragraph 1 above or in paragraph 1 of Article XXVIII)", and determinations of a principal supplying interest under those provisions are to be made in accordance with the guideline in paragraph 4 of the Procedures for Negotiations under Article XXVIII. As we emphasized earlier, paragraph 4 provides that a claim of interest is to be made "*within ninety days* following the circulation of *the import statistics* referred to in paragraph 2". Those import statistics, as stated in paragraph 2 of the Procedures for Negotiations under Article XXVIII, are statistics of imports *for the last three years* for which statistics are available as from the time that the Member notifies its intention to modify its concessions. Insofar as paragraph 3 is open to two different readings, we must adopt the reading that is harmonious with these elements of the Procedures for Negotiations under Article XXVIII. In addition, we note that paragraph 3 refers, in the singular, to "the determination" of which Members have a principal or substantial supplying interest.

7.224. In support of its contention that an importing Member is under a legal obligation to reappraise which WTO Members hold a principal or substantial supplying interest to reflect changes in import shares that have taken place following the initiation of the negotiations, China relies on the following statement by the GATT panel in *Canada – Lead and Zinc*:

> The Panel does not consider that full statistics for the applicable base period must be available at the very beginning of the negotiations, provided that these data become available later in the negotiations and the latter are not unduly delayed.[367]

7.225. The European Union counters that the panel report in *Canada – Lead and Zinc* confirms that it is a long-standing practice to determine the value of tariff concessions on the basis of the three-year period prior to the initiation of the negotiations pursuant to Article XXVIII.[368] The European Union notes that in that case, the GATT panel had agreed with the parties that the entire calendar year of 1974 was part of the three-year base period preceding the initiation of the negotiations, even if the notification of the intention to withdraw the concessions had been circulated only on 23 December 1974, since negotiations had not effectively started until 1975.[369] The European Union notes that, on this premise, the GATT panel went on to find that the EEC should have taken into account the statistics for the first 10 or 11 months of 1974 when they became available in the course of 1975.[370] Thus, the European Union submits that, contrary to what China alleges, "nothing in these findings suggests that the EEC should have taken into account import data for the period *after* the effective initiation of the negotiations (i.e. 1975 and onwards)".[371] On the contrary, the European Union notes that "the whole report is based on the uncontested assumption that only data pre-dating the effective opening of the negotiations

[364] Emphasis added.
[365] China's first written submission, para. 84; China's opening statement at the first meeting with the Panel, para. 37.
[366] EU's second written submission, para. 47.
[367] GATT Panel Report, *Canada – Lead and Zinc*, para. 17.
[368] At paragraph 15 of its Report, the panel "noted that as a general principle, Article XXVIII negotiations had in the past been based on the most recent three-year period for which trade statistics were available, for the purpose of determining principal or substantial supplier rights".
[369] GATT Panel Report, *Canada – Lead and Zinc*, para. 16.
[370] GATT Panel Report, *Canada – Lead and Zinc*, para. 17.
[371] EU's first written submission, para. 181. (emphasis added)

in 1975 was relevant for the determination of the value of the concession".[372] In addition, Thailand has drawn the Panel's attention to the fact that, in that case, the panel report also reflects that the EEC was of the view that "there was no precedent in Article XXVIII negotiations for bringing forward the base period to incorporate statistical data becoming available after negotiations had begun", and that the EEC had voluntarily agreed "in a desire to adopt a reasonable approach, to take account of the trends in trade and in prices in 1974" instead of using only the reference period of 1971-1973.[373]

7.226. China also notes that the GATT panel in *US/EEC − Poultry* lends further support to its position, as that panel had stated that "[i]n its choice of a reference period, the Panel was guided by the practice normally followed by contracting parties in tariff negotiations, namely *to lay particular emphasis on the period for which the latest data were available*".[374] The European Union responds that in *US/EEC −Poultry*, the GATT panel was requested by the parties to issue an advisory opinion on the question of the value of a tariff concession, as of 1 September 1960, in the context of negotiations under Article XXIV:6 of the GATT. The European Union notes that the panel decided to use, as a reference period, the 12-month period from 1 July 1959 to 30 June 1960. The European Union notes that the reason why the parties requested the panel to determine the value of the concession as of 1 September 1960, rather than as of the date when the establishment of the panel was requested in 1963, is not explained in the report. As a result, the European Union states that "this advisory opinion provides little guidance in relation to the issue raised in this claim".[375]

7.227. We observe that in practice, most negotiations under Article XXVIII have been conducted as reserved negotiations under Article XXVIII:5.[376] The European Union has indicated that it is unaware that, in practice, any such re-determination of the Members having a principal or substantial supplying interest has ever been made, either under the GATT 1947 or under the GATT 1994. We recognize, as Argentina has pointed out[377], that Members participating in a procedure under Article XXVIII should conduct the negotiations and consultations "with the greatest possible secrecy"[378], and that given this secrecy, there is some difficulty in accessing information concerning instances where the Member seeking to modify a concession has, during the course of the negotiations, proceeded to re-determine the Members having a principal or substantial suppling interest on the basis of more recent import data. For that reason, in the course of these proceedings we sought information on this point from China and the third parties. China states that it "has no information to discern whether an updating of data is done" in prior cases where the negotiations took several years.[379] Furthermore, no third party indicated that it was aware that, in practice, any re-determination of the Members having a principal or substantial supplying interest has ever been made, either under the GATT 1947 or under the GATT 1994.[380] Based on all of the foregoing, it appears to us that, if anything, prior GATT/WTO practice does not support China's contention that there is a legal obligation to reappraise which WTO Members hold a principal or substantial supplying interest to reflect changes in import shares that have taken place following the initiation of the negotiations.

[372] EU's first written submission, para. 181.

[373] GATT Panel Report, *Canada − Lead and Zinc*, para. 8. See Thailand's response to Panel question No. 4(a) to third parties.

[374] China's first written submission, para. 83. Panel Report, *US/EEC Poultry*, L/2088, 21 November 1963, BISD 12S/65, para. 6. (emphasis added)

[375] EU's first written submission, para. 181.

[376] A. Hoda, *Tariff negotiations and renegotiations under the GATT and the WTO, Procedures and Practices*, Cambridge University Press, 2001, p. 88; see also Committee on Market Access, Factual report on the status of renegotiations under Article XXVIII of the GATT 1994 − Report by the Secretariat, WTO Doc. G/MA/W/123, dated 12 May 2016.

[377] Argentina's response to Panel question No. 4(a) to third parties.

[378] The chapeau of Ad Article XXVIII states that parties "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". It adds that "[t]he [CONTRACTING PARTIES] shall be informed immediately of all changes in national tariffs resulting from recourse to this Article".

[379] A. Hoda, *Tariff negotiations and renegotiations under the GATT and the WTO, Procedures and Practices*, Cambridge University Press, 2001, p. 92 (with regard to the Article XXVIII:5 negotiations held between 1958 and 1994, that "in some cases the process was concluded within a few months while in others it took up to six years or more"); see also Committee on Market Access, Factual report on the status of renegotiations under Article XXVIII of the GATT 1994 − Report by the Secretariat, WTO Doc. G/MA/W/123, dated 12 May 2016.

[380] See responses by Argentina, Brazil, Canada, Thailand to Panel question No. 4(a) to third parties.

7.228. Based on all of the foregoing, we are unable to agree with China that an importing Member is under a legal obligation to reappraise which WTO Members hold a principal or substantial supplying interest to reflect changes in import shares that have taken place following the initiation of the negotiations. Therefore, we reject China claims that the European Union violated Article XXVIII:1 by not re-determining which Members held a relevant supplying interest on the basis of the increase in imports from China over the period 2009-2011.

7.4.3.3 Whether the European Union's decision not to recognize China as a Member holding a supplying interest was justified by the timing of China's claim

7.229. The European Union submits that it was "not required to take into account"[381] China's claims of a principal supplying interest in respect of the concessions included in the First Modification Package, which China has raised for the first time in this dispute. The European Union submits that it was also not required to take into account China's claims of a principal or substantial supplying interest in respect of the concessions included in the Second Modification Package, which China did not raise until May 2012, i.e. nearly three years after the expiry of the 90-day time limit mentioned in Paragraph 4 of the Procedures for Negotiations under Article XXVIII.

7.230. The European Union submits that, by the time China made its claims of interest in respect of the Second Modification Package, "the negotiations had already been concluded with both Thailand and Brazil and the EU Council had already approved the signature of the agreements reached with those two Members".[382] The European Union submits that while the term "should" used in paragraph 4 of the Procedures may suggest that the 90-day time limit is a guideline, from which it may be possible to depart with "due cause", there are no circumstances in this case that would justify such a departure. The European Union observes that China has not invoked any circumstances to justify its failure to submit its claims of a "principal" supplying interest within the 90-day time-limit in the context of the First Modification Package[383], and that the circumstances invoked by China in respect of the Second Modification Package do not justify the delay in submitting its claims of "principal" and "substantial" supplying interest.[384]

7.231. China does not dispute that Paragraph 4 of the Procedures for Negotiations under Article XXVIII provides for the filing of a claim of interest as a WTO Member holding a principal or substantial supplying interest. However, China submits that the 90-day period for making a claim of interest is not couched in mandatory terms and, as a result, does not set an absolute deadline.[385] China notes that the European Union does not deny that China's claim of a "substantial" supplying interest for the First Modification Package was introduced within the 90-day period.[386]

7.232. As regards the Second Modification Package, China argues that several circumstances justify the fact that it did not submit any claim of a principal or substantial supplying interest within the 90-day period, including: (i) the European Union's refusal to recognise China's claims of a substantial supplying interest in respect of the First Modification Package[387]; (ii) at the time where the European Union notified its intention to modify concessions on 16 June 2009, "the favourable effects of the relaxation of the import bans on 30 July 2008 were barely felt"[388]; and (iii) following the notification of the European Union's intention to modify the concessions, "no information transpired", so that China did not become aware that negotiations were "carried out" until the publication of the agreements with Brazil and Thailand.[389]

7.233. We note that Article XXVIII of the GATT 1994 does not explicitly identify the time-period during which a claim of principal or supplying interest must be made. However, as already discussed, paragraph 4 of the Procedures for Negotiations under Article XXVIII sets out a 90-day guideline, running from the date that the Member seeking to modify its concession circulates

[381] EU's second written submission, para. 2.
[382] EU's second written submission, para. 2.
[383] EU's second written submission, para. 6.
[384] EU's second written submission, paras. 8-12.
[385] China's second written submission, para. 86.
[386] China's second written submission, para. 87.
[387] China's response to Panel Question No 16, para. 97; China's second written submission, para. 88.
[388] China's response to Panel Question No 16, para. 97; China's second written submission, para. 88.
[389] China's response to Panel Question No 16, para. 97; China's second written submission, para. 88.

import statistics for the last three years for which statistics are available.[390] The Understanding on the Interpretation of Article XXVIII clarifies that the same 90-day guideline is applicable in the special cases provided for in paragraphs 1 and 4 of the Understanding.[391]

7.234. In this case, China's claim of a substantial supplying interest for the First Modification Package was filed within the 90-day period. China's claims of a "principal" supplying interest in respect of the concessions at issue in the First Modification Package were raised for the first time in this dispute, notwithstanding that the European Union had notified WTO Members of its intention to modify those tariff concessions in June 2006. China's claims of a supplying interest (whether "principal" or "substantial") in respect of the concessions at issue in the Second Modification Package were not made until May 2012, notwithstanding that the European Union had notified its intention to modify its concessions and circulated the accompanying import statistics in June 2009.[392]

7.235. We have already found that the SPS measures in place over the reference periods selected by the European Union did not constitute "discriminatory quantitative restrictions" within the meaning of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1. We have also found that, for the purpose of the Article XXVIII negotiations, the European Union was under no legal obligation to re-determine which Members held a principal or substantial supplying interest based on the latest available import data for 2009-2011. In the light of these findings on the two grounds upon which China alleges a violation of Article XXVIII:1, it is unnecessary, for the purpose of assessing whether the European Union acted consistently with Article XXVIII:1, to additionally rule on whether the European Union's decision not to recognize China as a Member holding a principal or substantial supplying interest was justified by the absence of a timely claim of supplying interest by China.[393]

7.4.4 Conclusion

7.236. Based on the foregoing, the Panel finds that China has failed to demonstrate that the European Union violated Article XXVIII:1 of the GATT 1994 by not recognizing that China held a principal or substantial supplying interest in the concessions at issue in the First and Second Modification Packages.

7.5 Claims under Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding on Article XXVIII of the GATT 1994

7.5.1 Introduction

7.237. China claims that the TRQs negotiated in the First and Second Modification Packages are inconsistent with Article XXVIII:2, read in conjunction with paragraph 6 of the Understanding on the Interpretation of Article XXVIII ("the Understanding").[394] According to China, the TRQs do not maintain "a general level of reciprocal and mutually advantageous concessions not less favourable

[390] Paragraph 4 provides in relevant part:
> Any contracting party which considers that it has a principal or a substantial supplying interest in a concession which is to be the subject of negotiation and consultation under Article XXVIII should communicate its claim in writing to the contracting party referred to in paragraph 1 above [the Member seeking to modify or withdraw a concession] and at the same time inform the secretariat. … Claims of interest should be made within ninety days following the circulation of the import statistics referred to in paragraph 2 above.

[391] See paragraphs 2 and 5 of the Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994.

[392] China's claims of supplying interests for the poultry meat products concerned (Exhibit CHN-48).

[393] The European Union raises the timeliness of China's claims in the context of rebutting China's claims under both Article XXVIII:1 and Article XIII:2. The European Union has confirmed that the issue of the timing of China's claims of principal or substantial supplying interest is not relevant to the assessment of China's claims under Article XXVIII:2 and paragraph 6 of the Understanding, Article XIII:1, or Article XIII:4 (EU's response to Panel question No. 69(b), para. 17). Insofar as the European Union raises the timing of China's claim of supplying interest under Article XXVIII as a defence to China's claims under Article XIII:2, we will address that issue in the context of our evaluation of China's claims under Article XIII:2.

[394] China's first written submission, paras. 118-146, 280(3)-(5); China's opening statement at the first meeting of the Panel, paras. 56-75; China's responses to Panel question Nos. 26-29, 31; China's second written submission, paras. 96-119; China's opening statement at the second meeting of the Panel, paras. 41-50; parties' responses, and comments on one another's responses, to Panel question Nos. 64, 66-67, 85, 111.

to trade than that provided for in this Agreement prior to such negotiations" within the meaning of Article XXVIII:2. That is because, China argues, the TRQs do not reflect "future trade prospects" calculated in accordance with paragraph 6 of the Understanding. We understand China's claims under Article XXVIII:2 and paragraph 6 to rest on multiple grounds, relating both to the total amount of the TRQs and the allocation of the TRQs among supplying countries.

7.238. The European Union responds that there is no violation of Article XXVIII:2 and paragraph 6 of the Understanding.[395] The European Union submits that the total amount of the TRQs equals or exceeds the greatest of the amounts that would result from applying each of the three formulae set out in paragraph 6 of the Understanding based on the relevant reference periods and import data. The European Union submits that the allocation of TRQs among supplying countries is not governed by Article XXVIII:2 or paragraph 6 of the Understanding.

7.5.2 Relevant legal provisions

7.239. Article XXVIII:2 of the GATT 1994 reads:

> 2. In such negotiations and agreement, which may include provision for compensatory adjustment with respect to other products, the Members 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*. (emphasis added)

7.240. Paragraph 6 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994 refers to the amount of compensation to be provided when, as in the First and Second Modification Packages, an unlimited tariff concession is replaced by a TRQ. Paragraph 6 of the Understanding requires that compensation be provided insofar as the "level of the quota", i.e. the total volume of imports subject to the lower in-quota tariff rates, is less than the amount of "future trade prospects". Paragraph 6 reads as follows:

> 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. (emphasis added)

7.241. For the purpose of determining the amount of compensation to be provided, subparagraphs (a) and (b) of paragraph 6 sets out three different formulae for calculating the amount of future trade prospects against which the level of the quota must be compared. These formulae provide that future trade prospects are to be calculated on the basis of historical trade levels, in either "the most recent representative three-year period", or the "most recent year". The resulting amount is to be increased either by the average annual growth rate of imports in the same period (in case a three-year period is selected), or by 10%. Whichever formula yields the greatest amount in the circumstances is to be used.

[395] EU's first written submission, paras. 154-182; EU's opening statement at the first meeting of the Panel, paras. 18-19; EU's responses to Panel question Nos. 25-28, 30; EU's second written submission, paras. 60-85; EU's opening statement at the second meeting of the Panel, paras. 21-31; parties' responses, and comments on one another's responses, to Panel question Nos. 64, 66-67, 85, 111.

7.242. 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".[396] 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.[397] 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.[398] 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".[399]

7.243. Furthermore, the European Union does not contest that Article XXVIII:2 "establishes a mandatory obligation which is cognizable under the DSU".[400] 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.[401] 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.

7.244. 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.[402] 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 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.[403] 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. As China notes, "[t]he EU's unlimited tariff concessions with regard to the poultry products at issue were replaced by TRQs in the *2007* and *2012 Modification Packages*. As such, paragraph 6 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994 is clearly applicable."[404]

7.245. Consistent with this understanding of the relationship between Article XXVIII:2 and paragraph 6 of the Understanding, China's claims of violation in this case are based on Article XXVIII:2, "read in conjunction" with the Understanding "and in particular paragraph 6

[396] EU's response to Panel question No. 25, para. 78.
[397] China's second written submission, paras. 96-101.
[398] In our view, China's claims in this case under Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding could be characterized in terms of the European Union not endeavouring to achieve the result set forth in Article XXVIII:2, and would thus fall within the scope of the obligation in that provision insofar as it is characterized as a "best efforts" obligation. Thus, in the circumstances of this case, whether Article XXVIII:2 is properly characterized as a "best efforts" obligation is not an issue we need to resolve.
[399] China's second written submission, para. 101.
[400] EU's response to Panel question No. 25, para. 78.
[401] See EU's response to Panel question No. 12, para. 42.
[402] China considers that "where paragraph 6 of the Understanding is strictly adhered to, the resulting tariff rate quota should normally be in compliance with Article XXVIII:2"(China's response to Panel question No. 26(b), para. 132). The European Union also considers that "if compensation is consistent with paragraph 6 of the Understanding it must be deemed compliant with Article XXVIII:2" (EU's response to Panel question No. 26, para. 83). See also EU's second written submission, para. 60.
[403] A. Hoda, *Tariff Negotiations under the GATT and the WTO, Procedures and Practices*, CUP 2001, pp. 52-53.
[404] China's first written submission, para. 136.

thereof".[405] China has claimed that the total amount of the TRQs and their allocation among supplying countries is inconsistent with these provisions in a number of different respects. China has clarified that each of those claims rests on the same legal basis, namely Article XXVIII:2 taken together with paragraph 6 of the Understanding, as opposed to some claims being based on the obligation in Article XXVIII:2, and others being based on the terms of paragraph 6 of the Understanding.[406]

7.246. Finally, in accordance with the findings of the panel and the Appellate Body in *EC – Poultry,* the parties agree that compensation negotiated within the framework of Article XXVIII is not "exempt from compliance with the non-discrimination principle inscribed in Articles I and XIII of the GATT 1994", and if "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".[407] The European Union agrees with China that, in accordance with *EC – Poultry*, the "compensation provided pursuant to an agreement under Article XXVIII is not meant to compensate exclusively the Member which has negotiated the compensation and must be made available to all Members on a MFN basis".[408]

7.5.3 Analysis by the Panel

7.247. Turning to the issues that are in dispute, our understanding is that China's claims under Article XXVIII:2 and paragraph 6 of the Understanding rest on several different grounds, relating both to the total amount of the TRQs and to the allocation of the TRQs among supplying countries.

7.248. The precise scope and nature of China's claims of violation under Article XXVIII:2 have been clarified in the course of the proceedings. Initially, the European Union understood that China's claims under Article XXVIII:2 and paragraph 6 of the Understanding did "not relate to the overall size of the TRQs at issue, but instead to the allocation of each of those TRQs among different supplying Members".[409] In the course of the proceedings, it has become apparent that China's claims under Article XXVIII:2 and paragraph 6 of the Understanding relate not only to the allocation of the TRQs among supplying countries, but also to the total amount of the TRQs.

7.249. The parties agree that the obligation in Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding applies to the calculation of the total amount of the TRQs. We further note that China's claims of violation relating to the allocation of the TRQs among supplying countries are for the most part based on the same grounds as its claims relating to the total amount of the TRQs. Accordingly, we consider it logical to first examine the claims that China advances regarding the total amount of the TRQs, and thereafter, in the light of the findings that we have reached, proceed to examine China's claims under Article XXVIII:2 and paragraph 6 of the Understanding relating to the allocation of the TRQs among supplying countries.

7.250. Before turning to the analysis of China's claims relating to the total amount of the TRQs and their allocation among supplying countries, however, we briefly recall our findings under Article XXVIII:1, and the implications that these findings have on our assessment of China's claims under Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding.

7.5.3.1 Whether different reference periods can be used for the determinations under Article XXVIII:1 and Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding

7.251. China's principal claims under Article XXVIII:2 and paragraph 6 of the Understanding, both at the level of the total amount of the TRQs and at the level of their allocation among supplying

[405] China's request for the establishment of a panel, items (ii) of section II.A and (ii) of section II.B.

[406] China's response to the Panel's Question 26, para.131. The European Union shares this understanding as well. See EU's response to Panel question No. 26, para. 81; EU's second written submission, para. 60.

[407] Appellate Body Report, *EC – Poultry*, paras. 100-101.

[408] China's first written submission, paras. 120-129; EU's response to Panel question No. 30, para. 87 (citing Appellate Body Report, *EC – Poultry*, paras. 96-102).

[409] EU's first written submission, para. 163. In its response to Panel question No. 26, the European Union still understood that "the allegations made by China in both section IV.A.2(a) and section IV.A.2(b) do not relate to the amount of compensation provided by the European Union, but instead to the allocation of such compensation among supplying countries" (EU's response to Panel question No. 26, para. 82).

countries, include the same two horizontal arguments that we have already considered in the context of examining China's claims under Article XXVIII:1. First, we understand China to argue that for both the First and Second Modification Packages, the European Union was under a legal obligation to estimate what the import levels would have been in the absence of the SPS measures restricting poultry imports from China. Second, we understand China to argue that the European Union was required to base its determinations, of the total amount and allocation of the TRQs for the Second Modification Package, on actual imports from the most recent three-year reference period preceding the conclusion of the negotiations. China considers that the Article XXVIII negotiations concluded in December 2012, and therefore the three preceding years are 2009-2011.

7.252. China has claimed that the European Union violated Article XXVIII:1 on essentially the same two grounds. We have already rejected China's claims under Article XXVIII:1, and instead found that the European Union was free to determine which Members held a principal and substantial supplying interest in the concessions at issue in the First and Second Modification Packages on the basis of actual imports into the European Union over the three-year period preceding the European Union notification of its intention to modify concessions under Article XXVIII. Given that finding, we consider it is necessary to explain our understanding of the implications that this finding has on our assessment of China's claims under Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding, given the significant degree of overlap in China's argumentation under these provisions.

7.253. We do not consider that the conclusions that we have reached in relation to China's claims under Article XXVIII:1 necessarily dispose of China's claims under Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding. The reason is that each provision contains its own applicable legal standard, which applies to a different subject-matter. We are well aware that the subject matter of Article XXVIII:2 and paragraph 6 of the Understanding is distinct from the subject matter of Article XXVIII:1.

7.254. Accordingly, having found that the European Union was free to base its determinations of which Members held a relevant supplying interest on actual imports over the reference periods that it selected for that purpose (2003-2005 and 2006-2008), we do not *a priori* exclude the possibility that the European Union might have been obligated to calculate the compensation required under Article XXVIII:2 and paragraph 6 of the Understanding on the basis of a different period.[410]

7.5.3.2 Whether the total amount of the TRQs is consistent with paragraph 6 of the Understanding

7.255. China submits that the total amount of the TRQs is less than the minimum levels calculated in accordance with paragraph 6 of the Understanding. China presents a series of arguments in this regard. First, we understand China to argue that the total amounts of the TRQs are not based on a "representative" period within the meaning of paragraph 6 because they were calculated on the basis of reference periods during which Chinese poultry products were subject to SPS import bans. Second, China submits that the total amounts of the TRQs for four of the TRQs under the Second Modification Package (tariff lines 1602 32 11, 1602 32 30, 1602 32 90 and 1602 39 29) fall below the minimum amount required by paragraph 6 when applied to imports into the European Union over the 2009-2011 period, which in China's view is "the most recent three-year period" within the meaning of paragraph 6 of the Understanding. Third, China argues that even if the 2006-2008 period is used, the total amounts of the TRQs should have been calculated on the

[410] China's views on this matter appear to have evolved in the course of these proceedings. In its first written submission, China stated that "the determination of the existence of a PSI or SSI in one period and the calculation of compensation on a different period would seem illogical", and that "[d]iscussions with WTO Members that may have PSI or SSI rights during one reference period, whilst agreeing on compensation based on data for another reference period, would create an imbalance that is neither logical nor reasonable" (China's first written submission, para. 86). At the first substantive meeting of the Panel, China stated that "the base period to be taken into account for the calculation of the compensation … may then be a period that is different from the period used to determine the WTO members with principal or substantial supplying interests" (China's opening statement at the first meeting of the Panel, para. 70). Along the same lines, at the second meeting of the Panel, China stated that "[l]egally speaking, the reference period used to determine Members with a PSI or SSI is different from that used to calculate compensation" (China's opening statement at the second meeting of the Panel, para. 48).

basis of imports into all EU28 countries over the 2006-2008 period, and that the total amount of one of the TRQs in the First Modification Package (tariff line 1602 31) falls below the minimum amount required by paragraph 6 of the Understanding when EU28 data is used.

7.256. The European Union rejects China's arguments. First, the European Union submits that there is no evidentiary basis for China's contention that, in the absence of the SPS measures applied to imports from China, the total amount of the TRQs determined on the basis of paragraph 6 of the Understanding would have been larger than the total amount of the TRQs agreed by the European Union. Second, the European Union submits that "the most recent representative three-year period" in paragraph 6 of the Understanding refers to the most recent years preceding the initiation of the negotiations under Article XXVIII, and not the three-year period preceding the conclusion of the negotiations as maintained by China. Accordingly, the European Union submits that it was under no obligation to calculate the total amounts of the TRQs for the Second Modification Package on the basis of import levels over the 2009-2011 period. Third, the European Union rejects China's contention that it was required to account for poultry imports into Romania, Bulgaria, or Croatia in the years prior to these countries becoming Members of the European Union.

7.257. In the light of the foregoing, we understand China to claim that the total amount of the TRQs is inconsistent with Article XXVIII:2 and paragraph 6 of the Understanding on three separate grounds. To resolve these claims, the Panel must resolve the following issues. First, whether the European Union was obliged to calculate the total amount of the TRQs for the First and Second Modification Packages on the basis of an estimate of what import levels would have been in the absence of the SPS measures prohibiting or restricting certain poultry imports from China. Second, whether the European Union was obliged to calculate the total amount of the TRQs for the Second Modification Package on the basis of import levels over the 2009-2011 period. Third, whether the European Union was required, in the context of the Second Modification Package, to account for poultry imports into Romania, Bulgaria and Croatia in the years before they acceded to the European Union. We will proceed to examine these issues in turn.

7.5.3.2.1 Whether the European Union was obliged to calculate the total amount of the TRQs on the basis of an estimate of what import levels would have been in the absence of the SPS measures

7.258. China claims that where as in this case SPS import bans are imposed, the period of application of these import bans cannot be used as a representative basis for determining the amount of compensation under Article XXVIII:2 and paragraph 6. Otherwise "it is impossible to provide compensation that [is] based on the future trade prospects of China".[411] Rather, China considers that the period selected "must be representative of China's future trade prospects which must be trade prospects free from import bans".[412] China submits that this applies both to the determination of "the global TRQs" (i.e. the total amount of each TRQ, as distinguished from the shares of the TRQ) and also the TRQ allocations among supplying countries.[413] In other words, China contends that, "pursuant to Article XXVIII:2, for the global TRQ volume to restore the general balance of concessions, the future trade prospects of paragraph 6 of the Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994 should take into account the future trade prospects of all WTO Members exempt from the impact of import bans".[414]

7.259. We recall that paragraph 6 of the Understanding requires that when an unlimited tariff concession is replaced by a TRQ, the amount of compensation provided should be based on a calculation of the amount by which "future trade prospects" exceed the level of the quota. Paragraph 6 specifies how "future trade prospects" are to be calculated, based on the formulae in sub-paragraphs (a) and (b). Paragraph 6(a) provides that if "future trade prospects" are calculated based on average annual trade over a three-year period, that period must be a "representative" three-year period.

[411] China's first written submission, para. 143.
[412] China's first written submission, para. 143.
[413] China's first written submission, para. 145.
[414] China's second written submission, para. 102.

7.260. We consider that, for the purpose of calculating the *total* amount of the TRQs under paragraph 6 of the Understanding, a three-year period would be "representative" if the *total* amount of the average annual trade during that period is typical of, and serves to represent, the *total* amount of annual trade in the product which has occurred in the past or could be expected to occur in the future. Conversely, for the purpose of calculating the *total* amount of the TRQs under paragraph 6 of the Understanding, a three-year period may not be "representative" if the *total* amount of the average annual trade during that period is not typical of, and could not serve to represent, the *total* amount of annual trade in the product which has occurred in the past or could be expected to occur in the future.

7.261. Accordingly, we consider that in order to find that the reference periods selected by the European Union were not "representative" for the purpose of calculating the *total* amount of the TRQs because of the SPS measures that were in place during this time, it would be necessary to establish that these SPS import restrictions significantly altered the *total* amount of annual trade in the poultry products concerned from all sources, and not merely that the amount from China would have been greater. However, China has not asserted that in the absence of the SPS measures applied to imports from China, the *total* amount of imported poultry products into the European Union from *all sources* would have been any greater. We cannot assume that this would have been so, because imports from China compete directly with imports from other sources, which were not subject to those measures.[415] Assuming that the amount of poultry imports supplied from China into the European Union would have been greater in the absence of the SPS measures at issue, one might expect to find a corresponding decrease in the amount of imports of the like products supplied from other sources into the European Union in the absence of any change in overall demand for those products in the European Union. In the absence of any assertion or demonstration by China that the *total* amount of imports into the European Union from all sources of the poultry products concerned would have been any different in the absence of the SPS measures, China has not provided any calculation of whether the *total* amount of the TRQs determined on the basis of paragraph 6 of the Understanding would have been larger than the total amount of the TRQs agreed by the European Union for any of the tariff lines at issue in the First or Second Modification Packages.

7.262. While our analysis of this claim could stop at this point, we recall our prior finding that China has failed to demonstrate that the SPS measures at issue are "discriminatory quantitative restrictions" within the meaning of paragraphs 4 or 7 of the Ad Note to Article XXVIII:1. The same legal standard is not directly referenced in the text of Article XXVIII:2 or paragraph 6 of the Understanding. However, paragraph 6 of the Ad Note to Article XXVIII:1, which relates to the amount of compensation that is negotiated, links back to the concept of "discriminatory quantitative restrictions". Paragraph 6 of the Ad Note to Article XXVIII:1 states:

> "It is not intended that provision for participation in the negotiations of any Member with a principal supplying interest, and for consultation with any Member having substantial interest in the concession which the applicant 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 restriction* maintained by the applicant Member." (emphasis added)

7.263. The Ad Note suggests that, when calculating the amount of the compensation for the purpose of Article XXVIII:2 and paragraph 6 of the Understanding, there is no requirement to make allowance for each and every measure that may have had the effect of restricting the importation of the products concerned under that concession, but only for those measures that constitute "discriminatory quantitative restrictions".[416]

7.264. Based on the foregoing, we reject China's claims that the European Union acted inconsistently with Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding by calculating "future trade prospects" and the total amount of the TRQs, on the basis of actual imports of the products concerned into the European Union over the periods selected by the

[415] EU's comments on China's response to Panel question No. 71(a), para. 14.
[416] EU's first written submission, para. 160.

European Union, rather than on an estimate of what those import levels would have been in the absence of the SPS measures.

7.5.3.2.2 Whether the European Union was obliged to calculate the total amount of the TRQs on the basis of import levels over the three years preceding the conclusion of the Article XXVIII negotiations

7.265. We now turn to the second ground of China's claim that the total amount of the TRQs is inconsistent with Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding.

7.266. China claims that based on the more recent representative period 2009–2011 for the Second Modification Package, the total amount of the TRQs determined by the European Union falls short of the total amount that China calculated, pursuant to paragraph 6 of the Understanding, for tariff lines 1602 32 11, 1602 32 30, 1602 32 90 and 1602 39 29.[417] China stresses that, according to paragraph 6 of the Understanding, compensation should be based on trade data for the "most recent representative three-year period" or for the "most recent year".[418] According to China, these terms must be understood to mean the most recent year, or three-year period, before the conclusion of the negotiations on compensation.[419] As noted above, China considers that the Article XXVIII negotiations under the Second Modification Package concluded in December 2012, and therefore the three preceding years are 2009-2011.

7.267. It is not in dispute that under paragraph 6 of the Understanding, the compensation should be based on trade data for the "most recent" representative three-year period or for the "most recent" year. The legal issue raised by China's claim is whether these terms should be interpreted to mean the most recent period or year preceding the conclusion of the negotiations, as China contends, or rather the most recent period or year preceding the initiation of the negotiations, as the European Union contends.

7.268. Before commencing with our analysis of this issue, we recall that we have already found, in the context of our examination of China's claims under Article XXVIII:1, that the European Union was free to determine which Members held a principal and substantial supplying interest on the basis of actual imports into the European Union over the three-year period preceding the European Union's notification of its intention to modify concessions under Article XXVIII. The European Union was under no obligation to re-determine that issue to take into account changes in import shares over the period 2009-2011.[420] In the course of analysing that issue, we addressed a number of arguments that are specific to the legal standards that apply to the determination of which Members hold a principal or substantial supplying interest under Article XXVIII:1. However, some of the arguments that we addressed have been reiterated by the parties in their argumentation under Article XXVIII:2 and paragraph 6 of the Understanding. To avoid addressing the same arguments multiple times, our analysis of China's parallel claim under Article XXVIII:2 and paragraph 6 of the Understanding will focus on those arguments and interpretative elements that are specific to paragraph 6 of the Understanding and Article XXVIII:2, and that we have not already addressed in the context of our findings under Article XXVIII:1.[421]

7.269. Paragraph 6 of the Understanding states that the amount of the compensation and future trade prospects must be based on the "most recent" three-year period or year, but is silent on whether this refers to the most recent period or year preceding the initiation of negotiations under Article XXVIII, the most recent period or year preceding the conclusion of negotiations under Article XXVIII, or the most recent period or year preceding some other point in time.[422] Thus, we

[417] China's response to Panel question No. 29, paras. 144-145; China's second written submission, para. 106.
[418] China's second written submission, para. 106.
[419] China's first written submission, paras. 86 and 111; China's response to Panel question No. 29, para. 149; China's opening statement at the second meeting of the Panel, para. 48; China's response to Panel question No. 107(a), para. 96.
[420] See section 7.4.3.2 above.
[421] We see nothing to be gained, and a potential for confusion, from reproducing the same analysis multiple times through the Report in respect of overlapping arguments.
[422] Paragraph 6 of the Understanding does not contain comparable language to, for example, paragraphs 2 and 3 of Annex IV of the Agreement on Subsidies and Countervailing Measures, which refers to "the most recent 12-month period … preceding the period in which the subsidy is granted".

consider that, as a textual matter, the ordinary meaning of the terms "the most recent" three-year period or year is inconclusive with regard to the question before us.[423]

7.270. Turning to the context of paragraph 6 of the Understanding, both parties submit that their opposing interpretations are supported by paragraph 6 of the Ad Note to Article XXVIII:1. Paragraph 6 of the Ad Note reads as follows:

> It is not intended that provision for participation in the negotiations of any Member with a principal supplying interest, and for consultation with any Member having substantial interest in the concession which the applicant 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 at the time of the proposed withdrawal or modification,* making allowance for any discriminatory quantitative restriction maintained by the applicant Member. (emphasis added)

7.271. According to the European Union, this paragraph "makes it clear that the adequacy of compensation must be judged in the light of the conditions prevailing at the moment where the modification of the schedule is proposed, rather than at the time where the modification is eventually agreed", and submits that this is confirmed by the wording of the French and Spanish versions of paragraph 6.[424] China disagrees with the European Union's reading of paragraph 6 of the Ad Note, and instead considers that the moment of the "proposed withdrawal or modification" is not the moment of the notification of the mere intention to withdraw or modify concessions, but rather the moment at which the details of the withdrawal or modification are agreed immediately preceding their implementation.[425] In our view, the parties' arguments show that the ordinary meaning of the wording of paragraph 6 of the Ad Note is capable of accommodating both of those interpretations. Accordingly, while we agree that this provision is relevant context, we consider that it is of limited assistance in resolving the interpretative issue before us.

7.272. However, we do not consider that China's interpretation of paragraph 6 of the Understanding can be reconciled with the object and purpose of this provision and Article XXVIII:2. In particular, paragraph 6 of the Understanding seeks to facilitate the negotiations under Article XXVIII:2 by providing a benchmark that the negotiating Members can use as a basis for the calculation of compensation in the case of TRQs. We do not agree with the European Union that the benchmark must necessarily be "known in advance of the negotiations" and "fixed", insofar as this would suggest that the Members concerned could not agree, as part of their negotiations, to use a different period.[426] However, we 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

[423] We note that the immediate context of these terms is also inconclusive, insofar as the content of the three formulae set forth in paragraph 6(a) and (b) are neutral as to whether the calculation called for is to be based on the most recent period or year preceding the initiation of negotiations under Article XXVIII, or the most recent period or year preceding the conclusion of negotiations under Article XXVIII.

[424] EU's first written submission, paras. 159, 177. The French and Spanish versions refer, respectively, to "*les conditions du commerce au moment où sont projetés le retrait ou la modification*" and "*las condiciones del comercio en el momento en que se proyecte dicho retiro o modificación*".

[425] China's opening statement at the first meeting, para. 69; China's second written submission, para. 104.

[426] EU's first written submission, para. 179. As China observes, in the First Modification Package (tariff line 0210 99 39), the European Union modified the reference period that covered initially 2003-2005 to the period of 2000-2002 due to changes to the European Union customs classification regulations adopted in 2002, and that for another line of the First Modification Package (tariff line 1602 32 19), the European Union admitted that it agreed, "upon the insistence of Thailand", not to base the calculation of the compensation on the most recent calendar year preceding the initiation of the negotiations, i.e. 2005, but to base it on a more recent twelve-month period preceding the initiation of negotiations, i.e. July 2005 to June 2006. This does not, in our view, lend support to the conclusion that "the most recent" period or year can be interpreted to mean "the most recent" period or year preceding *the conclusion of the negotiations*. However, it does show that the period or year used to calculate the compensation need not necessarily "be known in advance of the negotiations" and "fixed".

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.

7.273. We consider that Article XXVIII:2 is relevant context for the interpretation of paragraph 6 of the Understanding, given the close relationship between these two provisions. Therefore, we have also considered whether a requirement to base the calculation of the total amount of a TRQ on the most recent three-year period preceding the conclusion of the negotiations would serve the objective, reflected in Article XXVIII:2, of the Members concerned to "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. For the reasons that follow, we are not persuaded that it would necessary serve this objective.

7.274. First, as the European Union has pointed out, there is no reason why the import volumes following the initiation of negotiations should necessarily be higher than the pre-initiation import volumes. For example, according to China's data and calculations, the amount of the TRQs for two of the tariff items included in the Second Modification Package (1602 39 21 and 1602 39 80) is lower if the formulae of paragraph 6 of the Understanding are applied on the basis of import data for the period 2009-2011, instead of import data for the reference period 2006-2008.[427] Furthermore, we consider that a "moving" benchmark would have the potential to create an incentive for the parties to delay the conclusion of negotiations while waiting for more favourable trade data to emerge.[428]

7.275. Second, we note that the benchmark in paragraph 6 of the Understanding establishes the basis for calculating the *minimum* amount of compensation that must be provided. In this regard, paragraph 6 states that the calculation of future trade prospects must be "based on the greater" of the three formulae contained in subparagraphs (a) and (b). Because paragraph 6 establishes the formulae for defining the minimum amount of the TRQ, we consider that it is not necessary to interpret the terms the "most recent" three-year period in paragraph 6 of the Understanding to mean the most recent period preceding the conclusion of the negotiations in order to provide for the possibility that the amount of the TRQs is adjusted to reflect any increase in imports that may take place in the course of the negotiations. It is always open for the Members involved in negotiations under Article XXVIII to agree on compensation that exceeds the minimum amount required.

7.276. Finally, with regard to prior practice, the Panel has asked the parties whether, in prior cases where the negotiations under Article XXVIII took several years, it is possible to discern whether the Members concerned determined the level of compensation under Article XXVIII:2 on the basis of import data that became available during the negotiations. China responds that it "has no information to discern whether an updating of data [was] done".[429]

7.277. Based on the foregoing, we conclude that the European Union was not obliged to calculate the total amount of the TRQs on the basis of import levels over the three years preceding the conclusion of the Article XXVIII negotiations. Accordingly, we reject China's claims that the European Union acted inconsistently with Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding by calculating "future trade prospects" and the total amount of the TRQs on the basis of imports of the products concerned into the European Union over the period 2006-2008 in the context of the Second Modification Package, and not on the basis of imports over the 2009-2011 period.

7.5.3.2.3 Whether the European Union was required to account for poultry imports into Romania, Bulgaria and Croatia in the years before they acceded to the European Union

7.278. China submits that even using the reference periods selected by the European Union, i.e. 2006-2008, the total amount of one of the TRQs in the First Modification Package (tariff line 1602

[427] EU's second written submission, para. 76.
[428] EU's first written submission, para. 180.
[429] China's response to Panel question No. 111, para. 104.

31) falls below the minimum amount required by paragraph 6 of the Understanding when EU28 data is used.[430]

7.279. We recall that the total amount of the TRQ for tariff line 1602 31 was determined in the context of the First Modification Package. The negotiations in the First Modification Package took place in 2006. Romania and Bulgaria did not accede to the European Union until 1 January 2007. Croatia acceded to the European Union on 1 January 2013. The European Union confirms that it did not account for imports into these countries when determining the total amount of the TRQs.

7.280. China argues that the European Union was required to do so. Firstly, as regards Romania and Bulgaria, China submits that when the First Modification Package was negotiated in 2006, the European Union knew that the two countries would be joining the European Union in 2007.[431] Secondly, as regards Croatia, China agrees that, "technically the EU was not required to take into account Croatia's imports when the First Modification Package was negotiated and reached in 2006, as there was uncertainty as to whether and when Croatia would become a member"; however, China nonetheless submits "for the purpose of this dispute settlement, the Panel should use the import data that includes those of Croatia, as the EU is obliged to increase the Union concession level when Croatia became a member, in exchange for Croatia's withdrawal of its own concession".[432]

7.281. China observes, however, that "whether or not to include import data for these three countries will have a negligible impact on the present dispute".[433] In this regard, China explains that throughout the period 2000-2012, Croatia imported only 6.8 tonnes under tariff line 1602 31, and all of these imports took place in 2012. By way of comparison, China notes that the corresponding EU28 imports under 1602 31 in 2012 alone were 77,659 tonnes. For Romania and Bulgaria, China explains that for tariff line 1602 31, total imports of 25.4 metric tonnes were recorded for Romania in 2003 and 8.3 metric tonnes for Bulgaria in 2005. By way of comparison, China notes that the corresponding EU28 imports under tariff line 1602 31 were 63,883 tonnes in 2003, and 94,500 tonnes in 2005.[434]

7.282. The European Union submits that it was under no obligation to account for imports into these countries in the years preceding their accession to the European Union, and that to the extent that the accession of those countries to the European Union resulted in an increase of the applicable duty rates, the European Union would have been required to provide compensation in accordance with Article XXIV:6 of the GATT 1994.[435] In addition, the European Union notes that the difference arising from using import data including imports into these three countries only leads to a minimal difference. Specifically, the European Union observes that the total amount of the TRQ agreed by the European Union for tariff line 1602 31 covers 103,896 tonnes. According to China's alternative calculation in Exhibit CHN-49, the compensation required pursuant to paragraph 6 of the Understanding including imports into these countries would amount to 103,953 tonnes, i.e. a difference of just 57 tonnes per year.[436]

7.283. We are not persuaded that the European Union was obliged to account for imports into Romania, Bulgaria, or Croatia when determining in the total amount of the TRQ for tariff line 1602 31 in the context of the First Modification Package. As noted above, Romania and Bulgaria did not accede to the European Union until 2007, and Croatia did not accede until 2013. However, the initiation and conclusion of the Article XXVIII negotiations under the First Modification Package occurred in 2006.[437] Furthermore, the total amount of the TRQ for tariff line 1602 31 was determined on the basis of imports over the period 2003-2005.[438]

7.284. In addition, China acknowledges that including the import data for these three countries would have a negligible impact on the total amount of the TRQ. We note that insofar as the

[430] China's response to Panel question No. 29, paras. 144-145; China's second written submission, para. 106.
[431] China's response to Panel question No. 71(b), para. 24.
[432] China's response to Panel question No. 71(b), para. 25.
[433] China's response to Panel question No. 71(b), para. 26.
[434] China's response to Panel question No. 71(b), para. 26.
[435] EU's second written submission, paras. 81-82.
[436] EU's second written submission, para. 80.
[437] See paragraphs 7.50 to 7.54.
[438] See paragraph 7.57.

information contained in Exhibit CHN-49 is accurate[439], it would follow that the total amount of the TRQ for 1602 31 is 0.05% less than required by Article XXVIII:2 and paragraph 6 of the Understanding. However, we understand China 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".[440]

7.285. In addition, we note the argument by the European Union that to the extent that the accession of those countries to the European Union resulted in an increase of the applicable duty rates, the European Union would have been required to provide compensation in accordance with Article XXIV:6 of the GATT 1994.

7.286. Based on the foregoing, we are not persuaded that the European Union acted inconsistently with Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding by calculating "future trade prospects" and the total amount of the TRQs on the basis of import statistics that exclude imports into Romania, Bulgaria and Croatia which took place in the years before they acceded to the European Union.

7.5.3.3 Whether the allocation of the TRQs is inconsistent with Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding

7.287. Having addressed China's claims regarding the total amount of the TRQs, we now turn to China's claims that the allocation of the TRQs among supplying countries is inconsistent with Article XXVIII:2 and paragraph 6 of the Understanding.

7.288. China argues that if a TRQ resulting from Article XXVIII negotiations is allocated among supplying countries, the provisions of Article XXVIII:2 and paragraph 6 of the Understanding apply at the level of the individual shares allocated. China submits that the allocation of all or the vast majority of the TRQs to Brazil and Thailand, with a relatively small "all others" share and no country-specific share allocated to China, does not reflect China's future trade prospects. In this connection, China argues that there are several different violations of paragraph 6. First, China submits that by using reference periods during which Chinese poultry products were subject to SPS measures, the TRQ allocation is not based on a "representative" period within the meaning of paragraph 6. Second, China submits that by basing the TRQ allocation for the Second Modification Package on the 2006-2008 period, the TRQ allocations are not based on "the most recent three-year period" within the meaning of paragraph 6. Third, China argues that the "all others" share for one of the TRQs (tariff line 1602 30 80) is less than that required if EU28 data is used.[441] Fourth, China contends that the absence of any "all others" share for one of the TRQs (tariff line 1602 39 21) violates paragraph 6.[442]

7.289. The European Union submits that Article XXVIII:2 and paragraph 6 regulate the overall value for all Members of the compensation provided, and apply only at the level of the total amount of each TRQ. The European Union submits that Article XXVIII and paragraph 6 of the Understanding do not address or apply to the allocation of TRQs among supplying countries, which is specifically and exhaustively addressed by Article XIII of the GATT. Without prejudice to this position, the European Union submits that China has in any event failed to demonstrate that any of the TRQ allocations are inconsistent with the requirements of paragraph 6.

7.290. The threshold legal issue raised by China's claims is whether Article XXVIII:2 and paragraph 6 of the Understanding apply to the allocation of TRQ shares among supplying countries, as China contends, or merely apply to the total amount of the TRQs, as the European Union contends.

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[439] It is not entirely clear how these figures relate to the figures that China presents in its response to Panel question No. 71(b), para. 26.

[440] China's second written submission, para. 101.

[441] China's response to Panel question No. 29(a), paras. 144-145.

[442] China's response to Panel question No. 29(a), paras. 144-145. China accepts that there were no imports from countries falling under the category of "all others", and that a "technical application of the formulas of Paragraph 6 of the Understanding thus results in zeros, as indicated in Exhibit CHN-49". However, China explains that "even when there were actually no imports during the reference period, the EU is required to create a TRQ that is larger than the trade actually affected, namely larger than zero imports". China's response to Panel question No. 71(c), paras. 27-28.

7.291. Beginning with the text of paragraph 6 of the Understanding, we note that it contains no reference to the shares of a TRQ allocated to certain supplying countries or group of countries. Rather, paragraph 6 refers in the singular to "a tariff rate quota" in its first sentence, and to "the quota" in its second sentence. When read as a whole, paragraph 6 establishes the basis for calculating the total amount of the TRQ. However, China submits that where "a global TRQ" is broken down into what China terms "country-specific TRQs" and what China terms "an 'all others' TRQ", it follows that the provisions of paragraph 6 of the Understanding must be applied "at the level of each TRQ", as well as at the level of "the global TRQ".[443] Thus, China refers to each of the *shares* of a TRQ as a "TRQ" on its own, and refers to each of the TRQs as a "global TRQ". Proceeding on the basis of this terminology, China argues that the use of the singular in relation "a tariff rate quota" and "the quota" actually signifies that the calculations provided for in paragraph 6 should be applied for each of the TRQ shares allocated among supplying countries. In China's view, "it would not make any sense to fix a global TRQ taking into account overall future prospects without taking into account future trade prospects at the level of the separate TRQs in which the global TRQ is broken down", and that to do otherwise "would result in over-compensation for some and under-compensation for others, thereby creating discrimination".[444]

7.292. We are not persuaded by China's interpretation of paragraph 6 of the Understanding. Beginning with the ordinary meaning of the terms used, it is evident that the term "tariff quota" is not the same as a "share" of an allocated tariff quota. China rightly notes that paragraph 6 does not refer to the "total amount of compensation".[445] However, in our view this does not have the implications drawn by China. As discussed above, paragraph 6 refers to "a tariff rate quota" and "the quota", but not to the shares of TRQ allocated among supplying countries. In the absence of any juxtaposition of these different terms in the text of paragraph 6, there would be no need, in the text of paragraph 6, to include such qualifiers as the "global" or the "total" quota, or level of compensation.

7.293. Turning to the context of paragraph 6 of the Understanding, we consider that paragraph 6 can be presumed to use the term "tariff quota" with the same meaning as that term is elsewhere used in the GATT 1994. That includes Article XIII:5 of the GATT 1994, which states that the provisions of Article XIII apply "to any tariff rate quota" instituted or maintained by a Member. We consider that the term "tariff rate quota" cannot, in the context of Article XIII, be used interchangeably with the concept of a "share" of an allocated tariff quota. Article XIII:2(d) distinguishes "a quota" which is allocated among supplying countries from the "shares in the quota" that has been allocated. We note that interpreting the two terms interchangeably in the context of Article XIII:2(d) would lead to the absurd result that any share of a TRQ allocated to one country would then have to be allocated among different supplying countries.

7.294. We consider that Article XXVIII:2 is relevant context for the interpretation of paragraph 6 of the Understanding, given the close relationship between these two provisions. Therefore, we next consider whether the text of Article XXVIII:2 supports the conclusion that if a withdrawing Member allocates a tariff rate quota during Article XXVIII negotiations, "compliance with Article XXVIII:2 requires a comparison at the level of the WTO Members to which the quota was allocated rather than at the global level only".[446] For the reasons that follow, we do not consider that Article XXVIII:2 supports that conclusion.

7.295. 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. This is reinforced by the focus being on whether the compensation maintains a "general level" of concessions not less favourable to "trade", without any further precision.

7.296. China recognizes that the use of the word "general" implies that "what must be done is to aggregate the level of concessions of each WTO Member".[447] However, China points out that the

[443] China's first written submission, para. 137.
[444] China's first written submission, para. 138; China's second written submission, para. 110.
[445] China's response to Panel's question No 29, para. 141.
[446] China's opening statement at the first meeting of the Panel, para. 64.
[447] China's comments on the EU's response to Panel question No. 67, para. 7.

text of Article XXVIII:2 does not simply state that the Member concerned should endeavour to maintain the "general level" of tariff concessions, but refers rather to 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.[448]

7.297. We consider that China's argument seeks to read too much into the term "reciprocal" in Article XXVIII:2. The ordinary meaning of the term "reciprocal" is "[o]f the nature of a return made for something; given, felt, shown, etc., in return", and "[e]xisting on both sides; mutual; (of two or more things) done, made, etc., in exchange".[449] Other provisions of the GATT 1994 refer to "reciprocal and mutually advantageous" concessions and arrangements. Notably, the preamble to both the GATT 1994 and the WTO Agreement recognize the objective of 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.[450] It seems to us that they basically convey the notion of balanced concessions and arrangements. As the Panel in *EC – Chicken Cuts* observed:

> Taken together, the relevant aspects of the WTO Agreement and the GATT 1994 indicate that concessions made by WTO Members should be interpreted so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs. It is also clear that such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous. In other words, the terms of a concession should not be interpreted in such a way that would disrupt the balance of concessions negotiated by the parties.[451]

7.298. In the context of Article XXVIII:2, the use of the term "reciprocal" does not shed any light on whether: (i) the value of the compensation resulting from the negotiations, for each single Member, must be equivalent to the value, for that Member, of the concession prior to its modification or withdrawal, or rather (ii) the value of the overall compensation resulting from the negotiations, for all other Members, must be equivalent to the overall value, for all other Members, of the concession as it existed prior to its modification or withdrawal. The term "reciprocal" can be just as easily understood as referring to the relationship between the Member modifying the concession, on the one side, and all other Members, on the other side, rather than to each of the multiple relationships between the Member modifying the concession and every other Member.

7.299. Continuing with our textual analysis, both parties agree that Article XIII:2 refers specifically to the allocation of TRQs.[452] In our view, Article XIII:2 is therefore also relevant context for the purpose of the interpretation of Article XXVIII:2 and paragraph 6 of the Understanding. Specifically, if 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".[453] 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.

7.300. 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".[454] However, we recall that paragraph 6 contains three different formulae for calculating future trade

[448] China's opening statement at the first meeting of the Panel, para. 64.

[449] *Shorter Oxford English Dictionary*, 5th ed, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2487.

[450] We also note that Article XVII:3 of the GATT 1994 and Article XXVIII*bis* both refer to negotiations on a "reciprocal and mutually advantageous basis" to reduce obstacles to trade.

[451] See Panel Reports, *EC – Chicken Cuts*, para. 7.320.

[452] See e.g. China's response to Panel question No. 29(b), para. 147.

[453] China's first written submission, para. 138; China's second written submission, para. 110.

[454] China's response to Panel question No. 29, para. 143.

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.

7.301. Before concluding, we recall that China stresses that "[t]o be clear, China is not suggesting that a Member is required to allocate among supplying countries the compensation provided in the form of TRQs under Article XXVIII:2 and paragraph 6 of the Understanding". Rather, China clarifies that "in cases where the Member chooses to allocate or break down the total compensation among supplying countries and records the shares of the compensation of various supplying countries as part of its modification of the concessions, the compensation is provided not only at the global level, but also at the level of each supplying country or group of countries".[455] However, we do not understand the basis for the distinction that China draws between how Article XXVIII:2 would apply to assessing the adequacy of the value of compensation in the form of a TRQ that is not allocated among supplying countries, and how Article XXVIII:2 would apply to assessing the adequacy of the value of compensation in the form of a TRQ allocated among supplying countries. If Article XXVIII:2 is interpreted to require that the value of the compensation resulting from the negotiations for each single Member be equivalent to the value for that Member of the concession prior to its modification or withdrawal, then that general principle would apply irrespective of the form of the compensation. A global TRQ that is not allocated among supplying countries would therefore be subject to that same principle. In this regard, we do not consider that, in a situation where a Member replaces an unlimited tariff concession with a TRQ that is not allocated among supplying countries, the value of that compensation for each single Member would necessarily be equivalent to the value, for that Member, of the concession prior to its modification or withdrawal.

7.302. Based on the foregoing, we conclude that Article XXVIII:2 and paragraph 6 of the Understanding do not apply to the allocation of TRQ shares among supplying countries. Therefore it is not necessary to consider China's claims relating to the allocation of TRQ shares further. In any event, we note that China's claims of violation relating to the allocation of the TRQs are to some extent based on the same grounds as its claims relating to the total amount of the TRQs. Accordingly, we reject China's claims that the European Union acted inconsistently with Article XXVIII:2 read in conjunction with paragraph 6 of the Understanding by allocating the TRQs among supplying countries in a manner that does not reflect China's "future trade prospects".

7.5.4 Conclusion

7.303. The Panel finds that China has failed to demonstrate that the tariff rates and the TRQs negotiated and implemented by the European Union are inconsistent with Article XXVIII:2, read in conjunction with paragraph 6 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994, by failing to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that existing prior to the modification.

7.6 Claims under Article XIII:2(d) of the GATT 1994

7.6.1 Introduction

7.304. China claims that by allocating "all or the vast majority of the TRQs to two of the WTO Members" (i.e. Brazil and Thailand), the European Union acted inconsistently with Article XIII:2(d) of the GATT 1994.[456] According to China, it had a "substantial interest in supplying the product concerned", and the European Union therefore violated Article XIII:2(d) because it failed to seek agreement with all WTO Members having a substantial interest in supplying the product concerned, and did not allocate to all such Members shares based upon the proportions supplied

[455] China's opening statement at the second meeting of the Panel, para. 42.

[456] China's first written submission, paras. 223-252; China's opening statement at the first meeting of the Panel, paras. 109-112; China's responses to Panel question Nos. 41-42; China's second written submission, paras. 172-175; China's opening statement at the second meeting of the Panel, paras. 76-81; parties' responses, and comments on one another's responses, to Panel question Nos. 69, 72-74, 106-109, 111-120.

by them during a previous representative period, due account being taken of any special factors which affected the trade in the product.

7.305. China argues that all of the determinations under Article XIII:2 must be based on a "previous representative period", taking due account of "special factors which may have affected or may be affecting the trade in the product", including not only the allocation of TRQ shares vis-à-vis substantial suppliers under Article XIII:2(d) in accordance with the second sentence of Article XIII:2(d), but also the initial, threshold determination of which Members have a "substantial interest" in supplying the products concerned under Article XIII:2(d). In this case, China argues that the reference periods upon which the European Union made those determinations were not "representative", and that China's reduced ability to export as a result of import bans due to SPS measures, as well as its increased ability to export after the relaxation of the SPS measures in July 2008, were "special factors" that had to be taken into account. With respect to both the First and Second Modification Packages, China claims that the European Union should have determined that China was a substantial supplier and sought an agreement with China on the TRQ share allocations based on an estimate of the share of imports that China would have had in the absence of the SPS measures that restricted Chinese poultry imports over the reference periods used. With respect to the Second Modification Package, China additionally claims that the European Union was obligated to seek an agreement with China on the TRQ share allocations taking into account the increase in poultry imports from China over the 2009-2011 period, which China considers to be the most recent three-year period preceding the determination of the TRQs.

7.306. The European Union responds that China's claims rest on an incorrect interpretation of Article XIII:2(d).[457] Regarding the determination of which Members are substantial suppliers for the purpose of Article XIII:2(d), the European Union submits that there is no reason for interpreting the term "substantial interest" differently in the context of Article XXVIII:1 and Article XIII:2, especially in cases where the negotiations on the total amount of the TRQs pursuant to Article XXVIII take place concurrently with the negotiations on the allocation of those same TRQs pursuant to Article XIII:2(d). In addition to questioning whether consideration of "special factors" is required when determining which Members are substantial suppliers under Article XIII:2(d), the European Union considers that the SPS measures mentioned by China are not "special factors" within the meaning of Article XIII:2(d), and that the European Union was therefore under no obligation to determine which Members held a substantial supplying interest on the basis of an estimate of what China's share of imports into the European Union would have been in the absence of the SPS measures. The European Union also rejects China's claim that, in respect of the Second Modification Package, it was required to determine which Members held a substantial supplying interest based on more recent data regarding imports over the period 2009-2011.

7.6.2 Relevant provisions

7.307. China advances separate claims of violation under the chapeau of Article XIII:2, and under Article XIII:2(d). The chapeau of Article XIII:2 provides that:

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

7.308. The provisions that follow include paragraphs (a) through (d) of Article XIII:2. Of relevance to the present case is paragraph (d), which clarifies how the chapeau of Article XIII:2 is to be complied with as regards WTO Members that hold a "substantial interest" in supplying the product concerned. Article XIII:2(d) states:

> In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with *all other Members having a substantial interest* in supplying the product

[457] EU's first written submission, paras. 278-287; EU's opening statement at the first meeting of the Panel, paras. 20-25; EU's responses to Panel question Nos. 39, 42; EU's second written submission, paras. 163-176; EU's opening statement at the second meeting of the Panel, paras. 97-99; parties' responses, and comments on one another's responses, to Panel question Nos. 69, 72-74, 106-109, 111-120.

> concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during *a previous representative period*, of the total quantity or value of imports of the product, due account being taken of *any special factors which may have affected or may be affecting the trade in the product*. No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate. (emphasis added)

7.309. In *EC – Bananas III (Art. 21.5 – Ecuador II)* / *EC – Bananas III (Art. 21.5 – US*), the Appellate Body clarified that Article XIII:2(d) is a permissive "safe harbour" insofar as substantial suppliers are concerned. However, the Appellate Body explained that even where a TRQ is allocated among supplying countries in accordance with Article XIII:2(d), that allocation must also respect the requirement in the chapeau of Article XIII:2 vis-à-vis non-substantial suppliers (i.e. countries not recognized as having a "substantial interest" in supplying the product concerned). The Appellate Body stated:

> The provisions of Article XIII:2(a)-(d) are specific instances of authorized forms of allocation when a Member chooses to allocate shares of the tariff quota. Article XIII:2(d) allows for the case where a quota is allocated among supplying countries, either by way of agreement or, where this is not reasonably practicable, by allotment to Members having a substantial interest in supplying the product concerned, and in accordance with the proportions supplied by those Members during a previous representative period, taking due account of "special factors". In other words, Article XIII:2(d) is a permissive "*safe harbour*"; compliance with the requirements of Article XIII:2(d) is presumed to lead to a distribution of trade as foreseen in the chapeau of Article XIII:2, *as far as substantial suppliers are concerned*.[408]
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> ———————————
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> [408] If a Member allocates quota shares to Members with a substantial interest in supplying the product, in accordance with Article XIII:2(d), *it must also respect the requirement in the chapeau of Article XIII:2* — that distribution of trade approach as closely as possible the shares that Members may be expected to obtain in the absence of the restriction. This is usually done by allocating a share to a general "others" category for all suppliers other than Members with a substantial interest in supplying the product.[458] (emphasis added)

7.310. The second sentence of Article XIII:2(d) refers to "special factors".[459] An Ad Note that applies to both Article XI and XIII of the GATT 1994 states that the term "includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement".[460] Another Ad Note that is specific to Article XIII:2(d) clarifies that no mention was made of "commercial considerations" as a rule for the allocation of quotas because "it was considered that its application by governmental authorities might not always be practicable", and because "in cases where it is practicable, a Member could apply these considerations in the

[458] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)* / EC – *Bananas III (Article 21.5 – US)*, para. 338 and fn 408.

[459] The term is also found in several other provisions of the covered agreements, including Article XI:2(c) of the GATT 1994 (providing that "the Member shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned"); Article XII:2(a) and Article XVIII:9 of the GATT 1994 (both providing that "[d]ue regard shall be paid in either case to any special factors which may be affecting the reserves of such Member"); Article XVI:3 of the GATT 1994 (referring to "account being taken of the shares of the Members in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product"). Article 5.2(a) of the Agreement on Safeguards refers, reiterates the relevant portion of the second sentence of Article XIII:2(d), including the reference to "special factors".

[460] The Ad Note applies to the term "special factors" in Article XI:2, but applies to Article XIII:2(d) and Article XIII:4 by virtue of an Ad Note to Article XIII:4 that cross-references the Ad Note to Article XI:2.

process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2".

7.311. By its own terms, Article XIII:2(d) provides that a Member seeking to allocate a TRQ among supplying countries may seek agreement with respect to the allocation of shares in the quota "with all other Members" having a substantial interest in supplying the product concerned. In *EC – Poultry*, the Appellate Body confirmed that for a TRQ allocation to be in conformity with the first method set forth in Article XIII:2(d), the Member concerned cannot enter into agreements with some substantial suppliers and not others. In that case, the Appellate Body found that:

> To conform to Article XIII:2(d), all other Members having a "substantial interest" in supplying the product concerned would have to agree. That is not the case here. As the European Communities did not seek an agreement with Thailand, the other contracting party having a substantial interest in the supply of frozen poultry meat to the European Communities at that time, the Oilseeds Agreement cannot be considered an agreement within the meaning of Article XIII:2(d) of the GATT 1994.[461]

7.6.3 Analysis by the Panel

7.312. Turning to the issues in dispute, we understand China's claims under Article XIII:2(d) to rest on two different grounds, raising the following issues. First, whether the European Union was obliged to determine which Members held a "substantial interest" on the basis of an estimate of what import shares would have been in the absence of the SPS measures. Second, whether the European Union was obliged to determine which Members held a substantial supplying interest taking into account changes in import shares that occurred in the course of the negotiations under the Second Modification Package concurrently addressing the total amount of the TRQs and their allocation among supplying countries.

7.6.3.1 Separate analysis of China's claims under Article XIII:2(d) and the chapeau of Article XIII:2

7.313. In this case, China has advanced one set of claims of violation under Article XIII:2(d), and another set of parallel claims of violation under the chapeau of Article XIII:2. These appear to be claims in the alternative, insofar as China's claims under Article XIII:2(d) are directed at establishing that it was a Member with a substantial supplying interest, whereas its claims under the chapeau of Article XIII:2 are premised on the assumption that "it was not WTO Member with an SSI".[462]

7.314. The parties have presented their argumentation in respect of these two sets of claims in separate sections of their first and second written submissions, notwithstanding that there is a substantial degree of overlap between China's claims and the parties' arguments under Article XIII:2(d) and the chapeau of Article XIII:2. China has clarified that its claim that the European Union was under an obligation to allocate an "all others" share of at least 10% within each of the TRQs under the First and Second Modification Packages is relevant only to China's claims under the chapeau of Article XIII:2. However, it would appear that China's other claims under the chapeau of Article XIII:2 rest on the same supporting arguments as its claim that it had a "substantial interest" within the meaning of Article XIII:2(d).[463] The overlap between China's arguments under these provisions derives from the fact that, in China's view, there is significant overlap between the legal standards that apply under paragraph (d) and the chapeau of Article XIII:2. In particular, China considers that the European Union was required to determine which Members had a "substantial interest" within the meaning of Article XIII:2(d) based on a previous "representative" period, taking due account of "special factors which may have affected or may be affecting the trade in the product", and that the same legal standards apply in the context of the chapeau of Article XIII:2 when determining the amount of the TRQ share to be allocated to "all others".

[461] Appellate Body Report, *EC – Poultry*, para. 93.
[462] China's second written submission, para. 144.
[463] The Panel asked China to clarify whether its China's claim under the chapeau of Article XIII:2 rests on the same argument as its claim that it had a "substantial interest" within the meaning of Article XIII:2(d). China responded that "[t]he argument in Section IV-B-3-b is the same as that under Article XIII:2(d)" (China's response to Panel question No. 41(b), para. 173).

7.315. Notwithstanding the substantial degree of overlap between China's claims and the parties' arguments under Article XIII:2(d) and the chapeau of Article XIII:2, we shall address these claims separately, in the same manner as the parties have in their submissions.

7.6.3.2 Relevance of "special factors" to the determination of which Members hold a "substantial interest" within the meaning of Article XIII:2(d)

7.316. An important interpretative issue that arises in connection with China's claim under Article XIII:2(d) is whether consideration of "special factors" is relevant to the determination of which WTO Members hold a substantial interest under Article XIII:2(d).

7.317. We recognize that the text of the first sentence of Article XIII:2(d) does not explicitly state that "special factors" must be taken into account for that purpose. However, in our view this does not imply that "special factors" can be ignored in the context of determining which Members hold a substantial supplying interest. If that were the case, then following that same logic, the determination of which Members hold a substantial supplying interest would also not need to be based on a "previous representative period", because this legal criterion, like "special factors", is only referred to explicitly in the second sentence of Article XIII:2(d).

7.318. Furthermore, we can see no reason why Article XIII:2(d) would establish a legal obligation to take due account of "special factors" only when unilaterally allocating the shares of a TRQ among WTO Members having a "substantial interest" in supplying a product, but not in the initial, threshold determination of which Members hold a substantial supplying interest under the first sentence of Article XIII:2(d). We consider that the explicit reference to a "previous representative period" and "special factors" in the second sentence of Article XIII:2(d) can be explained by the need to "set the minimum standards for the determination of the TRQs if no negotiations are held", and that Article XIII:2(d) "assumes that, where there are negotiations, the negotiating WTO Members with [substantial supplying interests] will defend their interests and make certain that special factors are taken into account for the determination of the TRQs".[464]

7.319. In addition, we consider that Article XIII:4 offers some contextual support for the view that consideration of "special factors" is relevant to the determination of which Members hold a "substantial interest" for the purpose of the first sentence of Article XIII:2(d). As elaborated later in our Report in the course of addressing China's claim of inconsistency with Article XIII:4, we conclude that Article XIII:4 applies to both the first and second sentences of Article XIII:2(d).[465] The obligation in Article XIII:4 relates to the subsequent "reappraisal" of the "special factors" involved. This implies that consideration of "special factors" cannot be ignored in the initial appraisal of which Members hold a "substantial interest" for the purpose of the first sentence of Article XIII:2(d).

7.320. The European Union argues that that there is no reason to interpret the notion of a "substantial interest" in different ways in Article XXVIII and Article XIII.[466] To be clear, we are not suggesting that the meaning of the terms "substantial interest" in the context of Article XIII:2(d) should be interpreted without regard to the parallel determination that must be made in the context of Article XXVIII negotiations. We consider that the need for a harmonious interpretation is particularly important taking into account the existence of situations where, as in the present case, negotiations on the total amount of the TRQs under Article XXVIII occurs simultaneously with negotiations on the allocation of the TRQs under Article XIII:2(d).[467] Thus, we consider that these two provisions should be interpreted harmoniously.

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[464] China's second written submission, para. 174.

[465] See paragraph 7.464.

[466] EU's first written submission, paras. 279-283. In its response to Panel question No. 118(a), the European Union agrees that although the first sentence of Article XIII:2(d) does not make any reference to "special factors", "a method that disregards special factors affecting any of the suppliers of a given product would not be objective as it would be biased against the suppliers affected by those factors and in favour of the others". In its comments on the EU's response to Panel question No. 118(a), China sets forth its understanding that "it is not disputed between China and the EU that special factors should be taken into account in determining which Members are "'substantial suppliers"' under the first sentence of Article XIII:2(d)".

[467] At paragraph 33 of its third-party written submission, Canada observes that "[i]f Article XXVIII is being used, it is very likely that allocation under Article XIII will occur coincident with the establishment of a TRQ under Article XXVIII."

7.321. More specifically, we consider that a determination of which Members hold a principal or substantial supplying interest under Article XXVIII based on trade statistics for the last three-year period preceding the notification of the intention to modify concessions, in accordance with paragraph 4 of the Procedures for Negotiations under Article XXVIII, would generally satisfy the requirement, in Article XIII:2(d), that the determination be based on a "previous representative period". Furthermore, there are the attractions of methodological ease and consistency in using a 10% import share benchmark as the means of determining "substantial interest" in Article XIII as has been done in the context of Article XXVIII.[468] In this regard, China stated that it "does not consider that it is an *ipso facto* violation of Articles XXVIII and XIII for a member to use the 10% threshold to determine SSI status".[469] In these and other respects, we consider that the determination of which Members hold a "substantial interest" under Article XIII:2(d) may generally rely on the determination that has been made in the context of Article XXVIII.

7.322. However, in the context of Article XIII:2, we consider that the determination of which Members hold a "substantial supplying interest" under Article XIII:2(d) must be supplemented by the cumulative consideration of whether there are "special factors" within the meaning of Article XIII:2. In our view, this reading seeks a harmonious interpretation and application of Article XIII:2 and Article XXVIII, and at the same time gives due regard to the particular legal standards reflected in the text of the provisions concerned.

7.6.3.3 Whether different reference periods can be used for the determinations under Article XXVIII:1, Article XXVIII:2, and Article XIII:2(d)

7.323. China's claims under Article XIII:2(d) are founded on the same two horizontal arguments that we have already considered in the context of examining China's claims under Article XXVIII:1, and also in the context of examining China's claims under Article XXVIII:2 and paragraph 6 of the Understanding. First, we understand China to argue that, in respect of both the First and Second Modification Packages, the European Union was obligated to estimate what import shares into the European Union would have been in the absence of the SPS measures restricting poultry imports from China. Second, we understand China to argue that, in respect of the Second Modification Package, the European Union was required to base its determinations on actual imports from the most recent three-year reference period prior to the conclusion of the negotiations. China considers that the negotiations concluded when the European Union notified Members of the same in December 2012, and therefore in its view the determinations under Article XIII:2(d) should have used 2009-2011 as the reference period.

7.324. China has claimed that the European Union violated Article XXVIII:1 and Article XXVIII:2 on essentially the same grounds. We have already rejected China's claims under Article XXVIII:1, finding that the European Union was free to determine which Members held a principal and substantial supplying interest in the First and Second Modification Packages on the basis of actual imports into the European Union over the three-year period preceding the European Union notification of its intention to modify concessions under Article XXVIII (i.e. 2003-2005 and 2006-2008). We have also rejected China's claims under Article XXVIII:2 and paragraph 6 of the Understanding, again finding that the European Union was free to determine the total amount of the TRQs in the First and Second Modification Packages on the basis of actual imports into the European Union over the three-year period preceding the European Union notification of its intention to modify concessions under Article XXVIII (i.e. 2003-2005 and 2006-2008).

7.325. However, we do not consider that the conclusions that we have reached in relation to China's claims under Article XXVIII:1 and Article XXVIII:2 are necessarily dispositive of China's claims under Article XIII:2(d). The reason is that each of these provisions contains its own applicable legal standard, as elaborated in the different terms used in each provision. In addition, each of these provisions applies to a different subject. The subject-matter of China's claims under Article XXVIII:1 is the reference period used to determine which Members hold a principal or substantial supplying interest for the purpose of entering into negotiations or consultations under Article XXVIII. This is distinct from the subject-matter of China's claims under Article XXVIII:2 and

[468] Canada's third-party written submission, para. 35. We note that the panel in *EC-Bananas III* (Ecuador) found the approach of the European Union in that case (to interpret this language in conformity with Ad Article XXVIII:1 paragraph 7 and the 10% rule developed in that context) to be reasonable(Panel Report *EC-Bananas III (Ecuador)*, para. 7.83-7.85).

[469] China's response to Panel question No. 68(a).

paragraph 6 of the Understanding, which is the reference period used to determine the total amount of the TRQs. Both of the foregoing are distinct from the subject-matter of China's claims under Article XIII:2(d), which is the reference period used to determine which Members held a "substantial interest" in supplying the products at issue for the purpose of determining the allocation of the TRQ shares among supplying countries.

7.326. Accordingly, having found that the European Union was free to base its determinations under Article XXVIII:1 and Article XXVIII:2 on actual imports over the reference periods that it selected for that purpose (2003-2005 and 2006-2008), we cannot *a priori* exclude the possibility that the European Union might have been obligated to allocate the TRQ shares among supplying countries on the basis of a different reference period taking into account the particular legal standards that apply in the context of Article XIII:2(d). Specifically, we do not exclude *a priori* that a different reference period could be used for the different determinations, insofar as that conclusion would be warranted on the basis of the legal standard that applies under Article XIII:2(d).

7.327. We are presented with a number of arguments that are specific to the legal standards that apply under Article XIII:2, and in particular the notion of "special factors which may have affected or may be affecting the trade in the product". Some of the arguments presented by the parties in relation to China's claims under Article XIII:2 reiterate arguments that were also advanced, and that we have already addressed, in the context of addressing China's claims under Article XXVIII:1 and Article XXVIII:2 and paragraph 6 of the Understanding. To avoid addressing the same arguments multiple times, our analysis of China's claims under Article XIII:2(d) will focus on those arguments and interpretative elements that are specific to Article XIII:2, and that we have not already addressed in the context of our findings under Article XXVIII:1 and Article XXVIII:2.

7.6.3.4 Whether the European Union was obliged to determine which Members were substantial suppliers based on an estimate of what their import shares would have been in the absence of the SPS measures

7.328. China claims that where SPS import bans are imposed, the period of application of these import bans cannot be used as a previous "representative" period for the purpose of determining which Members have a "substantial interest" in supplying that product. In addition, China argues that "its reduced ability to export as a result of import bans due to SPS measures" was a "special factor that affected trade in the products" concerned, and that had to be taken into account by the European Union. With respect to both the First and Second Modification Packages, we understand China to claim that the European Union acted inconsistently with Article XIII:2(d) by not determining which Members held a substantial supplying interest on the basis of an estimate of the share of imports that China would have had in the absence of the SPS measures.

7.329. As we understand it, China's contention is that the European Union was obligated to estimate what other Members' poultry import shares into the European Union would be without any of the SPS measures on Chinese poultry imports, at a time when those SPS measures were still in force, and then determine that China held a "substantial interest" on the basis of that counterfactual estimate. We understand this contention to be distinct from China's additional claim, which we address in the next subsection, that the European Union was obliged to determine which Members held a substantial interest taking into account changes in import shares into the European Union in some poultry products after those SPS measures were relaxed in July 2008. We will analyse China's contention first in the light of the notion of a "previous representative period", and then in the light of the concept of "special factors".

7.330. We understand China's view to be that for a period to be "representative" within the meaning of Article XIII:2, the "period cannot be affected by an import ban".[470] We agree with China that the European Union was obliged to base its determinations under Article XIII:2(d) on a "previous representative period". We also consider that the existence of one or more import restrictions during the reference period selected for the purpose of Article XIII:2(d) could, depending on the facts of a case, warrant the conclusion that the reference period selected might not be "representative". The GATT panel report in *EEC – Apples I (Chile)* supports this understanding. When considering the representative period for the imposition of quantitative restrictions, the years 1975, 1977 and 1978 were taken into account by the panel, while 1976 was

[470] China's first written submission, para. 252.

excluded because it was not "representative" as voluntary restraint agreements with the EEC were in effect at that time. In these circumstances, the panel stated:

> Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977 and 1978 as a "representative period".[471]

7.331. Likewise, we note that the panel in *EC – Bananas III (Art. 21.5 – Ecuador)* considered that a period during which some EC member States applied "import restrictions or prohibitions" could not serve as a previous representative period.[472]

7.332. However, we do not read either of these prior reports to say that the existence of any import restrictions during a previous period means that *ipso facto*, such a period cannot be "representative". Thus, we do not agree with the sweeping conclusion that for a period to be "representative" within the meaning of Article XIII:2, the "period cannot be affected by an import ban".[473] Our reasons are as follows.

7.333. Firstly, it appears that the import restrictions in question in both of these previous cases may have included WTO-inconsistent measures. In this regard, we recall that in *EEC – Apples (Chile I)*, the restrictions were described as "voluntary restraint agreements". In the present case, China is not challenging the consistency of the SPS measures with any provision of the covered agreements.[474] Moreover, we have found that the SPS measures were not "discriminatory quantitative restrictions" within the meaning of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1. Accordingly, the present case is one in which the import restrictions that were maintained during the reference periods must be presumed to be WTO-consistent. In our view, there is nothing unusual about Members maintaining measures that may, directly or indirectly, affect the importation of certain products. It follows, for the purpose of calling into question the representativeness of the period selected, that a relevant consideration would be whether those measures are WTO-consistent or not.

7.334. Secondly, if it were the case that the existence of any import restriction during a previous period meant that *ipso facto* such a period cannot be considered "representative" for the purpose of Article XIII:2, we would expect this limitation to be reflected in some way in the text of Article XIII:2, just as the concept of "discriminatory quantitative restrictions" is explicitly mentioned in the context of Article XXVIII. However, Article XIII:2(d) contains only a reference to a "previous representative period", with no such qualification. While the chapeau of Article XIII:2 refers to "the shares which the various Members might be expected to obtain in the absence of *such restrictions*", when applied to a tariff rate quota, this means the shares which the various Members might be expected to obtain in the absence of the tariff rate quota. In other words, the chapeau refers to "such restrictions", and not to import restrictions in general.

7.335. Thirdly, whether the existence of certain import restrictions over a period means that the period is one that is not "representative" depends on the particular factual circumstances of a case. In the present case, it is not in dispute that all tariff items at issue were prohibited or restricted before and after the period 2002-2008, when importation of all Chinese poultry products was prohibited.[475] It appears that EU imports from China under all of the tariff lines at issue had been at 0% or negligible levels over the 1999-2002 period, and that EU imports from China under a number of the tariff lines at issue were still prohibited as a consequence of the heat treatment measure, until 2015 at least.[476] From this perspective, we are not persuaded by the argument that the existence of the SPS measures in place during the reference periods 2003-2005 and 2006-2008 means that these periods were, in the circumstances of this case, not "representative".

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[471] Panel Report, *EEC – Apples I (Chile)*, para. 4.8.
[472] Panel Report, *EC – Bananas III (Art. 21.5 – Ecuador)*, para. 6.42.
[473] China's first written submission, para. 252.
[474] China's first written submission, para. 31. See also China's opening statement at the first meeting of the Panel, para.5; China's second written submission, paras. 42, 46; China's response to Panel question No. 6, para. 23; China's response to Panel question No. 81, para. 43).
[475] See section 7.2.3 above.
[476] See the import statistics in section 7.2.4 above.

7.336. We turn now to the concept of "special factors". China contends that by using a reference period that was tainted by the existence of import prohibitions due to the SPS measures, the European Union did not base its determinations of which Members held a substantial supplying interest, or the TRQ allocation, taking due account of "special factors which may have affected or may be affecting the trade in the product". According to China, the "special factor" in this regard was "the reduced ability to export as a result of import bans due to SPS measures".[477]

7.337. In this respect, we find it difficult to characterize the SPS measures as such as "special factors", insofar as they apply equally to imports from all Members in the same situation.[478] As already noted, in our view, there is nothing unusual about Members applying WTO-consistent measures which may, directly or indirectly, affect the importation of certain products. It is not in dispute that "the reduced ability to export as a result of import bans due to SPS measures" was the result of the determination that Chinese poultry producers had not complied with the applicable SPS measures maintained by the European Union. We have some difficulty with the notion that a Member setting a TRQ would need to make allowance for import restrictions arising from foreign producers' non-compliance with applicable SPS measures.

7.338. In our view, the Ad Note to Article XIII:2(d) is relevant context to the interpretation of the concept of "special factors" in Article XIII:2. The Ad Note clarifies that:

> No mention was made of "commercial considerations" as a rule for the allocation of quotas because it was considered that its application by governmental authorities *might not always be practicable*. Moreover, in cases where it is *practicable*, a Member could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2. (emphasis added)

7.339. The ordinary meaning of the word "practicable" is "[a]ble to be put into practice; able to be effect, accomplished or done; feasible".[479] The Ad Note makes clear that in requiring that due account be taken of "special factors", but including no mention of "commercial considerations", the intention was to avoid establishing a rule for the allocation of quotas whose application "might not always be practicable". The Ad Note clarifies that commercial considerations could be applied "where it is practicable" in the process of seeking agreement. Likewise, Article XIII:2(d) provides that a Member seeking to allocate a TRQ among supplying countries may seek agreement with all Members holding a substantial supplying interest, but has the right to unilaterally allocate the TRQ among substantial suppliers in cases where allocation by agreement is not reasonably "practicable".

7.340. We consider that the Ad Note to Article XIII:2(d), and the text of that provision itself, convey that the rules governing the allocation of TRQs among supplying countries should not be interpreted in a manner that would establish requirements that governmental authorities cannot put into practice, or which are otherwise not feasible. This mirrors the objective, expressed in the text of paragraph 4 of the Ad Note to Article XXVIII:1, of ensuring that negotiations and agreement under Article XXVIII are not "unduly difficult" and that "complications in the application of this Article" are avoided.[480]

7.341. In our view, treating the SPS measures that were in place over the 2003-2005 and 2006-2008 periods as "special factors" would result in a rule for the allocation of the TRQs that is not practicable. The reason is that estimating what poultry imports would be without any of the SPS measures affecting Chinese poultry imports would be an extremely complex task involving the use of highly speculative estimates.[481] Under such an approach, the European Union would have been obligated to take into account not only the range of SPS measures that applied to China and which are of concern to China (including the residues measure, the avian influenza measure, and

[477] China's response to Panel question No. 119, para. 108.
[478] EU's first written submission, para. 232.
[479] *Shorter Oxford English Dictionary*, 5th ed, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2309.
[480] See the import statistics in section 7.2.4 above.
[481] EU's first written submission, para. 131; EU's second written submission, para. 29

the heat treatment measure), but also the SPS measures applied to many other WTO Members and, more generally, for its entire sanitary regime applied to imports of poultry products.[482]

7.342. Furthermore, we note that imports of all of the poultry products under the First Modification Package were still prohibited at the time of the allocation of the TRQs among supplying countries, and it appears that imports of a majority of the products under the Second Modification Package remained prohibited at the time of the allocation as well.[483] Therefore, accepting China's interpretation of Article XIII:2(d) would lead to the result that the European Union was obliged to recognize China as a substantial supplier of poultry products that China was prohibited from exporting to the European Union, obliging the European Union to seek agreement with China on the TRQ allocation in respect of such products, and ultimately allocating an unusable country-specific share of the TRQs for such products to China, reducing the size of the shares allocated to imports from other sources. Alternatively, the European Union would have been obliged to increase the amount of the "all others" share to reflect the amount that China would be able to export, if and when the import restrictions affecting poultry imports from China under those tariff lines were removed.

7.343. Based on the foregoing, we find that China has not demonstrated that the European Union acted inconsistently with Article XIII:2(d) by determining which countries had a substantial interest in supplying the products concerned on the basis of their actual share of imports into the European Union, rather than on the basis of an estimate of what import shares into the European Union would have been in the absence of the SPS measures restricting poultry imports from China.

7.6.3.5 Whether the European Union was obliged to determine which Members were substantial suppliers taking into account changes in import shares following the initiation of the negotiations on TRQ allocation

7.344. With respect to the Second Modification Package, we understand China to claim that the European Union acted inconsistently with Article XIII:2(d) by not recognizing that China was a substantial supplier, and seeking an agreement with China on the TRQ allocation, on the basis of changes in import shares over the period 2009-2011.

7.345. We understand this second claim to rest on two different lines of argument. First, we understand China to argue that, as a general rule, Article XIII:2(d) requires that the determination of which Members hold a "substantial interest" must always be based on a reference period closely preceding the entry into force of the TRQ. Second, we understand China to argue that, in the particular circumstances of this case, China's increased ability to export after the relaxation of the SPS measures in July 2008 was a "special factor" that had to be taken into account by the European Union when making its determination of which Members held a "substantial interest" in supplying the products at issue.

7.346. We consider that China's claims and the arguments of the parties raise several issues, which we will proceed to examine in turn. We will begin by examining whether, as a general rule, Article XIII:2(d) requires that the determination of which Members hold a substantial interest in supplying the products concerned must always be based on a period immediately preceding the entry into force of the TRQ in situations where, as in a case like the present one, there is a period of several years between the initiation of the negotiations with substantial suppliers aimed at allocating the TRQs, and the subsequent entry into force of the TRQ. If we conclude that there is no such rule requiring the use of the most recent three-year period prior to the entry into force of the TRQs, we will then consider whether, in the particular circumstances of this case, China's increased ability to export following the relaxation of the SPS measures in July 2008 was a "special factor" within the meaning of Article XIII:2. If we conclude that China's increased ability to export following the relaxation of the SPS measures in July 2008 was a "special factor", we will then proceed to examine whether the European Union was obligated to take into account the increased

[482] EU's response to Panel question No. 74(a), para. 23. The European Union also stated in its response to Panel question No. 74, para. 29, that "if China's interpretation is followed, that type of estimate will be far more complicated and speculative, because of the very large number of factors that could have to be controlled for: not just for WTO inconsistent measures, but any SPS measure or any other regulatory requirements that may have the effect of restricting imports from certain countries".

[483] After the relaxation of the SPS measures in July 2008, "uncooked" poultry products remained prohibited as a consequence of the heat treatment. See paragraphs 7.85 and 7.91-7.93.

imports of Chinese poultry products over the period 2009-2011 on its own initiative and in the absence of any related request by China until May 2012 and, on the basis of those increased imports, have recognized China as a substantial supplier in respect of any of the TRQs at issue in the Second Modification Package.

7.347. Beginning with the first issue, China submits that the European Union was required to base its determination under Article XIII:2(d) on a reference period preceding the entry into force of the TRQs, and in China's view that reference period was the period 2009-2011 for the Second Modification Package.[484] China considers that the existence of a general rule requiring the use of the most recent data that becomes available in the course of the negotiations is supported by the chapeau of Article XIII:2, which requires that the allocation of a TRQ must aim at a distribution of trade in such product "approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of" the allocation. In China's view, the trade in the period immediately preceding the TRQ allocation provides an objective basis to measure the shares Members might be expected to obtain in the absence of the TRQ. China finds additional support for its interpretation of Article XIII:2 in the statement by the panel in *US – Line Pipe* that "trade flows *before the imposition* of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure".[485] In addition, China notes that the GATT panel in *EEC – Apples (Chile I)* considered appropriate to use as a "representative period" a three-year period previous to 1979, "the year in which the EEC measures *were in effect*".[486]

7.348. We recall that in the present case, in June 2009 the European Union notified Members of its intention to modify certain tariff concessions under Article XXVIII, accompanied by statistics on imports from other Members for the last three years (2006-2008) in accordance with the Procedures for Negotiations under Article XXVIII. Following the EU notification in 2009, Thailand and Brazil each claimed a principal or substantial supplying interest in the concessions at issue in the Second Modification Package. The European Union entered into negotiations with Brazil and Thailand, and following five rounds of negotiations, reached agreement with Thailand and Brazil on both the total amount of the TRQs, and the allocation of the TRQs among supplying countries. According to the European Union, negotiations at negotiators' level were concluded with Brazil and Thailand in September 2011.[487] The draft agreements with Thailand and Brazil were initialled on 22 November 2011 and 7 December 2011, respectively. This was followed by approval of the bilateral agreements by each party in accordance with its internal procedures. The TRQs ultimately entered into force in March 2013. Thus, there was a period of several years in between the initiation of the negotiations with substantial suppliers in 2009, and the subsequent entry into force of the TRQs.

7.349. Beginning with the text of Article XIII:2(d), we consider that if the drafters intended for a general rule requiring the use of the most recent data that becomes available in the course of the negotiations to apply to the determination of which Members hold a "substantial interest", then *a fortiori* that same rule would also apply to the allocation of TRQs among substantial suppliers in cases falling under the second sentence of Article XIII:2(d). However, the second sentence of Article refers only to "a previous representative period", and does not specify that such period must precede the opening of the TRQs. In addition, the reference to "a" previous representative period in Article XIII:2(d) implies that there is no general rule that applies in all cases regarding the selection of the reference period.[488] Furthermore, Article XIII:4 envisages the "the selection of

[484] China's first written submission, paras. 198, 248. In its response to Panel question No. 107(a), para. 97, China explains that "[i]n the context of Article XIII, the reference period for the initial allocation in the first quota year should be a period preceding the entry into force of the TRQ. It is acknowledged that the importing Member needs some time to determine the allocation and to make necessary arrangement for the implementation, and therefore the reference period should not necessarily be a period immediately preceding the entry into force of the TRQ, to the extent '"immediately"' means one day or very few days." We note that the TRQs under the Second Modification Package entered into force in March 2013. Accordingly, if the use of a reference period immediately preceding the entry into force is required, this would be the period 2010-2012, and not 2009-2011.

[485] Panel Report, *US – Line Pipe*, para. 7.55. (emphasis added)

[486] GATT Panel Report, *EEC – Apples (Chile I)*, para. 4.8. (emphasis added)

[487] See footnote 128 above.

[488] By way of analogy, we note that in *Argentina – Poultry Anti-Dumping Duties*, the panel considered the requirement, in Article 2.4.2 of the Anti-Dumping Agreement, that the existence of margins of dumping shall normally be established on the basis of a comparison of "*a* weighted average normal value with a weighted average of prices of exports". The Panel stated that "Article 2.4.2 refers to a weighted average

a representative period" being made "initially" by the importing Member, subject to reappraisal. The clear implication is that there is no general rule, applicable to all cases, regarding the reference period that must be used for the purpose of Article XIII:2(d).

7.350. Turning to the wider context of Article XIII, we recall that we have already found that a Member is entitled to base its determinations under Article XXVIII:1 and Article XXVIII:2 on a reference period covering the three years preceding the notification of the intention to modify concessions, and is under no obligation to update those determinations based on changes in import levels and shares that may occur in the course of negotiations. In our view, to read such a general requirement into Article XIII:2, as a general rule applicable in all cases, would be incoherent and impracticable. Furthermore, we consider that reading such a far-reaching rule into Article XIII:2 would potentially render the concept of "special factors" redundant. As we discuss further below, we consider that changes which may have occurred since the representative period may have to be taken into account in re-determining which Members hold a "substantial interest" under Article XIII:2(d), insofar as those changes qualify as "special factors which may have affected or may be affecting trade in the product concerned".

7.351. In addition, we consider that there are other practical difficulties that would arise from mandating, as a general rule, the use of a reference period immediately preceding the opening of a TRQ for the purpose of re-determining which Members hold a "substantial interest" under Article XIII:2(d). In this regard, the European Union has elaborated on how there is necessarily a time-lag between the conclusion of the negotiations leading to bilateral agreements pursuant to Articles XXVIII and XIII:2(d), and the adoption of domestic legislation implementing those agreements. The European Union has explained how the approval of international agreements pursuant to Articles XXVIII and XIII in the context of EU law involves a rather complex process with different procedural stages, which usually takes more than one year.[489] We consider that the determination of which Members are substantial suppliers could not be based on a reference period that is after the conclusion of the negotiations with the Members recognized as substantial suppliers, let alone after the approval of the agreements by those negotiating Members in accordance with their internal procedures.

7.352. Finally, we do not consider that China's interpretation of Article XIII:2(d) finds support in the statement by the panel in *US – Line Pipe* that "trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure"[490], or with the fact that the GATT panel in *EEC – Apples (Chile I)* considered it appropriate to use as a "representative period" a three-year period previous to 1979, "the year in which the EEC measures were in effect".[491] In both of those cases, the TRQ was imposed unilaterally by the importing Member. Neither panel was confronted with a situation in which there was a time-lag of several years between the initiation of the negotiations with substantial suppliers aimed at allocating the TRQs, and the subsequent determination and entry into force of a TRQ.

7.353. For these reasons, we conclude that there is no general rule always requiring the use of the most recent three-year period prior to the entry into force of a TRQ to determine which Members hold a substantial supplying interest. We will now consider whether, in the particular circumstances of this case, China's increased ability to export following the relaxation of the SPS measures in July 2008 was a "special factor" within the meaning of Article XIII:2. We will first set out our interpretation of the term "special factors", and then turn to the facts of this case.

7.354. Article XIII:2(d) refers to "special factors which may have affected or which may be affecting the trade in the product". Similar formulations are used in other provisions of the covered agreements.[492] We consider that, in certain circumstances, consideration of "special factors" in the context of Article XIII:2(d) could require the Member allocating a TRQ among supplying countries to take into account changes in the import shares held by different Members which may have

normal value, and not the weighted average normal value. In our view, use of the word "'a'" simply means that there are various ways of establishing a weighted average" (Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.273).

[489] EU's response to Panel question No. 107(a).

[490] Panel Report, *US – Line Pipe*, para. 7.55.

[491] Panel Report, *EEC – Apples (Chile I)*, para. 4.8.

[492] See footnote 459.

occurred between the end of the representative period selected and the time of the TRQ being allocated. In other words, while for the reasons set forth above we consider that there is no general requirement in Article XIII:2 to always use more recent data taking into account developments subsequent to the reference period to re-determine which Members hold a substantial interest in supplying the products at issue, we are of the view this may be required in particular circumstances insofar as such changes in import shares are linked to "special factors".

7.355. We consider that our understanding is supported by the ordinary meaning of the terms accompanying "special factors" in the text of Article XIII:2(d). In this connection, we recall that the text of Article XIII:2(d) refers to the proportions supplied by different countries during a "previous" representative period, with due account being taken of any special factors "which may have affected or may be affecting" the trade in the product. We consider that the reference to special factors including not only those which may have affected trade in the previous reference period, but also those which "may be affecting" trade, implies consideration of trade developments which may have occurred between the end of the representative period selected and the time of the TRQ being allocated.

7.356. We consider that this understanding is also consistent with the text of the Ad Note which clarifies that the term "special factors" includes "changes" in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not "changes" artificially brought about by means not permitted under the Agreement. We understand the basic thrust of this clarification to be that changes artificially brought about by certain forms of unfair trade, e.g. dumping or subsidization, should not be taken into account under the rubric of "special factors". In that respect, the Ad Note is not directly relevant to the circumstances in this case. However, the fact that "special factors" is explicitly linked in the Ad Note to "changes brought about" lends support to the view that an analysis of special factors is dynamic, and may entail consideration of developments that have taken place between the end of the reference period selected and the time of the TRQ being allocated.

7.357. This understanding is also consistent with the following Ad Note that accompanied the provisions of the Havana Charter corresponding to Article XIII:2(d):

> The term "special factors" as used in [Article XIII:2(d)] includes among other factors the following changes, as between the various foreign producers, *which may have occurred since the representative period*:
>
> (1) changes in relative productive efficiency;
>
> (2) *the existence of new or additional ability to export*; and
>
> (3) reduced ability to export.[493] (emphasis added)

7.358. In addition to the clarification provided in this Ad Note, the Sub-Committee at the Havana Conference which considered the provisions of the Havana Charter corresponding to Articles XI and XIII of the General Agreement "agreed that it was desirable to make clear that, in cases where separate import quotas were allotted to the various foreign suppliers, a country whose productive efficiency or ability to export had increased relatively to other foreign suppliers *since the representative period on which import quotas were based* should receive a relatively larger import quota".[494]

7.359. Although the Ad Note that accompanied the provisions of the Havana Charter corresponding to Article XIII:2(d) was ultimately not included in the General Agreement, several panels have been guided by it when interpreting and applying the concept of "special factors" in Article XIII:2. In two cases, GATT panels found that the existence of a new or additional ability to export may constitute a "special factor" within the meaning of Article XIII:2(d). In *EEC – Apples (Chile I)*, the panel found that:

[493] Havana Charter Interpretative Note ad Article 22, cited in *GATT Analytical Index: Guide to GATT Law and Practice*, at 403. (emphasis added)

[494] Havana Reports, page 95, para. 52, cited in *GATT Analytical Index: Guide to GATT Law and Practice*, at 403. (emphasis added)

> [*E*]*xports from Chile into the EEC had been expanding rapidly*. Chile had more than doubled its share among Southern Hemisphere suppliers into the EEC market over a recent period, accounting for 5 per cent in 1974, 10 per cent in 1975, 13 per cent in 1976, 14 per cent in 1977 and 17 per cent in 1978. The Panel believed that *Chile's increased export capacity should have been taken into account by the EEC in its allocation of shares* among the Southern Hemisphere suppliers. The Panel felt such a consideration was in line with the interpretative note to the term "special factors" as drafted in the Havana Charter, in particular with reference to "the existence of new or additional ability to export" as between foreign producers.[495]

7.360. In *EEC – Dessert Apples*, the panel found that "the overall trend towards an increase in Chile's relative productive efficiency and export capacity had not been duly taken into account, nor had the temporary reduction in export capacity caused by the 1985 earthquake", and therefore "the Panel found that the account taken of special factors by the EEC in allocating Chile's quota share did not meet the requirements of Article XIII:2(d)".[496]

7.361. We consider that our understanding of "special factors" is also consistent with the immediate context, including the general rule in the chapeau of Article XIII:2. In our view, taking due account of changes in the relative import shares held by Members which may have occurred between the end of the representative period and the time of the TRQ being allocated is consistent with the requirement in the chapeau of ensuring that TRQ allocations "aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of" the TRQ.

7.362. Finally, we have carefully considered the practical difficulties and complications that could arise from re-determining which Members hold a "substantial interest" for the purpose of Article XIII:2(d) on a different and more recent reference period and set of trade statistics from those used to determine the total amount of the TRQ, in a situation in which these matters are being negotiated concurrently. We do not consider that doing so in exceptional circumstances would be illogical, impossible, or impracticable. In this regard, we recall the Appellate Body's finding in *EC – Bananas III (Art. 21.5 – Ecuador II)* / EC – *Bananas III (Art. 21.5 – US)* that, in principle, "the overall tariff quota quantity" and "the allocation of the quota shares among suppliers" are "elements that distinct and severable from one another".[497]

7.363. Based on the foregoing, we consider that consideration of "special factors which may have affected or which may be affecting the trade in the product" may include, in certain exceptional (i.e. "special") circumstances, changes in the import shares held by different Members that have occurred between the end of the representative period selected and the time of the TRQ being allocated.

7.364. Turning to the facts of the present case, we recall that the European Union determined which Members held a "substantial interest" under the Second Modification on the basis of their imports shares over the period 2006-2008. During that period, China held a 0% or negligible share of imports into the European Union for all of the products concerned.[498] Following the relaxation of the SPS measures in July 2008, it appears that imports of poultry products from China did not increase over the remaining half of 2008.[499] However, over the period 2009-2011, imports from China increased significantly under several of the tariff lines at issue in the Second Modification Package, including in particular 1602 39 29 and 1602 39 80 (the latter being merged with 1602 39 40, at the beginning of 2012, into 1602 39 85). For ease of reference, the import statistics are set out below[500]:

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[495] GATT Panel Report, *EEC – Apples (Chile I)*, para. 4.17 (citing Havana Charter Interpretative Note ad Article 22, paragraphs 2(d) and 4). (emphasis added)

[496] GATT Panel Report, *EEC – Dessert Apples*, para. 12.24.

[497] Appellate Body Reports, *EC – Bananas III (Art. 21.5 – Ecuador II)* / EC – *Bananas III (Art. 21.5 – US)*, para. 426.

[498] See the import statistics in section 7.2.4 above.

[499] See the import statistics in section 7.2.4 above.

[500] See the import statistics in section 7.2.4 above.

Tariff line	China's share of imports into the EU in 2006-2008	China's share of imports into the EU in 2009	China's share of imports into the EU in 2010	China's share of imports into the EU in 2011	TRQ share allocation
1602 32 11	0.0%	0.0%	0.0%	0.0%	Brazil: 97.89% Others: 2.11%
1602 32 30	0.0%	0.4%	0.9%	0.9%	Brazil: 78.92% Thailand: 17.56% Others: 3.51%
1602 32 90	0.0%	2.8%	1.5%	2.9%	Brazil: 10.3% Thailand: 73.3% Others: 16.4%
1602 39 21	0.0%	0.0%	0.0%	0.0%	Thailand: 100% Others: 0.0%
1602 39 29	0.0%	27.1%	40.7%	52.8%	Thailand: 98.4% Others: 1.6%
1602 39 40	0.0%	0.0%	0.0%	25.3%	Thailand: 80.21% Others: 19.79%
1602 39 80	0.0%	8.7%	17.6%	61.1%	Thailand: 82.76% Others: 17.24%

7.365. The word "special" means "[e]xceptional in quality or degree; unusual; out of the ordinary".[501] The word "factor" refers to "[a] circumstance, fact, or influence which tends to produce a result".[502] We consider that the increase in imports from China under the tariff lines 1602 39 29 and 1602 39 80 as set forth above is a development that falls within the ordinary meaning of an "unusual", or "out of the ordinary", "circumstance" or "fact".

7.366. The European Union argues that "special factors" alludes to "observable factual circumstances directly affecting the ability of one country to produce a given product and to compete with other suppliers".[503] We consider that China's new ability to export after the relaxation of the SPS measures in July 2008 also falls within that definition of a "special factor", as an "observable factual circumstance directly affecting the ability of one country to produce a given product and to compete with other suppliers". It was observable from the dramatic increase in imports into the European Union under tariff lines 1602 39 29 and 1602 39 80 (the latter merged with 1602 39 40, in 2012, into 1602 39 85) that occurred in the years immediately following the relaxation of the SPS measures in July 2008.

7.367. In this case, we consider that the changes in the import shares held by different Members which occurred between the end of the representative period selected and the time of the TRQ shares being allocated, which were a consequence of China's increased ability to export certain poultry products into the European Union following the relaxation of the SPS measures in July 2008, was a "special factor … affecting trade in the product". We have agreed with the European Union that the SPS measures are not themselves "special factors", but we must distinguish the SPS measures *per se* from China's new ability to export after the relaxation of the SPS measures in July 2008.

7.368. In sum, we have concluded that there is no rule in Article XIII:2 requiring that the determination of which Members hold a substantial supplying interest always be based on a period

[501] *Shorter Oxford English Dictionary*, 5th ed, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2945.

[502] *Shorter Oxford English Dictionary*, 5th ed, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 912.

[503] See e.g. EU's response to Panel question No 117, para. 110. With respect to Article XIII:2, Canada likewise considers that "the operation of this Article is based on information that can be documented, i.e. it serves to adjust in light of observed developments, not hypothesized ones"(Canada's third-party written submission, para. 38).

immediately preceding the entry into force of the TRQ in situations where, as in a case like the present one, there is a period of several years between the initiation of the negotiations with substantial suppliers aimed at allocating the TRQs, and the subsequent determination of the TRQ allocation and entry into force of the TRQ. However, we have found that, in the particular circumstances of this case, China's increased ability to export poultry products under certain tariff lines following the relaxation of the SPS measures in July 2008 was a "special factor" within the meaning of Article XIII:2(d). Having concluded that China's increased ability to export following the relaxation of the SPS measures in July 2008 was a "special factor", we must now assess whether the foregoing establishes that the European Union was obligated to take into account the increased imports of Chinese poultry products over the period 2009-2011 and, on the basis of those increased imports, recognize China as having a substantial interest in supplying the products concerned in respect of any of the TRQs at issue in the Second Modification Package.

7.369. We have already identified a number of issues with respect to the trade statistics provided by the parties, and we therefore approach them with an appropriate degree of caution.[504] However, it is clear that over the period 2009-2011, imports from China had increased significantly under tariff lines 1602 39 29 and 1602 39 80 (the latter being merged with 1602 39 40, at the beginning of 2012, into 1602 39 85). Imports from China under most of the other tariff lines in the Second Modification Package remained at zero or negligible levels, as some or all of these products were still restricted by the heat treatment measure in force. Accordingly, if the European Union was under an obligation to take into account the changes in import shares that occurred following the 2006-2008 reference period, we see no basis to find any violation of Article XIII:2(d) in respect of the TRQ for tariff lines 1602 32 11, 1602 32 30, 1602 32 90, or 1602 39 21. While imports from China under tariff line 1602 39 40 increased sharply in 2011, the increase only occurred in 2011. In our view, this distinguishes the increase in imports under tariff line 1602 39 40 from the steady and continuous increase in imports under tariff lines 1602 39 29 and 1602 39 80 over the period 2009-2011. As set out above, China's share of imports into the European Union under these two tariff lines increased steadily in 2009 (27.1% and 8.7%, respectively), 2010 (40.7% and 17.6%, respectively), and 2011 (52.8% and 61.1%, respectively).

7.370. If the European Union was under an obligation to take into account the changes in import shares that occurred following the 2006-2008 reference period on its own initiative and in the absence of any related request by China until May 2012, the issue that we will address below, we consider that the most recent data to be taken into account would have been from the data available to the European Union at the time that the negotiations with Thailand and Brazil were concluded. According to the European Union, negotiations at the negotiators' level were effectively concluded as of September 2011, and the draft agreements with Thailand and Brazil were initialled on 22 November 2011 and 7 December 2011, respectively. As China points out, the European Union did not notify the conclusion of the Article XXVIII negotiations until December 2012, after the bilateral agreements negotiated with Thailand and Brazil had been approved in accordance with each party's respective internal procedures. However, as noted above, the European Union has explained how under EU law the approval of international agreements pursuant to Articles XXVIII and XIII involves a rather complex process with different procedural stages, which usually takes more than one year. China has not contested that the negotiations at the negotiators' level were already concluded in September 2011, or that the draft agreements initialled before the end of 2011.[505]

7.371. We understand that in September 2011, the European Union would have had available preliminary import data on imports into the European Union covering approximately the first half of 2011.[506] Based on the trade statistics that were available to the European Union at that time, the change in the import trends under tariff lines 1602 39 29 and 1602 39 80 (the latter being merged with 1602 39 40, at the beginning of 2012, into 1602 39 85) would have already been apparent. While the parties have provided us with annual and not monthly import statistics, China's share of imports into the European Union in the year 2011 was 52.8% for 1602 39 29, and 61.1% for 1602 39 80. The trend over the period 2009-2011 was similar in respect of each of

[504] See the import statistics in section 7.2.4 above.
[505] See footnote 128 above.
[506] In its response to Panel question No. 107(c), the European Union explains that "preliminary" import data "becomes generally available with a three-month delay". Thus, we understand that as of September 2011, the European Union had preliminary import data on imports into the European Union covering approximately the first half of 2011.

these tariff lines. Based on the foregoing, we consider that had the European Union been obliged to take into account the trend of the increased imports from China as of at least September 2011, that increase in China's share of imports at that time would have required the European Union to recognize China as having a "substantial interest" within the meaning of Article XIII:2(d) with respect to tariff lines 1602 39 29 and 1602 39 80 (the latter being merged with 1602 39 40, at the beginning of 2012, into 1602 39 85) to reflect the increased imports from China.

7.372. Turning now to the question of whether the European Union was under a legal obligation to take into account the changes in import shares that occurred over the 2009-2011 period, we have already concluded that, in the particular circumstances of this case, China's increased ability to export poultry products under certain tariff lines following the relaxation of the SPS measures in July 2008 was a "special factor" within the meaning of Article XIII:2. An additional question that arises, however, is whether the European Union was under an obligation to take this change in import shares into account on its own initiative, in the course of the negotiations with Thailand and Brazil, and in the absence of any related request from China until May 2012.

7.373. We recall that China requested the European Union to enter into Article XXVIII negotiations in May 2012, claiming a principal supplying interest in all of the products at issue in the Second Modification Package. We recall that by May 2012, the two agreements with Thailand and Brazil had already been initialled, and the domestic legal procedure to authorize their implementation was already underway. The European Union has raised the issue of the timeliness of China's claims of a supplying interest in the context of responding to China's claims that the European Union acted inconsistently with Article XXVIII:1. We have already concluded that for the purpose of assessing whether the European Union acted consistently with Article XXVIII:1, it is unnecessary for the Panel to rule on whether its decision not to recognize China as a Member holding a principal or substantial supplying interest was justified by the absence of a timely claim of supplying interest by China.[507] However, the European Union has also raised the issue of the timeliness of China's claims of a principal or substantial supplying interest in the context of Article XIII:2. Specifically, the European Union argues that while the 90-day time-limit that applies for making a claim of supplying interest under Article XXVIII does "not apply to negotiations under Article XIII:2", that deadline "is but one expression of a generally applicable due process requirement".[508] The European Union submits that "[o]nce a Member announces its intention to negotiate the opening of a TRQ, the Members claiming a SSI must have made known their claims within a reasonable period of time".[509] The European Union indicates that this is "[a]ll the more so when such claims are not based on import data for a previous period but on other evidence not immediately available to the Member opening the TRQ".[510] The European Union argues that in this case China failed to make its claims known within a reasonable period of time, and that the European Union "was not required to reopen the negotiations under Article XIII:2 (d) already concluded with Brazil and Thailand in order to take into account China's manifestly untimely claim".[511]

7.374. In our view, the issue raised by the foregoing is whether the European Union was under an obligation to take into account the change in import shares that occurred over the 2009-2011 period on its own initiative in the course of its negotiations with Thailand and Brazil, in the absence of any related request from China being made prior to May 2012. We consider that the European Union was under such an obligation for the following reasons.

7.375. First, we are not persuaded by the European Union's suggestion that once a Member announces its intention to negotiate the opening of a TRQ, other Members could be understood as waiving a claim of substantial supplying interest *for the purpose of Article XIII* if they do not make known "their claims within a reasonable period of time".[512] The European Union itself acknowledges that the Procedures for Negotiations under Article XXVIII, including the 90-day time-limit mentioned in paragraph 4, do not apply to negotiations under Article XIII:2.[513] There is no comparable provision in Article XIII:2(d) requiring a supplying Member to claim the status of a substantial supplier at all, let alone to make such a claim within any prescribed time-limit.

[507] See section 7.4.3.3 above.
[508] EU's response to Panel question No. 69(b), para. 18.
[509] EU's response to Panel question No. 69(b), para. 18.
[510] EU's response to Panel question No. 69(b), para. 18.
[511] EU's response to Panel question No. 69(b), para. 18.
[512] EU's response to Panel question No. 69(b), para. 18.
[513] EU's response to Panel question No. 69(b), para. 18.

Furthermore, in the circumstances of this case, the European Union's notification for the First Modification had put Members on notice that it intended to "replace with tariff rate quotas" the concessions at issue in the First Modification Package.[514] However, in the notification of its intention to modify the concessions for the poultry products covered by the Second Modification Package, the European Union did not put Members on notice that it intended to "replace with tariff rate quotas" the concessions at issue.[515] Thus, in the case of the Second Modification Package, nothing was disclosed to China as to whether the European Union would replace the concessions with TRQs, nor whether it would allocate TRQs among supplying countries, nor whether negotiations under Article XIII:2(d) would be conducted concomitantly with the negotiations under Article XXVIII.[516] Moreover, given the requirement of secrecy that applies in Article XXVIII negotiations[517], the Panel does not consider that China was in a position of being aware of what stage of the EU's Article XXVIII negotiations were under way at any point in time prior to the notification of the conclusion of those negotiations in December 2012. Thus, China had no reason to claim substantial supplying interest status for the purpose of Article XIII:2(d) negotiations, nor to request any reappraisal of "special factors" by the European Union in the course of its ongoing negotiations with Thailand and Brazil.[518]

7.376. Secondly, the concept of "special factors which may have affected or which may be affecting the trade in the product concerned" appears to be an inherently dynamic concept, and thus it is not clear why an importing Member's consideration of special factors would not be of an ongoing nature in the course of the negotiations. Furthermore, if the reference period and appraisal of special factors was appraised only at the point in time when the negotiations commenced, and thereafter fixed, there would, in the words of the European Union, "be very little to negotiate and agree about".[519] Where a TRQ is allocated by agreement, the subject-matter of the negotiations leading to that agreement would include negotiations on the selection of a previous representative period, and the extent to which there were any special factors to be taken into account. Thus, it may be presumed that those matters may be subject to ongoing discussion and reappraisal in the course of the negotiations, rather than being settled and fixed from the outset.

7.377. Finally, in the present case, the "special factor" that we have found to exist was China's increased ability to export poultry products under certain tariff lines following the relaxation of the SPS measures in July 2008. We recall that this manifested itself in a rapid and dramatic increase in Chinese poultry imports into the European Union under tariff lines 1602 39 29 and 1602 39 80 (the latter being merged with 1602 39 40, at the beginning of 2012, into 1602 39 85) as evidenced by the import shares set out further above. According to the European Union, negotiations at the negotiators' level concluded in September 2011; at that time, these developments in the preceding years cannot be regarded as a factual circumstance that the European Union would have been unaware of in the absence of any request for reappraisal by China.

7.378. Based on the foregoing, we find that China has demonstrated that the increase in EU imports from China over the period 2009-2011 following the relaxation of the SPS measures in July 2008 was a "special factor" that had to be taken into account by the European Union when determining which countries had a substantial interest in supplying the products concerned, and that the European Union acted inconsistently with Article XIII:2(d) by not recognizing China as a Member holding a "substantial interest in supplying the products" under tariff lines 1602 39 29 and 1602 39 80[520] and by failing to seek agreement with China on the allocation of the TRQs for those particular tariff lines. However, we find that the European Union did not act inconsistently with Article XIII:2(d) by failing to recognize China as holding a substantial interest in the other products concerned in the Second Modification Package (i.e. tariff lines 1602 32 11, 1602 32 30, 1602 32 90, 1602 39 21, and 1602 39 40[521]).

[514] G/SECRET/25, p. 2 (Exhibit CHN-15).
[515] See G/SECRET/32 (Exhibit CHN-25).
[516] China's comments on the EU's response to Panel question No. 69(b), para. 12.
[517] See paragraph 7.227.
[518] China's comments on EU response to Panel question No. 69(b), para. 12.
[519] EU's first written submission, para. 226.
[520] Merged with tariff line 1602 39 40 into tariff line 1602 39 85, effective 1 January 2012.
[521] Merged with tariff line 1602 39 80 into tariff line 1602 39 85, effective 1 January 2012.

7.7 Claims under the chapeau of Article XIII:2 of the GATT 1994

7.7.1 Introduction

7.379. China claims that by allocating "all or the vast majority of the TRQs to two of the WTO Members" (i.e. Brazil and Thailand), the European Union acted inconsistently with the chapeau of Article XIII:2.[522] The basis for China's claims under the chapeau of Article XIII:2 is that "even assuming that it was not"[523] a Member with a substantial supplying interest, the allocation of TRQ shares agreed with Thailand and Brazil does not comply with the requirements of the chapeau of Article XIII:2 vis-à-vis other WTO Members, including China, that were not recognized as having a substantial interest in supplying the products concerned.

7.380. China argues that all of the determinations under Article XIII:2 must be based on a "previous representative period", taking due account of "special factors which may have affected or may be affecting the trade in the product".[524] These determinations include not only the allocation of TRQ shares vis-à-vis substantial suppliers under Article XIII:2(d) in accordance with the second sentence of Article XIII:2(d) and the determination of which Members are substantial suppliers under Article XIII:2(d), but also the allocation of TRQ shares vis-à-vis Members not recognized as having a substantial interest.[525] In this case, China argues that the reference periods upon which the European Union made those determinations were not "representative"[526], and that China's reduced ability to export as a result of import bans due to SPS measures, as well as the increased ability to export after the relaxation of the bans in July 2008, were "special factors" that had to be taken into account.[527] With respect to both the First and Second Modification Packages, China claims that the European Union should have determined the TRQ shares allocated to "all others" based on an estimate of the share of imports that China would have had in the absence of the SPS measures that restricted Chinese poultry imports over the reference periods used.[528] With respect to the Second Modification Package, China additionally claims that the European Union should have determined the TRQ shares allocated to "all others" taking into account the increase in poultry imports from China over the 2009-2011 period, which China considers to be the most recent three-year period preceding the determination of the TRQs.[529] Finally, China claims that the European Union was in any event under an obligation to allocate an "all others" share of at least 10% for each of the TRQs under the First and Second Modification Packages, so as to enable at least one other Member to achieve a substantial interest in supplying the products.[530]

7.381. The European Union responds that China's claims rest on an incorrect interpretation of the obligations in Article XIII:2.[531] We understand the European Union to accept that, although the general rule in the chapeau of Article XIII:2 does not explicitly require that "special factors" affecting non-substantial suppliers be taken into account, the chapeau of Article XIII:2 may be violated if a TRQ allocation disregards a "special factor" affecting one or more non-substantial suppliers, in a manner that was biased against non-substantial suppliers.[532] However, the European Union considers that the SPS measures mentioned by China are not "special factors" within the meaning of Article XIII:2, and that it was therefore under no obligation to allocate a greater "all others" TRQ share on the basis of an estimate of what China's share of imports into

[522] China's first written submission, paras. 169-207; China's opening statement at the first meeting of the Panel, paras. 85-103; China's responses to Panel question Nos. 41-43; China's second written submission, paras. 140-171; China's opening statement at the second meeting of the Panel, paras. 66-75; parties' responses, and comments on one another's responses, to Panel question Nos. 69, 72-74, 86-90, 106-109, 111-120.

[523] China's second written submission, para. 144.

[524] China's second written submission, para. 145.

[525] China's first written submission, para. 171; China's second written submission, para. 141.

[526] China's second written submission, para. 151.

[527] China's first written submission, paras. 193-194. See also China's response to Panel question No. 119, para. 108.

[528] China's first written submission, paras. 197, 199, 201; China's second written submission, paras. 147, 159-160.

[529] China's first written submission, para. 198; China's second written submission, para. 160.

[530] China's first written submission, paras. 212-216.

[531] EU's first written submission, paras. 210-237; EU's opening statement at the first meeting of the Panel, paras. 20-25; EU's responses to Panel question Nos. 39-40, 42, 44; EU's second written submission, paras. 114-152; opening statement at the second meeting of the Panel, paras. 63-96; parties' responses, and comments on one another's responses, to Panel question Nos. 69, 72-74, 86-90, 106-109, 111-120.

[532] EU's response to Panel question No. 118(b), para. 118.

the European Union would have been in the absence of the SPS measures.[533] The European Union also rejects China's claim that in respect of the Second Modification Package, it was required to allocate TRQ shares based on more recent data regarding imports over the period 2009-2011.[534] Finally, the European Union submits that there is no legal obligation in Article XIII:2 to always allocate an "all others" share of a minimum amount, independently from the import data over the reference period.[535]

7.7.2 Relevant provisions

7.382. We recall that the chapeau of Article XIII:2 provides that:

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

7.383. The chapeau states that Members "*shall* aim at a distribution of trade […] approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". The wording of the chapeau ("shall") suggests that it contains a binding obligation, and this is reinforced by the fact that the Ad Note to Article XIII:2(d) refers to the chapeau as containing a "general rule". In this case, the parties agree that the chapeau of Article XIII:2 imposes a mandatory legal obligation that must be respected when allocating a TRQ among supplying countries. In that sense, we understand the European Union to agree with China that the chapeau of Article XIII:2 "states a general rule capable of being violated separately from the provisions of Article XIII:2(d)".[536]

7.384. We see no reason to disagree with the parties, taking into account that in several prior cases, panels or the Appellate Body have upheld claims of violation based on the chapeau of Article XIII:2.[537] In *US – Line Pipe*, the panel found that the measure at issue was "not consistent with the general rule contained in the chapeau of Article XIII:2 because it has been applied without respecting traditional trade patterns".[538] The panel stated that:

> In our view, the chapeau of Article XIII:2 contains a general rule, and not merely a statement of principle. This is confirmed by the Note Ad Article XIII:2, which refers to "the general rule laid down in the opening sentence of paragraph 2".[539]

7.385. This understanding is further confirmed by the Appellate Body's finding that Article XIII:2(d) is a permissive "safe harbour" only insofar "as substantial suppliers are concerned", and that a Member allocating shares to substantial suppliers in accordance with Article XIII:2(d) "must also respect the requirement in the chapeau of Article XIII:2".[540] We understand this to mean that the general rule in the chapeau of Article XIII:2 contains a legal requirement relating to the allocation of TRQ shares among supplying countries that is capable of being violated separately from the provisions of Article XIII:2(d). We understand the parties to agree on this point as well. Specifically, the European Union agrees with China that, even where the allocation of TRQ shares among supplying countries has been agreed with the substantial suppliers in accordance with Article XIII:2(d), this does not necessarily mean that the TRQ

[533] EU's first written submission, para. 232; EU's second written submission, paras. 114-132.
[534] EU's response to Panel question No. 106(a), para. 77; EU's response to Panel question No. 109(b), para. 90.
[535] EU's first written submission, paras. 250-266; EU's second written submission, para. 141.
[536] EU's response to Panel question No. 40, paras. 114-116.
[537] Appellate Body Report, *EC – Bananas III*, para. 163; Panel Report, *US – Line Pipe*, para. 7.55; Appellate Body Reports, *EC – Bananas III (Art. 21.5 – Ecuador II)* / *EC – Bananas III (Art. 21.5 – US)*, para. 353.
[538] Panel Report, *US – Line Pipe*, para. 8.1(1).
[539] Panel Report, *US – Line Pipe*, footnote 64.
[540] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)* / *EC – Bananas III (Article 21.5 – US)*, para. 338 and fn 408.

allocation complies with the general rule in the chapeau in respect of the non-substantial suppliers.[541]

7.7.3 Analysis by the Panel

7.386. Turning to the issues in dispute, we understand China's claims under the chapeau of Article XIII:2 to rest on three different grounds, raising the following issues. First, whether the European Union was obliged to determine the TRQ shares allocated to "all others" on the basis of an estimate of what import shares would have been in the absence of the SPS measures. Second, whether the European Union was obliged to determine the TRQ shares allocated to "all others" taking into account changes in import shares that occurred in the course of the negotiations regarding the total amount of the TRQs and their allocation among supplying countries. Third, whether the European Union was under an obligation to allocate an "all others" share of at least 10% for each of the TRQs, so as to enable at least one other Member to achieve a substantial supplying interest.

7.387. We will examine these issues in turn. Before doing so, however, we will explain our approach to examining China's claims under Article XIII:2(d) and the chapeau of Article XIII:2, and then address the interpretative issue of the relevance of "special factors" in the determination of whether the allocation of the TRQ shares to "all others" complies with the general rule in the chapeau of Article XIII:2. This interpretative issue relates to China's first and second claims of violation under the chapeau of Article XIII:2.

7.7.3.1 Separate analysis of China's claims under Article XIII:2(d) and the chapeau of Article XIII:2

7.388. In this case, China has advanced one set of claims of violation under Article XIII:2(d), and another set of parallel claims of violation under the chapeau of Article XIII:2. As explained in the context of our evaluation of China's claims under Article XIII:2(d), these appear to be claims in the alternative, insofar as China's claims under Article XIII:2(d) are directed at establishing that it was a Member with a substantial supplying interest, whereas its claims under the chapeau of Article XIII:2 are "even assuming that it was not".[542]

7.389. In examining China's claims under Article XIII:2(d), we have already found that the European Union acted inconsistently with Article XIII:2(d) by refusing to recognize China as a Member holding a "substantial interest in supplying the products" under tariff lines 1602 39 29 and 1602 39 80 (the latter being merged with 1602 39 40, at the beginning of 2012, into 1602 39 85) and by failing to seek agreement with China on the allocation of the TRQ shares for those particular tariff lines. Given these findings, we recognize that it may not be strictly necessary for the Panel to proceed to assess China's alternative claims of violation under the chapeau of Article XIII:2, insofar as they rest on the same grounds.

7.390. However, it is well established that panels have the discretion to address arguments and make additional findings beyond those strictly necessary to resolve a particular claim or defence.[543] These could include, for example, alternative findings that could serve to assist the

[541] EU's response to Panel question No. 39, para. 111; EU's opening statement at the second meeting of the Panel, paras. 68-69.

[542] China's second written submission, para. 144.

[543] The Appellate Body has confirmed that "[j]ust as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim" (Appellate Body Report, *EC – Poultry*, para. 135). (emphasis original) The logical corollary of this proposition is that a panel has the discretion based on the circumstances of each case to address certain claims and arguments even where it is *not* strictly necessary to do so to resolve the matter at issue. We observe that Article 11 of the DSU provides that a panel should make an objective assessment of the matter before it, "and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". While Article 11 does not specify what "such other findings" might include, the Appellate Body has confirmed that panels have the discretion to make alternative findings, including alternative factual findings (Appellate Body Reports, *US – Softwood Lumber IV*, para. 118; *Canada – Wheat Exports and Grain Imports*, para. 126; *China – Auto Parts*, para. 208; *US – Carbon Steel (India)*, para. 4.274; and *India – Solar Cells*, para. 5.152. See, e.g. Panel Reports, *India – Patents (US)*, paras. 6.11-6.12 and 7.44-7.50; *Canada – Dairy*, para. 7.119; *EC – Bed Linen (Article 21.5 – India)*, paras. 6.234-6.246;

Appellate Body in completing the legal analysis should it disagree with legal interpretations developed by a panel.[544] A panel may be guided by a range of different considerations when deciding whether to address arguments beyond those strictly necessary to resolve the matter[545], and the manner in which a panel may do so, including the scope and nature of any such other alternative findings, may also vary depending on the issues before the panel.[546]

7.391. In this case, we consider it appropriate to make findings on all of China's claims under the chapeau of Article XIII:2. In assessing China's claims under the chapeau of Article XIII:2, we are presented with some issues that we have not already addressed in the context of our examination of China's claims under Article XIII:2(d). This includes, most notably, the relevance of the notion of "special factors which may have affected or may be affecting the trade in the product" in the determination of whether the allocation of TRQ shares to "all others" complies with the general rule in the chapeau of Article XIII:2. However, some of the arguments presented by the parties in relation to China's claims under the chapeau of Article XIII:2 reiterate arguments that were also advanced, and that we have already addressed, in the context of China's claims under Article XIII:2(d). To avoid addressing the same arguments multiple times, our analysis of China's claims under the chapeau of Article XIII:2 will focus on those arguments and interpretative elements that are specific to the chapeau of Article XIII:2, and that we have not already addressed in the context of our findings, in the previous section of this Report, under Article XIII:2(d).

7.7.3.2 Relevance of "special factors" in the determination of whether the allocation of TRQ shares to "all others" complies with the general rule in the chapeau of Article XIII:2

7.392. We observe that reference to a "previous representative period" and "special factors" is made only in the second sentence of Article XIII:2(d), in the context of the unilateral allocation of TRQ shares among substantial suppliers. These terms are not referred to in the chapeau of Article XIII:2, which refers in more general terms to an obligation to "aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". The chapeau does not specify the criteria by which one judges what shares the various Members might be expected to obtain in the absence of the TRQ[547], but the chapeau also states that "to this end" Members "shall observe the following provisions" set forth in sub-paragraphs (a) through (d) of Article XIII:2. Thus, these provisions must inform the interpretation of the chapeau.

7.393. The parties agree that a TRQ allocation agreed among substantial suppliers could nonetheless be inconsistent with general rule in the chapeau vis-à-vis non-substantial suppliers, at least insofar as a TRQ allocation was not based on actual import shares held by different countries during a "previous representative period" and taking due account of "special factors", in such a way that was biased against one or more non-substantial suppliers.[548] China considers that these legal criteria set forth explicitly in Article XIII:2(d) "form context for satisfying the chapeau of Article XIII:2 as regards WTO Members that hold no substantial supplying interest".[549] The European Union considers that "to remain reasonable and fair the method agreed with the substantial suppliers should also be applied to non-substantial suppliers and should be based on objective and unbiased criteria", and that "a method that disregards special factors affecting any of the suppliers of a given product would not be objective as it would be biased against the suppliers affected by those factors and in favour of the others".[550] On that basis, the European Union accepts that although the chapeau of Article XIII:2 "does not require explicitly to take into consideration special factors affecting non-SSI Members it would appear that if the TRQ is

US – Corrosion-Resistant Steel Sunset Review, paras. 7.172-7.184; *China – Auto Parts*, fn 641 to para. 7.371; *EC and certain member States – Large Civil Aircraft*, para. 7.224; *China – Raw Materials*, paras. 7.229-7.230; *China – Rare Earths*, para. 7.140; and *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.672).

[544] See, e.g. Appellate Body Reports, *US – Softwood Lumber IV*, para. 118; *US – Tuna II (Mexico)*,para. 405.

[545] See, e.g. Panel Reports, *Canada – Dairy*, para. 7.119, and *China – Auto Parts*, fn 641 to para. 7.371.

[546] See, e.g. Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 7.672.

[547] John Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill Company, Inc., 1969) p. 323.

[548] China's first written submission, paras. 186-188; China's response to Panel question No. 41(a), para. 10; EU's opening statement at the second meeting of the Panel, para. 72; EU's response to Panel question No. 118.

[549] China's response to Panel question No. 41(a), para. 10.

[550] EU's response to Panel question No. 118(a), paras. 115-116.

allocated on the basis of a method that disregards a special factor affecting one or more non-substantial suppliers, that method would not contribute to attain the objective of the chapeau".[551]

7.394. We see no reason to disagree with the parties. Indeed, we consider that this interpretation is supported by the Appellate Body's clarification of the relationship between Article XIII:2(d) and the chapeau of Article XIII:2. When allocating a TRQ among supplying countries, the amount of any "all others" share allocated to non-substantial suppliers will be the amount of the TRQ that has not been allocated among substantial suppliers. The Appellate Body has found that Article XIII:2(d) is a permissive "safe harbour" only insofar "as substantial suppliers are concerned", and that a Member allocating shares to substantial suppliers in accordance with Article XIII:2(d) "must also respect the requirement in the chapeau of Article XIII:2".[552] This supports the understanding that a TRQ allocation agreed among substantial suppliers could be inconsistent with the rights of non-substantial suppliers under the general rule in the chapeau of Article XIII:2 insofar as the basis for the allocation, as agreed by the substantial suppliers, was not based on a "previous representative period" or did not take due account "special factors", in a manner that was biased against one or more non-substantial suppliers.

7.395. In addition, without making express reference to any "special factors which may have affected or may be affecting trade in the product", we note that the panel in *US – Line Pipe* suggested that "changed circumstances" may need to be taken into account in the context of evaluating a TRQ allocation under the chapeau of Article XIII:2. The panel was of the view that:

> In our view, Korea is correct to argue that a Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures without respecting traditional trade patterns (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, *as a result of changed circumstances*, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure.[553] (emphasis added)

7.396. Based on the foregoing, we consider that to comply with the obligation in the chapeau of Article XIII:2, "special factors which may have affected or may be affecting trade in the product" cannot be disregarded in the determination of the TRQ shares allocated to "all others" in a manner that would be biased against one or more non-substantial suppliers. We consider that this interpretation reflects a harmonious interpretation of the chapeau of Article XIII:2 and paragraph (d), and is in line with the Appellate Body's prior statements regarding their relationship. Under this interpretation, the general rule in the chapeau of Article XIII:2 serves to protect the rights and interests of Members that are not recognized as having a substantial supplying interest under Article XIII:2(d).

7.7.3.3 Whether the European Union was obliged to allocate a greater TRQ share to "all others" based on an estimate of what their import shares would have been in the absence of the SPS measures

7.397. China claims that where SPS import bans are imposed, the period of application of these import bans cannot be used as a previous "representative" period for the purpose of the TRQ allocation. In addition, China argues that "its reduced ability to export as a result of import bans due to SPS measures" was a "special factor that affected trade in the products concerned", and that had to be taken into account by the European Union. With respect to both the First and Second Modification Packages, we understand China to claim that the European Union acted inconsistently with the chapeau of Article XIII:2(d) by not allocating a greater "all others" share on the basis of an estimate of the share of imports that China would have had in the absence of the SPS measures.

7.398. In the context of examining China's parallel claim under Article XIII:2(d), we found that the European Union did not act inconsistently with Article XIII:2(d) by basing its determinations of which Members were substantial suppliers on their actual share of imports into the European

[551] EU's response to Panel question No. 118(b), para. 118.
[552] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)* / EC – *Bananas III (Article 21.5 – US)*, para. 338 and fn 408.
[553] Panel Report, *US – Line Pipe*, para. 7.54.

Union, rather than on the basis of on an estimate of the share of imports that China would have had in the absence of the SPS measures. We consider that our reasoning and conclusion applies *mutatis mutandis* to China's alternative claim under the chapeau of Article XIII:2.

7.399. Based on the foregoing, we find that China has not demonstrated that the European Union acted inconsistently with the chapeau of Article XIII:2 by determining the TRQ shares allocated to "all others" on the basis of the actual share of imports into the European Union, rather than on the basis of an estimate of what import shares would have been in the absence of the SPS measures restricting poultry imports from China.

7.7.3.4 Whether the European Union was obliged to allocate a greater TRQ share to "all others" taking into account changes in import shares following the initiation of the negotiations on TRQ share allocations

7.400. With respect to the Second Modification Package, we understand China to claim that the European Union acted inconsistently with the chapeau of Article XIII:2 by not allocating a greater share of the TRQs to "all others" to take into account the increase in imports over the period 2009-2011 from countries that were not recognized as having a substantial interest (including, and largely accounted for by, China).

7.401. In the context of examining China's parallel claim under Article XIII:2(d), we found that the changes in the import shares held by different Members which occurred between the end of the representative period selected and the time of the TRQ being allocated, which were a consequence of China's increased ability to export certain poultry products into the European Union following the relaxation of the SPS measures in July 2008, qualified as a "special factor … affecting trade in the product" within the meaning of Article XIII:2(d). We further found that this special factor had to be taken into account for the purpose of determining which Members held a "substantial interest" for the purpose of the first sentence of Article XIII:2(d). We found that the European Union was obliged to take into account the trend of the increased imports from China, and the resulting change in import shares at the time negotiations with Brazil and Thailand concluded at negotiators level, in September 2011. In our view, those aspects of the Panel's reasoning in the context of Article XIII:2(d) apply *mutatis mutandis* to China's alternative claim under the chapeau of Article XIII:2, regarding the determination of the size of the "all others" shares for the TRQs.

7.402. The separate issue that arises in the context of examining China's claims under the chapeau of Article XIII:2 is whether the TRQ shares allocated to "all others" in the Second Modification Package reflects the data showing the trend of the increased imports from China, and the resulting change in import shares, that would have been available to the European Union in September 2011.

7.403. Based on the trade statistics provided by the parties, the actual share of imports into the European Union held by countries that were not allocated a country-specific share in the particular TRQ in question[554] was the following:

[554] See the import statistics in section 7.2.4 above. In the case of tariff line 1602 32 11, "Others" includes all countries other than Brazil (the only country allocated a country-specific share in this TRQ). In the case of tariff lines 1602 32 30 and 1602 32 90, "Others" includes all countries other than Brazil and Thailand (both of which were allocated their own country-specific shares in these two TRQs). In the case of tariff lines 1602 39 21, 1602 39 29, 1602 39 40, and 1602 39 80, "Others" includes all countries other than Thailand (the only country allocated a country-specific share in these four TRQs).

Tariff line	Share of imports by countries in the "Others" category into the EU in 2006-2008 (average)	Share of imports by countries in the "Others" category into the EU in 2009	Share of imports by countries in the "Others" category into the EU in 2010	Share of imports by countries in the "Others" category into the EU in 2011	TRQ share allocation
1602 32 11	2.83%	0.3%	0.7%	3.3%	Brazil: 97.89% Others: 2.11%
1602 32 30	0.76%	1.1%	1.5%	1.3%	Brazil: 78.92% Thailand: 17.56% Others: 3.51%
1602 32 90	7.7%	4.5%	2.0%	3.1%	Brazil: 10.3% Thailand: 73.3% Others: 16.4%
1602 39 21	0.0%	0.0%	0.0%	0.0%	Thailand: 100% Others: 0.0%
1602 39 29	1.1%	27.2%	42.8%	53.1%	Thailand: 98.4% Others: 1.6%
1602 39 40	3.3%	4.9%	0.0%	25.3%	Thailand: 80.21% Others: 19.79%
1602 39 80	18.3%	11.3%	21.2%	61.2%	Thailand: 82.76% Others: 17.24%

7.404. We have already identified a number of issues with respect to the trade statistics provided by the parties, and we therefore approach them with an appropriate degree of caution.[555] However, it is clear that over the period 2009-2011, imports from countries that were not allocated a country-specific share (including and largely accounted for by China) had increased significantly under tariff lines 1602 39 29 and 1602 39 80 (the latter being merged with 1602 39 40, at the beginning of 2012, into 1602 39 85). Imports from countries that were not allocated a country-specific share (including China) under most of the other tariff lines in the Second Modification Package remained at zero or negligible levels, as some or all of these products remained prohibited. Accordingly, as in the case of Article XIII:2(d), we see no basis for finding any violation of the chapeau of Article XIII:2 in respect of the TRQ for tariff lines 1602 32 11, 1602 32 30, 1602 32 90, or 1602 39 21. While imports from countries that were not allocated a country-specific share (including and largely accounted for by China) under tariff line 1602 39 40 increased as well, the increase only occurred in 2011. In our view, this distinguishes the increase in imports under tariff line 1602 39 40 from the steady and continuous increase in imports under tariff lines 1602 39 29 and 1602 39 80 over the period 2009-2011. As set out above, imports from countries that were not allocated a country-specific share (including and largely accounted for by China) into the European Union under these two tariff lines increased steadily in 2009 (27.2% and 11.3%, respectively), 2010 (42.8% and 21.2%, respectively), and 2011 (53.1% and 61.2%, respectively).

7.405. We recall our understanding that in September 2011, the European Union had preliminary import data on imports into the European Union covering approximately the first half of 2011. Based on the trade statistics that were available to the European Union as of that time, the change in the import trends under tariff lines 1602 39 29 and 1602 39 80 was already apparent. While the parties have provided us with annual and not monthly import statistics, the share of imports by countries in the "all others" category into the European Union in 2011 was 53.1% for 1602 39 29, and 61.2% for 1602 39 80.

7.406. Based on the foregoing, we find that China has demonstrated that the increase in imports from China over the period 2009-2011 following the relaxation of the SPS measures in July 2008 was a "special factor" that had to be taken into account by the European Union when determining

[555] See section 7.2.4 above.

the TRQ shares allocated to "all others", and that the European Union acted inconsistently with the chapeau of Article XIII:2 by not allocating a greater "all others" share under tariff lines 1602 39 29 and 1602 39 80 (the latter tariff line was merged with tariff line 1602 39 40 into tariff line 1602 39 85, effective 1 January 2012).

7.7.3.5 Whether the European Union was under an obligation to allocate an "all others" share of at least 10% for each of the TRQs under the First and Second Modification Packages

7.407. We turn now to China's third claim under the chapeau of Article XIII:2, which rests on an additional, alternative line of argumentation from that which we have just considered. China interprets Article XIII:2 as requiring a Member imposing a TRQ to always allocate a share to "all others", independently from the factual situation considered, and without regard to the import data over the reference period.[556] According to China, "the all others share should be at a level that allows at least one Member within that group to reach SSI status if its products are sufficiently competitive".[557] China argues that because the European Union recognizes a country as a substantial supplier only if it accounts for 10% of imports in the product concerned, the European Union was accordingly required to allocate at least 10% of each TRQ to "all others".[558]

7.408. China claims that the TRQ for all other countries for several of the tariff headings concerned is below a share of 10%, and this is in violation of the general rule in the chapeau of Article XIII:2.[559] We understand China's claims to include, in this regard, the six TRQs under the First and Second Modification Packages for which the "all others" share was less than 10%. These TRQs include 0210 9939 (0.31%), 1602 32 19 (4.56%), 1602 32 11 (2.11%), 1602 32 30 (3.51%), 1602 39 21 (0.0%), and 1602 39 29 (1.6%).

7.409. We begin our analysis with the text of the provision at issue. The chapeau of Article XIII:2 requires that the allocation of TRQ shares approach "as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". We see nothing in the terms of the chapeau of Article XIII:2 establishing an obligation to allocate a minimum share to an "all others" category in a TRQ. To the contrary, establishing an "all others" share in a TRQ without regard to the actual import shares held over a previous representative period would be at odds with the general rule that TRQ shares should be allocated in a way that approaches "as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". In this regard, we agree with the panel in *US – Line Pipe* that:

> [A] Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures *without respecting traditional trade patterns* (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, as a result of changed circumstances, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure.[560] (emphasis added)

7.410. Furthermore, we consider that an obligation to allocate a minimum share to "all others" irrespective of actual historical import levels would conflict with the obligation in the second sentence of Article XIII:2(d). This could have been the case if the European Union had, for example, allocated an "all others" share for tariff line 1602 39 21, in respect of which there have been no imports from any Member other than Thailand since 2001. The text of Article XIII:2(d), second sentence, mandates that when allocating TRQ shares in cases where it is not practicable to reach agreement with all substantial suppliers, the importing Member must allocate "the product shares based on the proportions, supplied by such Members during a previous representative period...".

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[556] China's second written submission, para. 146.
[557] China's opening statement at the second meeting of the Panel, para. 65. See also China's response to Panel question No. 88, and China's response to the EU's question No. 3.
[558] China's response to Panel question No. 71(c), para. 30.
[559] China's first written submission, para. 216.
[560] Panel Report, *US – Line Pipe*, para. 7.54.

7.411. China relies on two statements made by the Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* in support of its contention that a Member allocating a TRQ among supplying countries must always allocate a share to the "all others" category large enough to enable at least one Member to achieve a substantial supplying interest. First, China refers to the Appellate Body's statement that:

> If a Member allocates quota shares to Members with a substantial interest in supplying the product, in accordance with Article XIII:2(d), it must also respect the requirement in the chapeau of Article XIII:2 - that distribution of trade approach as closely as possible the shares that Members may be expected to obtain in the absence of the restriction. This is *usually done by allocating a share to a general "others" category* for all suppliers other than Members with a substantial interest in supplying the product.[561] (emphasis added)

7.412. We do not read the words "[t]his is usually done" in this passage to mean or imply that there is an obligation "to allocate always a share to 'all others' … independently from the factual situation considered, and notably the import data over the reference period".[562] It appears to us that when the Appellate Body stated that "allocating a share to a general 'others' category for all suppliers other than Members with a substantial interest" is what is "usually done", the Appellate Body was merely stating that *when* Members allocate TRQ shares to non-substantial suppliers, that is "usually done" through an "all others" share, as opposed to being done through individual, country-specific allocations for all other countries.

7.413. The underlying panel report in *EC – Bananas III (Article 21.5 – Ecuador)* had explained this point as follows:

> The general rule laid down in Article XIII:2 of GATT requires Members to "aim at a distribution of trade … approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions". To this end, where the option of allocating a tariff quota among supplying countries is chosen, Article XIII:2(d) provides that allocations of shares (i.e. country-specific allocations for substantial suppliers; and a global allotment in an "other" category for non-substantial suppliers *unless country-specific allocations are allotted to each and every non-substantial supplier*) should be based upon the proportions supplied during a previous representative period.[563] (emphasis added)

7.414. This explanation by the panel in *EC – Bananas III (Article 21.5 – Ecuador)* followed on from an earlier, and even more detailed explanation of the same point by the original panel in *EC – Bananas III*. That panel explained why it is more practicable to allocate a share to an "all others" category, rather than giving every country its own country-specific share corresponding to its historical import levels:

> *[I]f* a Member wishes to allocate shares of a tariff quota to some suppliers *without a substantial interest*, then such shares must be allocated to all such suppliers. Otherwise, imports from Members would not be similarly restricted as required by Article XIII:1. As to the second point, in such a case it would be required to use the same method as was used to allocate the country-specific shares to the Members having a substantial interest in supplying the product, because otherwise the requirements of Article XIII:1 would also not be met.
>
> The allocation of *country-specific* tariff quota shares to *all* supplying countries on the basis of the first method (agreement) may in practice be difficult since there will likely be demand for more than 100 per cent of the tariff quota and, furthermore, *there would be no possibility to make provision for new suppliers*. This would leave the second method as the only practical alternative - a result that, however, runs counter to the provision of Article XIII:2(d) to first seek agreement with all Members having a substantial interest in supplying the product concerned.

[561] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US),* footnote 408.
[562] China's second written submission, para. 146.
[563] Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.27.

> *The consequence of the foregoing analysis is that Members may be effectively required to use a general "others" category for all suppliers other than Members with a substantial interest in supplying the product.*[564] (emphasis added)

7.415. In addition, we note that immediately after making the statement as to how the allocation of TRQs shares is "usually done", the Appellate Body proceeded to find a violation of Article XIII:2 in that case on the grounds that the TRQ at issue was not "based on the respective shares of the ACP and non-ACP supplier countries in the European Communities' banana market".[565] Thus, the Appellate Body found a violation based on the fact that the TRQ allocation did not reflect actual market shares. China has not identified any prior WTO panel or Appellate Body report that found a violation of Article XIII:2 based on a failure to set aside a minimum "all others" share, irrespective of actual imports shares held during the reference period.

7.416. China relies on a second statement from *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* in support of its argument. In that case, the Appellate Body interpreted the terms of the EC Schedule and the Bananas Framework Agreement to mean that the TRQ allocation agreed in 1994 was set to expire in 2002, but not the concessions in the EU Schedule establishing the total amount of the TRQ. The Appellate Body observed that this reading of Section I-B of the European Communities' Schedule and, specifically, of paragraph 9 of the Bananas Framework Agreement, was consistent with Article XIII:2(d) and Article XIII:4. In connection with Article XIII:4, the Appellate Body recalled the statement by the original panel in *EC – Bananas III*, that:

> [A]lthough the EC reached an agreement with all Members who had a substantial interest in supplying the product at one point in time, under the consultation provisions of Article XIII:4, the EC would have to consider the interests of a new Member who had a substantial interest in supplying the product if that new Member requested it to do so. The provisions on consultations and adjustments in Article XIII:4 mean in any event that the [Bananas Framework Agreement] could not be invoked to justify *a permanent allocation* of tariff quota shares.[566] (emphasis added)

The Appellate Body then stated that, in its view, paragraph 9 of the Bananas Framework Agreement reflected the requirements of Article XIII:4.

7.417. China reads this passage from the Appellate Body to mean that Article XIII:4 prohibits a "permanent allocation of tariff quota shares", and therefore a TRQ allocation may not be "cast in stone, but must be a dynamic process based on market developments".[567] China argues that this in turn means "that a country-specific TRQ may not lead to long-term freezing of the shares of imported products and cannot be applied in such a way as to create an artificial hurdle preventing the natural evolution of the import market structure".[568] China argues that it follows from this that "the TRQs for other countries must be fixed at levels to allow a supplying WTO Member within the all other category to compete and increase its share so as to allow it to request consultations to recognize its SSI or PSI and obtain country-specific TRQs", and that in this way, "the TRQs will not lead to a long-term freeze of the import shares, as the shares of the suppliers will evolve in accordance with their comparative advantage".[569]

7.418. We consider that China reads too much into the statement that the provisions on consultations and adjustments in Article XIII:4 mean in any event "that the [Bananas Framework Agreement] could not be invoked to justify a permanent allocation of tariff quota shares".[570] Nowhere in the statements invoked by China did the panel or the Appellate Body mention or imply any obligation to reserve a share in the TRQ to "all other" suppliers to prevent a long-term freeze of the TRQ allocation. Furthermore, the statement was made in relation to Article XIII:4, and not

[564] Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 7.73-7.75.
[565] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US),* para. 340.
[566] Panel Report, *EC – Bananas III (Ecuador)*, para. 7.92, cited in Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*; Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, para. 427.
[567] China's first written submission, para. 209.
[568] China's first written submission, para. 210.
[569] China's first written submission, para. 212.
[570] Panel Report, *EC – Bananas III (Ecuador)*, para. 7.92, cited in Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*; Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, para. 427.

the terms of Article XIII:2 on which China's claim of violation is based. To the extent that the Appellate Body was recognizing that the objective of preventing a long-term freeze of the TRQ allocation finds reflection in Article XIII:4, we do not see how this would justify reading into Article XIII:2 a requirement to allocate a minimum share of a TRQ to the "all others", regardless of actual import levels. As discussed at the outset, doing so would appear to violate the obligation that is expressly contained in the chapeau of Article XIII:2.

7.419. In addition, we do not consider that China has adequately responded to the European Union's point that allocating a 10% share to the "all others" category, so as to enable at least one other Member to achieve a substantial supplying interest, would not actually prevent a freezing of the TRQ allocation, but merely postpone that effect.[571] As the European Union observes, the objective of preventing a long-term freeze of the allocation cannot necessarily be achieved by reserving a given share to "all others" in the TRQ, but may instead require other means, such as setting a time limit to the validity of the allocation (or a periodic review thereof).[572] As we explained elsewhere in our Report[573], China's response to this argument was to claim that the European Union violated Article XIII:1 and XIII:2 by failing to annually review and reallocate the TRQ shares based on the most recent trade developments.[574]

7.420. Finally, in these proceedings China has suggested that the Panel should at least find an inconsistency with the chapeau of Article XIII:2 in respect of the one TRQ where there is a 0.0% "all others" share (tariff line 1602 39 21). However, we see no legal basis for drawing this distinction. Based on the trade data provided by the parties, it appears that there have been no imports of the poultry products under tariff line 1602 39 21 from any Member other than Thailand over the period 2006-2008, or from any other Member since 2001. Furthermore, leaving aside that there appears to be no legal basis for requiring a Member to allocate an all others share, it is not clear why a 0.0% share that reflects actual imports during the reference period should be treated differently from a 0.31% share (0210 99 39), or from a 1.6% share (1602 39 29), or from a 2.11% share (1602 32 11) that reflects actual imports during the reference period.

7.421. Based on the foregoing, we find that China has failed to demonstrate that the European Union acted inconsistently with the chapeau of Article XIII:2 by not allocating an "all others" share of at least 10% for all of the TRQs under the First and Second Modification Packages.

7.8 Claims under Article XIII:1 of the GATT 1994

7.8.1 Introduction

7.422. China claims that the "allocation of all or the vast majority of the TRQs to two of the WTO Members" (i.e. Brazil and Thailand) violates not only Article XIII:2, but also Article XIII:1 of the GATT 1994. According to China, this is so because the importation of the like product from other WTO Members is not "similarly prohibited or restricted" as required by the terms of that provision.[575]

7.423. China considers that like products are not "similarly prohibited or restricted" for the following reasons. First, because the TRQ for tariff line 1602 39 21 was allocated entirely to Thailand.[576] Second, because for the other TRQs where the European Union has allocated a share to "all others", it did so in volumes and portions "that are so small as to allow no meaningful

[571] We agree with the European Union that a non-substantial supplier could at a certain point capture the whole "all others" share, which would then lead to a permanent freeze in the TRQ allocation unless the "all others" share was a moving target and thus also the amount of the TRQ is a moving target (which would transform a TRQ in an open ended tariff concession) (EU's second written submission, para. 146).

[572] EU's first written submission, paras. 262-263.

[573] See paragraph 7.136. See also China's opening statement at the first meeting of the Panel, para. 102.

[574] As explained in section 7.3.3.1 above, these claims are outside the Panel's terms of reference.

[575] China's request for the establishment of a Panel, items II.A(iv) and II.B(iv). China's first written submission, paras. 151-168; China's opening statement at the first meeting of the Panel, paras. 76-84; China's responses to Panel question Nos. 35-38; China's second written submission, paras. 122-139; China's opening statement at the second meeting of the Panel, paras. 56-65; parties' responses, and comments on one another's responses, to Panel question Nos. 60, 64-65, 87-88.

[576] China's first written submission, paras. 158-159; China's opening statement at the first meeting of the Panel, para. 81; China's second written submission, paras. 129, 131-132.

access to or participation in the TRQs", rendering it significantly more difficult or impossible for the WTO Members concerned to obtain SSI status going forward.[577] China submits that this "reinforces" the effect of the very small "all others" share.[578] Third, China argues that like products are not similarly restricted on the basis that the European Union negotiated country-specific TRQ shares with Brazil and Thailand, but not for other WTO Members that were substantial suppliers, including China.[579] Finally, China submits that where the restrictions in the form of TRQs are determined on the basis of a reference period tainted by SPS import bans that applied to only some WTO Members, this means that imports from all third countries are not "similarly restricted".[580] According to China, "[t]he fact that Article XIII:2 regulates allocation of a TRQ does not in any way preclude Article XIII:1 from regulating allocation".[581] In China's view, "the same measure, including those relating to the allocation of TRQs, could violate Article XIII:1 and Article XIII:2, simultaneously".[582]

7.424. The European Union responds that China's claims under Article XIII:1 are unfounded because Article XIII:1 generally does not deal with the allocation of TRQ shares among supplying countries.[583] More precisely, the European Union considers that Article XIII:2 is *lex specialis*[584] vis-à-vis Article XIII:1, in the sense that Article XIII:1 is applicable only "for aspects of the allocation of TRQs that are not covered by Article XIII:2", and only "to the extent that its application does not lead to results that would conflict with the outcome resulting from the application of Article XIII:2".[585] In the European Union's view, Article XIII:1 requires that a TRQ be "applied on a product-wide basis and no Member is excluded from participation in the TRQ", but this "does not govern the *level of access* that each Member must have in a TRQ".[586] The European Union observes that the TRQs at issue in this dispute "are defined only by reference to the tariff line, which in turns refers to the intrinsic characteristics of the products, such as percentage of meat contained in the product and whether or not the product is cooked".[587]

7.8.2 Relevant legal provisions

7.425. Article XIII:1 reads as follows:

> No prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, 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*. (emphasis added)

7.8.3 Analysis by the Panel

7.426. China claims that the "allocation of all or the vast majority of the TRQs to two of the WTO Members" (i.e. Brazil and Thailand) violates Article XIII:1 of the GATT 1994 because the

[577] China's first written submission, paras. 161-164, 167; China's opening statement at the first meeting of the Panel, paras. 81-82; China's second written submission, paras. 129-139.
[578] China's second written submission, para. 135; China's response to Panel question No. 60.
[579] China's first written submission, paras. 165-166; China's opening statement at the first meeting of the Panel, paras. 79-80, 84; China's second written submission, para. 127; China's opening statement at the second meeting of the Panel, para. 61. China agrees with the European Union "that there is no requirement to negotiate with WTO Members not holding a substantial supplying interest" (China's response to Panel question No. 37).
[580] China's first written submission, para. 168.
[581] China's opening statement at the second meeting of the Panel, para. 57. See also China's response to Panel question No. 64(a), para. 3.
[582] China's opening statement at the second meeting of the Panel, para. 59. See also China's responses to Panel question No. 64, para. 7, and No. 65, para. 11.
[583] EU's first written submission, paras. 196-209; EU's responses to Panel question Nos. 32-34; EU's second written submission, paras. 86-113; EU's opening statement at the second meeting of the Panel, paras. 42-62; parties' responses, and comments on one another's responses, to Panel question Nos. 60, 64-65, 87-88.
[584] EU's first written submission, paras. 186, 201, 204-205; EU's second written submission, paras. 90, 96; EU's opening statement at the second meeting of the Panel, para. 45; EU's response to Panel question No. 64(a), paras. 7-9.
[585] EU's response to Panel question No. 64(a), para. 10.
[586] EU's first written submission, para. 198. (emphasis original)
[587] EU's first written submission, para. 199.

importation of the like product from other WTO Members is not "similarly prohibited or restricted" as required by the terms of that provision. China's claim and the arguments of the parties raise the issue of the relationship between the obligations found in Article XIII:1 and Article XIII:2, and in particular whether the allocation of TRQ shares among supplying countries is governed by the general non-discrimination obligation in Article XIII:1.

7.427. We note that the terms of Article XIII:1 could be read to mean that no tariff rate quota may be applied by any Member on the importation of any product of the territory of any other Member (e.g. poultry from China), unless the importation of the like product of all third countries (e.g. Brazil and Thailand) is "similarly restricted". However, Article XIII:1 does not provide any specific guidance on how to administer TRQs in a manner that avoids discrimination in the allocation of shares.

7.428. A TRQ will, by definition, comprise a two-tier tariff rate in which the in-quota tariff rate is lower than the out-of-quota tariff rate. In every case in which a TRQ is allocated among supplying countries, some Member(s) will be allocated a share of the TRQ that is larger than the share that is allocated to other Members. Taken together, this means that the Member(s) with the larger TRQ shares will be entitled to export the volumes set out in their country specific shares at the lower, in-quota tariff rate, as compared with other Members. That could be understood to mean that products from different Members are not "similarly restricted". When a TRQ is allocated in varying amounts among supplying countries, then each Member is not, and by definition cannot be, "similarly restricted" vis-à-vis any other Member that is allocated a greater or smaller share (or no share) of the TRQ.

7.429. Of course, it would follow from such an interpretation of Article XIII:1 that Members are legally prohibited, by the terms of Article XIII:1, from ever allocating a TRQ among supplying countries. This is because where a TRQ is allocated among supplying countries, the "similarly restricted" requirement of Article XIII:1 would never be met, insofar as that requirement is applied at the level of the amount of the shares allocated. It is axiomatic that the terms of Article XIII:1 cannot be read in isolation from Article XIII:2, which expressly authorizes a Member to allocate shares in a TRQ, in varying amounts, among different supplying countries.[588] Therefore, we cannot interpret Article XIII:1 as prohibiting a Member from allocating shares in a TRQ in varying amounts among different supplying countries insofar as this would conflict with Article XIII:2.

7.430. Prior panel and Appellate Body Reports have, unsurprisingly, interpreted Article XIII:1 so as not to conflict with the obligations in Article XIII:2 relating to the allocation of TRQs. Notably, the panel in *EC – Bananas III* explained:

> While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned.[589]

7.431. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body sought to delineate the scope of Article XIII:1 from the scope of Article XIII:2. Beginning with an examination of the terms of Article XIII:1 taken together with Article XIII:5, the Appellate Body set forth its understanding of the scope of Article XIII:1:

> Applying Article XIII:1 to a tariff quota requires that the word "restriction" be read as a reference to a tariff quota. Article XIII:1 is then rendered thus: *no tariff quota shall be applied* by a Member on the importation of any product of the territory of any other Member, unless the importation of the like product of all third countries is similarly made subject *to the tariff quota*. The application of *the tariff quota is thus on a*

[588] We recall that Article XIII:2(d) provides that the importing Member "may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned"; and provides that, in cases in which this method is not reasonably practicable, the importing Member "shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product".

[589] Panel Report, *EC-Bananas III*, para. 7.75.

> *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".[590] (emphasis added)

7.432. Thus, the Appellate Body did not read the "similarly restricted" requirement of Article XIII:1 as applying at the level of the amount of the TRQ shares allocated among supplying countries. Rather, the Appellate Body equated the term "restriction" in Article XIII:1 with the TRQ as a whole, rather than at the level of the individual shares allocated among supplying countries. The Appellate Body understood the obligation in Article XIII:1 to be that no tariff quota shall be applied by a Member on the importation of any product from some Members, unless the importation of the like product of all third countries is similarly "made subject to the tariff quota". Under this reading, a violation of Article XIII:1 would be established if the products from one Member are "made subject to the tariff quota", but the products of one or more other Members are not made subject to the tariff quota.

7.433. After clarifying how Article XIII:1 applies to TRQs, the Appellate Body then immediately turned to the subject-matter of Article XIII:2. The Appellate Body stated that:

> 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. The provisions of Article XIII:2(a)-(d) are specific instances of authorized forms of allocation when a Member chooses to allocate shares of the tariff quota.[591] (emphasis added)

7.434. In the present case, China has not alleged that Brazil or Thailand were not "made subject to the tariff quota". Nor has China alleged that the TRQ is applied other than "on a product-wide basis". China has not articulated what are the different elements of the TRQs, or their allocation, that China is challenging under Article XIII:1, separately from that which China has already challenged under Article XIII:2. Rather, China's claims under Article XIII:1 appear to be based on essentially the same elements as its claims regarding the TRQ allocation under the chapeau of Article XIII:2. All of China's argumentation under Article XIII:1 relates to the amount of the TRQ shares allocated to "all others", or to the allocation of country-specific shares only to Brazil and/or Thailand but not to China which claimed it was also a substantial supplier.

7.435. China did not expressly address the relationship between Article XIII:1 and XIII:2 in its first written submission. The Panel solicited China's views of the relationship between Article XIII:1 and XIII:2 with regard to the allocation of TRQ shares among supplying countries, with a view to understanding the difference between China's claims and arguments under Article XIII:1 and those China has advanced under Article XIII:2. China has stated that it disagrees with the European Union that Article XIII:2 is *lex specialis* with respect to TRQ share allocation.[592] However, in setting forth its views on how Article XIII:1 applies to the allocation of TRQ shares among supplying countries, China advanced an interpretation of Article XIII:1 under which this provision would seem to impose essentially the same rule that is already expressed in Article XIII:2 (including both

[590] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 337.

[591] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 338.

[592] China's comments on the EU's response to Panel question No. 64(a).

its chapeau and paragraph (d)).[593] In addition to the requirements that China sees as being common to both Article XIII:1 and Article XIII:2, China states that:

> In addition, however, Article XIII:1 has a broader scope of application compared to Article XIII:2 inasmuch as it also provides that no conditions or formalities are established with regard to access to the tariff rate quotas that differentiate between WTO Members such that the importation from all WTO Members is not similarly restricted. Thus, as mentioned in Question 34(a) above that was addressed to the EU, China also believe that Article XIII:1 also requires similar treatment with respect to matters such as the product coverage of the tariff rate quotas, applying the same in-quota tariff rates, applying the same out-of-quota tariff rates or similarity in the procedures and formalities to access the tariff rate quotas.[594]

7.436. We have already addressed the substance of all of the arguments that China advances under Article XIII:1 in the context of addressing China's arguments regarding the allocation of the TRQs under Article XIII:2. As for the additional elements that China considers would fall within the broader scope of application of Article XIII:1, and which may not be subject to Article XIII:2, China has not alleged that there are any "conditions or formalities …established with regard to access to the tariff rate quotas that differentiate between WTO Members", or that the TRQs at issue accord any dissimilar treatment "with respect to matters such as the product coverage of the tariff rate quotas, applying the same in-quota tariff rates, applying the same out-of-quota tariff rates or similarity in the procedures and formalities to access the tariff rate quotas".

7.8.4 Conclusion

7.437. Based on the foregoing, we find that China has failed to demonstrate that the "allocation of all or the vast majority of the TRQs to two of the WTO Members" (i.e. Brazil and Thailand) violates the requirement, in Article XIII:1, that no tariff rate quota be applied by any Member on the importation of any product of the territory of any other Member unless the importation of the like product of all third countries is "similarly prohibited or restricted".

7.9 Claims under Article I:1 of the GATT 1994

7.9.1 Introduction

7.438. China claims that the "allocation of all or the vast majority of the TRQs to two of the WTO Members" (i.e. Brazil and Thailand) violates not only Article XIII:2, but also the requirement in Article I:1 that any "advantage, favour, privilege or immunity" granted to any Member be "accorded immediately and unconditionally" to the like product originating in any other Member.[595] According to China, the first "advantage" or "favour" granted to products of Brazil and Thailand that is not "accorded immediately and unconditionally" to the like products from all other Members is the "disproportionate high allocation" of the share in the TRQs to Brazil and Thailand together with "the difference between the in-quota rates and the much higher out-of-quota rates".[596] The second "advantage" or "favour" is the granting of "a country-specific volume of the tariff rate quotas" to Brazil and Thailand, whereas "[o]ther WTO Members with substantial supplying interests, such as China, have a volume of imports that cannot be predicted since it is in competition with imports originating in other countries".[597] China states that its claims under Article I:1 are "independent legal claims", and "not a consequential claim that depends on the outcome of claims under Articles XIII or XXVIII".[598]

[593] China's response to Panel question No. 35, paras. 155, 157. See also China's second written submission, paras. 127-128.
[594] China's response to Panel question No. 35, para. 158.
[595] China's first written submission, para. 280(16). The arguments in supports of China's claims under Article I:1 are found in China's first written submission, paras. 271-279; China's responses to Panel question Nos. 58-59; China's second written submission, paras. 202-208; parties' responses, and comments on one another's responses, to Panel question Nos. 60, 64.
[596] China's second written submission, para. 207.
[597] China's second written submission, para. 208.
[598] China's first written submission, para. 275; see also China's response to Panel question No.59(b), and Panel question No. 59(c), para. 207; China's second written submission, para. 205.

7.439. The European Union responds that China's claims under Article I:1 are unfounded because this provision does not govern the allocation of TRQs among supplying countries.[599] According to the European Union, Article I:1 would only be implicated insofar as a Member imposes differential in-quota duties on imports of like products from different supplier countries.[600] The European Union submits that if China's claim were upheld, "it would mean that any time a Member allocates a TRQ (regardless of whether it has complied with Article XIII:2 or not) there would be a violation of Article I:1 because it would not grant immediately and unconditionally the same access to the TRQ to all other Members".[601] The European Union does not consider the relationship between Article XIII:2 and Article I:1 to be one of *lex specialis* vs *lex generalis*, because the European Union considers that even in the absence of Article XIII:2, the terms of Article I:1 do not regulate the allocation of TRQ shares among supplying countries.[602]

7.9.2 Relevant legal provisions

7.440. Article I of the GATT 1994 is entitled "Most-Favoured-Nation Treatment". Article I:1 states:

> 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 Member 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 Members.

7.9.3 Analysis by the Panel

7.441. China claims that the "allocation of all or the vast majority of the TRQs to two of the WTO Members" (i.e. Brazil and Thailand) violates the terms of Article I:1 because the TRQ allocation results in an "advantage, favour, privilege or immunity" being accorded to Brazil and Thailand which is not accorded "immediately and unconditionally" to the like product originating in or destined for the territories of all other Members. China's claim and the arguments of the parties raise the issue of the relationship between the obligations found in Article I:1 and Article XIII:2, and in particular whether the allocation of TRQ shares among supplying countries is governed by the general MFN obligation in Article I:1.

7.442. We note that the terms of Article I:1 require that, with respect to the tariffs applied to poultry products ("customs duties and charges of any kind imposed on or in connection with importation"), any "advantage, favour, privilege or immunity" granted by the European Union to any poultry product originating in Brazil or Thailand must "be accorded immediately and unconditionally" to the like poultry product originating in China or any other Member. However, Article I:1 does not provide specific guidance on how to administer TRQs in a manner that avoids discrimination in the allocation of shares.[603]

7.443. A TRQ will, by definition, comprise a two-tier tariff rate in which the in-quota tariff rate is lower than the out-of-quota tariff rate. In every case in which a TRQ is allocated among supplying countries, some Member(s) will be allocated a share of the TRQ that is larger than the share that is allocated to other Members. Taken together, this means that the Member(s) with the larger TRQ

[599] EU's first written submission, paras. 303-308; EU's opening statement at the first meeting of the Panel, para. 6; EU's second written submission, paras. 189-195; EU's opening statement at the second meeting of the Panel, para. 107; parties' responses, and comments on one another's responses, to Nos. 60, 64.

[600] EU's first written submission, para. 306; EU's second written submission, paras. 190, 194. The European Union submits that Article XIII:1 "does not necessarily require that the same in-quota tariff rates applies to all Members as that matter is already regulated by Article I:1 of the GATT 1994. It would make little sense to hold that two provisions of the same agreement impose the same identical obligation, because that would imply that one of those provisions is redundant" (EU's response to Panel question No. 32 para. 97).

[601] EU's first written submission para. 308.

[602] EU's response to Panel question No. 64(a), paras. 8-9, 12.

[603] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 343.

shares will be entitled to export the volumes set out in their country specific shares at the lower, in-quota tariff rate, as compared with other Members. That could be understood to constitute an "advantage" or "favour" with respect to "customs duties and charges of any kind imposed on or in connection with importation". When a TRQ is allocated in varying amounts among supplying countries, then such "advantage" or "favour" is not, and by definition cannot, be "accorded immediately and unconditionally" to any other Member that is allocated a smaller share (or no share) of the TRQ.

7.444. Of course, it would follow from such an interpretation of Article I:1 that Members are legally prohibited, by the terms of Article I:1, from ever allocating a TRQ among supplying countries. This is because where a TRQ is allocated among supplying countries, the advantages granted to those who receive the largest TRQ shares would not be accorded "immediately and unconditionally" to all other Members".[604] It is axiomatic that the terms of Article I:1 cannot be read in isolation from Article XIII:2, which expressly authorizes a Member to allocate shares in a TRQ, in varying amounts, among different supplying countries.[605] Therefore, to interpret Article I:1 as prohibiting a Member from allocating shares in a TRQ in varying amounts among different supplying countries would conflict with Article XIII:2.

7.445. Prior panel and Appellate Body Reports have, unsurprisingly, interpreted Article I:1 so as not to conflict with the obligations in Article XIII:2 specifically relating to the allocation of TRQs. The panel in *EEC – Apples (Chile I)* considered it "more appropriate to examine the matter in the context of Article XIII which deals with the non-discriminatory administration of quantitative restrictions rather than Article I:1".[606] Likewise, the panel in *EEC – Dessert Apples* also "considered it more appropriate to examine the consistency of the EEC measures with the most-favoured-nation principles of the General Agreement in the context of Article XIII", as "[t]his provision deals with the non-discriminatory administration of quantitative restrictions and is thus the lex specialis in this particular case".[607] In *EC – Bananas III*, the panel found that "it is more appropriate to consider these issues under Article XIII because that is the more specific provision", and accordingly made "no finding on the compatibility of the EC's tariff quota share allocations and BFA reallocation rules with Article I:1".[608]

7.446. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body sought to delineate the scope of Article I:1 from the scope of Article XIII, indicating that they are "distinct" and that the two provisions may apply to "different elements" of a measure or import regime.[609] The Appellate Body stated:

> 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 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

[604] EU's first written submission para. 308.

[605] We recall that Article XIII:2(d) provides that the importing Member "may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned"; and provides that, in cases in which this method is not reasonably practicable, the importing Member "shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product".

[606] GATT Panel Report, *EEC – Apples (Chile I)*, para. 4.1.

[607] GATT Panel Report, *EEC – Dessert Apples*, para. 12.28.

[608] Panel Report, *EC – Bananas III (Guatemala / Honduras)*, paras. 7.129-7.130. In *EC – Bananas III*, the Appellate Body stated, in the context of a different issue, that "although Articles I and XIII of the GATT 1994 are both non-discrimination provisions, their relationship is not such" that a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII (Appellate Body Report, *EC – Bananas III*, para. 183). Apart from indicating that the relationship between these two provisions is such that a waiver of the obligation under the former does not imply a waiver of the obligations under the latter, the Appellate Body did not further elaborate on the different scope and subject-matter of these two provisions.

[609] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 343.

> 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.[610] (emphasis added)

7.447. In the present case, China has not alleged that the TRQs impose "differential in-quota duties on imports of like products from different supplier countries under a tariff quota". Nor has China articulated what are the "different elements" of the TRQs or their allocation that is being challenged under Article I:1, as opposed to Article XIII. Rather, China's claim under Article I:1 appears to be based on essentially the same elements as its claims regarding the TRQ allocation under Article XIII:2, simply articulated in a more general way.

7.448. First, China asserts that the TRQ allocation to Brazil and Thailand is "disproportionate". However, China does not articulate the basis upon which this "disproportionate" standard is to be assessed. Given that China argues that its claims under Article I:1 are "independent legal claims" that are "not a consequential claim that depends on the outcome of claims under Articles XIII or XXVIII"[611], it might be surmised that in China's view, whether a TRQ allocation is "disproportionate" under Article I:1 is to be assessed on a basis that is different from the TRQ allocation rules set forth in Article XIII:2. However, China has not elaborated its argument beyond stating that the TRQ allocation is "disproportionate". We see no basis in the text of Article I:1 for applying a stand-alone "disproportionate" standard to assess the GATT-consistency of the allocation of TRQ shares among supplying countries. Moreover, to read such a standard into Article I:1 would mean that there are different and potentially conflicting requirements under Article I:1 and Article XIII governing the allocation of TRQs among supplying countries.

7.449. In the context of its argumentation under Article I:1, China also notes that Brazil and Thailand are granted a country-specific volume of the tariff rate quotas, with a volume that is transparent, predictable, and free from competition from other supplying countries, while other substantial suppliers such as China are not.[612] However, as the European Union has observed, these "are inherent features of any share allocated to any substantial supplier pursuant to Article XIII:2(d)".[613] Thus, to find a violation of Article I:1 on that basis would again require interpreting Article I:1 to mean that Members are legally prohibited, by the terms of Article I:1, from allocating a TRQ among supplying countries.

7.450. The Appellate Body has clarified that Article I and XIII may apply to "different elements" of a measure or import regime[614], and we do not exclude, *a priori*, that certain elements relating to the allocation of a TRQ among supplying countries could potentially fall within the scope of the general MFN obligation in Article I:1. However, in the present case, China has not identified any elements of the TRQ allocation that fall within the scope of Article I:1.[615]

7.9.4 Conclusion

7.451. Based on the foregoing, we find that China has failed to demonstrate that the "allocation of all or the vast majority of the TRQs to two of the WTO Members" (i.e. Brazil and Thailand) violates the requirement in Article I:1 that any "advantage, favour, privilege or immunity" granted to any Member be "accorded immediately and unconditionally" to the like product originating in any other Member.

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[610] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 343.

[611] China's first written submission, para. 275; see also China's response to Panel question No.59(b), and Panel question No. 59(c), para. 207; China's second written submission, para. 205.

[612] China's second written submission, para. 208.

[613] EU's second written submission, para. 193.

[614] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 343.

[615] Appellate Body Report, *US – Gambling,* para. 140. (emphasis original, footnotes omitted)

7.10 Claims under Article XIII:4 of the GATT 1994

7.10.1 Introduction

7.452. China claims that the European Union violated Article XIII:4 of the GATT 1994 by refusing to enter into "meaningful consultations" with China.[616] We understand China to acknowledge that, following its request for consultations under Article XIII:4, the parties did in fact hold consultations on 19 May 2014. However, China claims that these were not "meaningful consultations", on the grounds that the European Union "stated that Article XIII did not apply and failed to reappraise the quota allocation to account for the SPS measures".[617] China disagrees with the European Union's position that Article XIII:4 only establishes a "procedural obligation" to consult, and argues that "consultations followed by no adjustment when the conditions for an adjustment are met, would mean that the consultations under Article XIII:4 are a dead letter".[618] China considers that it made a duly justified claim of substantial supplying interest pursuant to Article XIII:4, and that Article XIII:4 applies when the allocation among substantial suppliers is based on either the first or second sentences of Article XIII:2(d).[619]

7.453. The European Union responds that there is no violation of Article XIII:4 because it discharged any obligation that it had to consult with China by meeting with China on 19 May 2014.[620] In this regard, the European Union submits that Article XIII:4 only sets out a "procedural obligation" to consult, and that "it is not required to adjust the allocation of the TRQ in response to the requests from a Member having a SSI".[621] The European Union additionally argues that China did not make a duly justified claim of substantial supplying interest when it requested consultations pursuant to Article XIII:4, and that Article XIII:4 only applies when the allocation among substantial suppliers is done unilaterally pursuant to the second sentence of Article XIII:2(d).[622]

7.10.2 Relevant legal provisions

7.454. Article XIII:4 reads as follows:

> 4. With regard to restrictions applied in accordance with paragraph 2 (d) of this Article or under paragraph 2 (c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the Member applying the restriction; Provided that such Member shall, upon the request of any other Member having a substantial interest in supplying that product or upon the request of [the CONTRACTING PARTIES], consult promptly with the other Member or [the CONTRACTING PARTIES] regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization.

7.455. Article XIII:4 refers explicitly to the request of "any other Member having a substantial interest in supplying that product". The parties agree that a WTO Member may, but is not required, to consult under Article XIII:4 with a Member that does not hold a substantial interest.[623]

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[616] China's first written submission, paras. 253-257, 280(13); China's responses to Panel question Nos. 48-49; China's second written submission, paras. 193-196; China's opening statement at the second meeting of the Panel, para. 82; parties' responses, and comments on one another's responses, to Panel question Nos. 123-128.

[617] China's first written submission, para. 253; China's second written submission, para. 194.

[618] China's response to Panel question No. 49(a), para. 191.

[619] China's comment on the EU's response to Panel question No. 123(a), para. 73 and China's comment on the EU's response to Panel question No. 127, paras. 82 *et seq*.

[620] EU's first written submission, paras. 288-297; EU's responses to Panel question Nos. 47-48; EU's second written submission, paras. 177-183; EU's opening statement at the second meeting of the Panel, paras. 104-106; parties' responses, and comments on one another's responses, to Panel question Nos. 123-128.

[621] EU's first written submission, para. 195; see also EU's response to Panel question No. 123(a), para. 119.

[622] EU's responses Panel question No. 123(a), paras. 120-121 and Panel question No. 127, para. 143.

[623] Parties' response to Panel question No. 48.

7.10.3 Analysis by the Panel

7.456. It is not in dispute that China sent a letter to the European Union on 19 December 2013 requesting to "enter into consultations with the European Union in accordance with Article XIII:4".[624] It is also not in dispute that a meeting was subsequently held between China and the European Union pursuant to that request on 19 May 2014.[625] We understand that the European Union refused to recognize that China had the requisite substantial supplying interest status to invoke Article XIII:4, and the European Union made no adjustment to the allocation of TRQ shares among supplying countries following this meeting.

7.457. We consider that China's claims under Article XIII:4 raise a number of disputed issues. First, whether the obligation in Article XIII:4 is applicable to cases where the shares of a TRQ are allocated among supplying countries by agreement with substantial suppliers pursuant to the first sentence of Article XIII:2(d). Second, whether China was a Member having a substantial interest in supplying that product, and thus entitled to invoke Article XIII:4, at the time that it requested consultations pursuant to Article XIII:4. Third, whether Article XIII:4 establishes a legal obligation on the importing Member to reallocate TRQ shares among supplying countries to reflect an updated reference period or a reappraisal of special factors, as China contends, or merely a procedural obligation to consult as the European Union argues. Fourth, whether the European Union refused to consult with China in the sense of refusing to meet with China to consider the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved. We will address these issues in turn.

7.10.3.1 Whether Article XIII:4 applies in cases where TRQ shares are allocated among supplying countries by agreement with substantial suppliers pursuant to Article XIII:2(d) first sentence

7.458. We understand the European Union to argue that the obligation to consult provided for in Article XIII:4 only applies when the TRQ shares are allocated unilaterally pursuant to the second sentence of Article XIII:2(d), and that in cases where a Member allocating the shares of a TRQ has reached an agreement with all Members having a substantial interest in supplying the product under the terms of the first sentence of Article XIII:2(d), there is no obligation to enter into consultations pursuant to Article XIII:4.

7.459. The scope of Article XIII:4 is set out in its introductory sentence, which states that it applies "[w]ith regard to restrictions applied in accordance with paragraph 2(d) of this Article…". Paragraph 2(d) applies "in cases in which a quota is allocated among supplying countries". The text of Article XIII:4 does not distinguish between allocation by agreement under the first sentence of paragraph 2(d), and unilateral allocation under the second sentence of paragraph 2(d). Rather, it refers generally to restrictions imposed pursuant to paragraph 2(d). We believe that more precise language would have been needed to exclude from the scope of application of Article XIII:4 the situation where a Member allocates the shares of a TRQ based on agreements reached pursuant to Article XIII:2, first sentence.

7.460. The European Union argues that its interpretation of the scope of Article XIII:4 is supported by the phrase "established unilaterally" appearing in the last sentence of Article XIII:4, which, according to the European Union, refers back only to the unilateral allocation of the shares under the second sentence of Article XIII:2(d).[626] We observe that the phrase "established unilaterally" in Article XIII:4 appears in the phrase providing for consultations regarding "the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilization".[627] We note that this phrase is in part linked to the last sentence of Article XIII:2(d), which provides that:

> No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to

[624] Letter of 19 December 2013 requesting consultation under Article XIII:4 of the GATT 1994 (Exhibit CHN-39).
[625] See paragraph 7.81.
[626] EU's response to Panel question No. 124(b)(i), paras. 131-132.
[627] See China's comment on the EU's response to Panel question No. 127, para. 82.

> it, subject to importation being made within any prescribed period to which the quota may relate.

7.461. The phrase "established unilaterally" in Article XIII:4 is not specifically linked to the allocation of shares among different supplying countries as provided under the first or the second sentence of Article XIII:2. We also note that the word "unilateral" does not appear in the text of the second sentence of Article XIII:2(d). Contrary to what the European Union argues, we do not consider that the phrase "established unilaterally" qualifies all the matters which can be the object of the consultations provided for in Article XIII:4, on the grounds that it is placed at the end of the list of matters that are subject to consultations as specified in Article XIII:4.[628] Rather, we read this language as relating more to the conditions or formalities regarding the utilization of the quota as per the terms of the third sentence of Article XIII:2(d).

7.462. Continuing with our textual analysis of Article XIII:4, we note that it provides for consultations regarding the need for an adjustment to the reference period selected (i.e. the "base period"), or the reappraisal of special factors. The European Union observes that reference to a "representative period" and "special factors" is explicitly made only in the second sentence of Article XIII:2(d).[629] We agree that, if the subject-matter of the consultations provided for in Article XIII:4 were clearly confined to matters that only arise in cases of unilateral allocation of TRQ shares under the second sentence of Article XIII:2(d), then it may follow, by necessary implication, that the scope of the obligation to enter into consultations would not extend to cases where TRQ shares are allocated by agreement. However, the European Union itself acknowledges that consideration of "special factors" is also relevant in the context of allocating the shares of a TRQ by agreement pursuant to the first sentence of Article XIII:2(d).[630] We have found that due account must be taken of a previous representative period and special factors in the context of allocating the shares of a TRQ by agreement with substantial suppliers[631], and also in determining which Members are substantial suppliers, in the context of the first sentence of Article XIII:2(d).[632] Therefore, we are not persuaded that consideration of the subject-matter of the consultations under Article XIII:4 gives rise to the necessary implication that the scope of the obligation to enter into consultations extends only to cases where shares of a TRQ are allocated unilaterally pursuant to the second sentence of Article XIII:2(d).

7.463. We further note that the narrow interpretation of Article XIII:4 proposed by the European Union has been previously rejected by the panel in *EC – Bananas III*. In that case, the shares of a TRQ had been allocated by agreement with all the Members which held a substantial interest in supplying the product in question. The panel stated that:

> While the provisions of Article XIII:4 on consultations and adjustments seem to be primarily aimed at adjustments to quota shares allocated pursuant to Article XIII:2(d), second sentence, *they also apply in the case where agreements were reached pursuant to Article XIII:2(d), first sentence, with Members having a substantial interest in supplying the product concerned*. In addition, in so far as a new Member has a substantial interest in supplying that product, its share of the "others" category can be viewed, for purposes of Article XIII:4, as a provision established unilaterally relating to the allocation of an adequate quota.[633] (emphasis added)

7.464. This finding supports our understanding that there is nothing in the language of Article XIII:4 to suggest that its scope of application is confined to the allocation of TRQ shares under the second sentence of Article XIII:2(d). For these reasons, we find that the right to request consultations under Article XIII:4 is available to Members holding a substantial supplying interest in cases in which the allocation of TRQ shares among supplying countries is agreed pursuant to the first sentence of Article XIII:2(d), and not only in those cases in which the TRQ shares are allocated unilaterally pursuant to the second sentence of Article XIII:2(d).

[628] EU's response to Panel question No. 124(b)(i), para. 132.
[629] EU's response to Panel question No. 124(b)(i), para. 132.
[630] See paragraph 7.393.
[631] See paragraphs 7.392 to 7.396.
[632] See paragraphs 7.316 to 7.322.
[633] Panel Report, *EC – Bananas III (Ecuador)*, footnote 373.

7.10.3.2 Whether China had a substantial interest in supplying the products concerned at the time of its request under Article XIII:4

7.465. Article XIII:4 provides that a Member allocating TRQ shares among supplying countries pursuant to Article XIII:2(d) shall consult with any other Member having a substantial interest in supplying the product (or the WTO Members acting jointly) upon request. We recall that China sent a letter to the European Union on 19 December 2013 to request consultations under Article XIII:4.[634] In its letter, China stated that it was a Member with a substantial supplying interest in several of the tariff lines covered by the Second Modification Package, "as evidenced by the statistics of imports of the European Union from China in the most recent years prior to the adoption of the new tariff regime".[635] On 21 February 2014, the European Union responded by informing China that it did not meet the conditions to participate in the relevant negotiations.[636] The European Union has confirmed in these proceedings that it considered that, at the time of China's request for consultations under Article XIII:4, China did not have the substantial supplying interest necessary to request consultations under Article XIII:4.[637]

7.466. The parties have provided the Panel with import statistics for the period 1996-2015. We recall that China's shares of imports into the European Union of the poultry products covered by the Second Modification Package for years 2009-2015 were as follows[638]:

Tariff line	2009	2010	2011	2012	2013	2014	2015
1602 32 11	0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
1602 32 30	0.4%	0.9%	0.9%	0.8%	3.1%	4.2%	5.0%
1602 32 90	2.8%	1.5%	2.9%	0.8%	0.0%	1.6%	0.0%
1602 39 21	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
1602 39 29	27.1%	40.7%	52.8%	62.0%	58.4%	59.0%	59.4%
1602 39 40	0.0%	0.0%	25.3%	-	-	-	-
1602 39 80	8.7%	17.6%	61.1%	-	-	-	-
1602 39 85[639] (resulting from the merger of tariff lines 1602 39 40 and 1602 39 80, effective 1 January 2012)	(3.9%)	(8.3%)	(52.8%)	82.5%	81.7%	80.9%	86.2%

7.467. We note from these statistics that when China requested consultations on 19 December 2013, China held significant import shares in tariff lines 1602 39 29 and 1602 39 85 (58.4% and 81.7% for the year 2013, respectively). We also note that imports from China into the European Union under tariff lines 1602 39 29 and 1602 39 85 already accounted for more than 50% of imports of those poultry products by 2011 and continued to account for more than 50% of imports in 2012 (62.0% and 82.5%, respectively). Based on the import data submitted by the parties, China held an average import share of 51.8% in the importation into the European Union of products classified in tariff line 1602 39 29 for the years 2010-2012. China also held an average share of 47.9% of imports into the European Union of products under tariff line 1602 39 85 for the years 2010-2012.

[634] Letter of 19 December 2013 requesting consultation under Article XIII:4 of the GATT 1994 (Exhibit CHN-39).
[635] Letter of 19 December 2013 requesting consultation under Article XIII:4 of the GATT 1994 (Exhibit CHN-39).
[636] Response letter from the EU to China dated 21 February 2014 (Exhibit CHN-40).
[637] EU's first written submission, para. 296; EU's response to Panel question No. 47, para. 147; Response letter from the EU to China dated 21 February 2014 (Exhibit CHN-40). See paragraphs 7.79 to 7.81.
[638] See the import statistics in section 7.2.4 above.
[639] We note that when China made its request, tariff lines 1602 39 40 and 1602 39 80 had been merged into tariff line 1602 39 85 (effective 1 January 2012). For this reason, in this section we consider it necessary to also examine China's share of imports under the merged tariff line 1602 39 85.

7.468. These numbers indicate that China had a "substantial interest" in supplying the products classified under tariff line 1602 39 29 and 1602 39 85 when it made its request for consultations in 2013. We understand that the complete definitive import data from the year 2013 was not available to the European Union when China sent its request for consultations on 19 December 2013, or when the parties met to discuss the TRQs on 21 May 2014.[640] However, even the data for the year 2012 indicates that China had already achieved a substantial supplying interest in tariff lines 1602 39 29 and 1602 39 85 by that time. In light of China's significant import shares in these products during the years preceding the request for consultation, the Panel does not consider it necessary to determine the precise import share that is required for a supplying interest of a Member to be considered as "substantial" under Article XIII:4.[641] When China made its request for consultations under Article XIII:4 on 19 December 2013, China's import shares in the European Union market for the products classified under tariff lines 1602 39 29 and 1602 39 85 were clearly large enough for China to be considered a Member with a "substantial interest" in supplying these products (58.4% and 81.7%, respectively in 2013).

7.469. The European Union disagrees that China held a substantial supplying interest in these products when it made its request for consultation. It submits that since the processes of opening the TRQs and allocating the TRQ shares both occurred at the same time, "it follows that in 2014, just after the termination of the rebinding exercise by the EU pursuant to Article XXVIII and the implementation of the TRQs at issue, the EU was of the view that China did not hold a SSI necessary to request consultations under Article XIII:4."[642] In response to a question by the Panel, the European Union indicated that, at least for the years 2012 to 2015, the import shares held by China in tariff lines 1602 39 29 and 1602 39 85 were however sufficient to confer upon China the status of substantial interest supplier under both Article XXVIII:1 and Article XIII:2, "provided that imports were made during the relevant reference period".[643] Based on the above, we understand the European Union to be arguing that, for the purpose of Article XIII:4, the determination of which Members hold a substantial supplying interest may be based on the same reference period selected by the Member when it initially allocated the TRQ shares among supplying countries, in this case 2006-2008, and may disregard changes in import shares which may have occurred subsequent to that time.

7.470. In our view, the determination of which Members have a substantial supplying interest under Article XIII:4 cannot be based solely on import shares held during the reference period initially used to determine which Members held a substantial supplying interest under Article XIII:2, without taking into account changes in market shares that occurred following the initial TRQ share allocation. This is because Article XIII:4 aims in part to provide the opportunity for a Member which has increased its market share in a product subject to a TRQ to request, among other things, a readjustment of the TRQ shares based on more recent market developments. As the panel in *EC – Bananas III* observed, where a Member not having a substantial supplying interest is able to gain market share in the "others" category and possibly achieve a substantial supplying interest, this, in turn, "would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4".[644] This recognizes that a Member that did not have a substantial supplier interest during the initial allocation of a TRQ can nonetheless become a substantial supplier at a later point in time, such that it can request consultations with the Member that imposed the TRQ to adjust the TRQ shares under Article XIII:4. We note that the European Union itself recognizes that "a Member which was not a substantial supplier at the moment of the opening of the TRQ, and which at a certain point in time acquires an important import share in the product concerned (in or outside the TRQ) could claim a

[640] At the second meeting of the Panel, the European Union informed the Panel that import data for products imported into the European Union becomes available within a delay of three months, on a preliminary basis. Definitive data is available within one year. This was confirmed by the European Union in its response to Panel question No. 107(c), para 87: "[i]mport data becomes generally available with a three-month delay. But this is just preliminary data, which is subject to modification by the reporting authorities of the member States for up to one year." The Panel understands that in December 2013, the European Union had at its availability definitive data up to December 2012.

[641] We note that the Panel in *EC – Bananas III* also did not consider it necessary to rule on the "precise import share" that is required for a Member to have a substantial supplying interest in a product under Article XIII (Panel Report, *EC – Bananas III (Ecuador)*, para. 7.84).

[642] EU's response to Panel question No. 47(c), para. 146.

[643] EU's response to Panel question No.124(a), para. 129.

[644] Panel Report, *EC – Bananas III*, para. 7.76.

substantial supplying interest under Article XIII:4".[645] There is nothing in the text of Article XIII:4 to suggest that the possibility to request consultations is limited only to Members that held a substantial supplying interest when the TRQ was initially allocated under Article XIII:2(d). It follows that the reference period used to determine which Members held a substantial supplying interest at the moment of the initial TRQ allocation can be different from the reference period relied upon to determine substantial supplying interest under Article XIII:4.

7.471. For these reasons, we conclude, on the basis of the import shares made available to the Panel, that China was a Member having a substantial interest in supplying the products under tariff lines 1602 39 29 and 1602 39 85 at the time of its request for consultations under Article XIII:4, in December 2013. We disagree with the European Union insofar as it considers that, for the purpose of Article XIII:4, the determination of which Members hold a substantial supplying interest may be based on the reference period initially used to determine the TRQ share allocation, without taking into account changes in market shares that occurred following the initial TRQ share allocation.

7.10.3.3 Whether Article XIII:4 imposes an obligation to reallocate TRQ shares upon request from a Member with a substantial interest in supplying the product

7.472. Having found that China was a Member with a substantial interest in supplying the products under tariff lines 1602 39 29 and 1602 39 85 at the time of its request for consultations under Article XIII:4 in December 2013, the next question we have to consider is whether Article XIII:4 imposed an obligation on the European Union to reallocate the TRQ shares in respect of these products to reflect China's increased share of imports. As noted above, the European Union submits that Article XIII:4 only sets out a "procedural obligation" to consult, and that the Member maintaining a TRQ "is not required to adjust the allocation of the TRQ in response to the requests from a Member having a SSI".[646] China disagrees, and submits that "consultations followed by no adjustment when the conditions for an adjustment are met, would mean that the consultations under Article XIII:4 are a dead letter".[647]

7.473. We recall that Article XIII:4 states that a Member imposing a TRQ shall "consult promptly" upon request from a Member holding a substantial supplying interest. On its face, the wording of Article XIII:4 only imposes a mandatory obligation to consult upon the request of a Member holding a substantial supplying interest. The obligation to "consult" contained in Article XIII:4 is, in accordance with its ordinary meaning, an obligation to "confer about", "deliberate upon", or "consider" the matters listed in Article XIII:4.[648] There is nothing in the ordinary meaning of this term, or in the text of Article XIII:4, to suggest that the consultations should lead to a specific outcome, in this case the reallocation of the TRQ shares. We note that our reading of Article XIII:4 conforms to a general understanding of the term "consultations" as used elsewhere in the covered agreements.[649] Based on the ordinary meaning of the term "consult", we are therefore inclined to agree with the European Union that Article XIII:4 only imposes an obligation to "confer about", "deliberate upon", or "consider" the matters listed in Article XIII:4, and not an obligation to reallocate TRQ shares upon request from a Member with a substantial supplying interest.[650]

7.474. In addition, we consider that the context of Article XIII:4 suggests that it only imposes an obligation on the Member receiving a request from a substantial supplier to enter into consultations, but not an obligation to reallocate TRQ shares. In particular, we have already concluded that the obligation to enter into consultations under Article XIII:4 applies in the situation where the Member imposing the TRQ has allocated the shares under the first sentence of Article XIII:2(d) (allocation by agreement), and not only in the situations falling under the second sentence of Article XIII:2(d) (unilateral allocation by the Member imposing the TRQ). It follows from this interpretation that any Members with whom agreements are reached under the first

[645] EU's response to Panel question No. 42, para. 124.
[646] EU's first written submission, para. 195; EU's response to Panel question No. 123(a), para. 119.
[647] China's response to Panel question No. 49(a), para. 191.
[648] *Shorter Oxford English Dictionary*, 5th ed, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 497.
[649] Article 4 of the DSU, for example, also imposes a mandatory obligation to consult before requesting the establishment of a panel, but this obligation to consult clearly does not require that a specific outcome emanates from the consultations.
[650] See the EU's first written submission, para. 295; EU's second written submission, para. 182; EU's response to Panel question No. 123(a), para. 119.

sentence of Article XIII:2(d) are also substantial suppliers within the meaning of Article XIII:4, and that these Members may also therefore request consultations under that provision. Thus, if Article XIII:4 implied an obligation to reallocate the shares of a TRQ to reflect changes in import shares held by substantial suppliers, the beneficiaries of that obligation would include not only new substantial suppliers, but also any Members that have already entered into allocation agreements pursuant to the first sentence of Article XIII:2(d). Imposing an obligation on the Member allocating the TRQ to readjust the shares allocated could deprive these agreements of any binding effect, and these agreements would no longer constitute a "safe harbour" as far as these same substantial suppliers are concerned, contrary to the findings of the Appellate Body in *EC – Bananas III (Article 21.5 – US I) / (Article 21.5 – Ecuador II)*.[651] Thus, the applicability of Article XIII:4 to situations where agreements regarding the TRQ allocation were reached with Members having a substantial supplying interest, potentially following years of negotiations, suggests that the Member imposing and allocating the TRQ must have a degree of discretion as to whether or not it should reallocate the TRQ shares following a request for consultations under Article XIII:4.

7.475. However, we do not consider that this discretion is unfettered, such that a Member maintaining a TRQ is free to ignore significant changes in imports shares held by different countries following the opening of a TRQ. Our view is consistent with the fact that, in the same report, the Appellate Body suggested that Article XIII:4 could require an adjustment of a TRQ allocation, including in situations where the TRQ has been allocated by agreement. When examining the allocation agreement originally entered into between the European Communities and several other Members, as contained in paragraph 9 of the Bananas Framework Agreement, the Appellate Body stated in passing that:

> In our view, paragraph 9 of the Bananas Framework Agreement, which set an expiry date for the agreement at 31 December 2002, provided for consultations between the European Communities and "Latin American suppliers that are GATT Members" by 2001, and the review of the functioning of the agreement within three years, reflects *the requirements of Article XIII:4*, which requires consultation with substantial suppliers, reappraisal of special factors, *and an adjustment of the allocation agreement*.[652] (emphasis added)

7.476. Furthermore, we recall that the panel in *EC – Bananas III* had also previously suggested that if a Member not having a substantial supplying interest is able to gain market share in the "others" category and possibly achieve a substantial supplying interest, this, in turn, "would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4".[653]

7.477. We observe that Article XIII:4 was not at issue in either of those cases, and both statements were in the nature of *obiter dicta* made in passing. We further note that the panel in *EC – Bananas III* only stated that Article XIII:4 would provide such substantial suppliers with the "opportunity to receive" a country-specific allocation, and did not say that the Member applying the TRQ would have been obliged to allocate a specific share to that supplier in all circumstances.[654] However, these statements by the Appellate Body and the panel are both consistent with our understanding that, although a Member maintaining a TRQ that has been allocated among supplying countries must enjoy a degree of discretion as to whether or not to reallocate the TRQ shares following a request for consultations under Article XIII:4, such discretion is not unfettered.

7.478. Proceeding on the understanding that a Member does not have unfettered discretion to refuse to reallocate the TRQ shares upon the request of a Member holding a substantial supplying interest following a change in import shares, we do not however see any indication in the wording of Article XIII:4 of any time frame as to when or how often such reallocation would have to take place, or based on the occurrence of which events. There is no specific guidance in the text of Article XIII:4 on whether, for example, the reallocation would have to be done yearly or instead at

[651] Appellate Body Report, *EC – Bananas III (Article 21.5 – US I) / (Article 21.5 – Ecuador II*), para. 338.

[652] Appellate Body Reports in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 428.

[653] Panel Report, *EC – Bananas III*, para. 7.76.

[654] EU's response to Panel question No. 123(b), para. 127.

some other regular interval, or whether it would have to be done when any Member that did not receive a country-specific share experiences a surge in its import shares of the relevant product, or even when a Member that has already received a country-specific share significantly increases its share of imports beyond that which it has been allocated. We note in that regard that paragraph 9 of the Bananas Framework Agreement, which was at issue in the *EC – Bananas III (Article 21.5 – US I) / (Article 21.5 – Ecuador II)* dispute, provided that the initial allocation of the TRQ shares was set to expire on 31 December 2002. We understand that the Bananas Framework Agreement was agreed in 1994. Paragraph 9 also expressly provided that "full consultations with the Latin American suppliers that are GATT Members should start no later than in year 2001."[655] As noted above, the Appellate Body suggested that the foregoing "reflects the requirements of Article XIII:4".[656] While the Appellate Body did not elaborate, this suggests that an allocation agreement which was set to remain in force for eight years was nonetheless considered to meet the requirements of Article XIII:4, taking into account that it had an expiry date and provided for consultations. Based on the foregoing, we do not see that any purported obligation to reallocate TRQ shares arising under Article XIII:4 is subject to any particular time frame.

7.479. We note that China itself, in these proceedings, has been unable to clearly specify the time frame, frequency and the basis upon which the redetermination of the TRQ allocation would have to be made. In its second written submission, China stated for example that the allocation of TRQ shares is not static, and must "develop and be updated over time".[657] In the context of its claims under Article XIII:1 and XIII:2, China also submitted that the reassessment of the TRQ share allocation had to be reviewed and adjusted "from time to time"[658]; "before a new quota year starts"[659]; "preceding each allocation"[660]; and "when trade developments occur and the allocated shares are no longer representative of the import of a WTO Member in the absence of the TRQs."[661] At the second meeting of the Panel, China stated that since the TRQs in dispute operate on an annual basis, the European Union in this case is required to review the TRQ allocation every year, so as to determine whether the allocation should be updated in light of trade developments.[662] China also submitted that depending on the conditions of the market, a Member imposing a TRQ would also have the obligation under Article XIII to adjust the shares of the TRQ "on an as-needed basis".[663] We recall that we have ruled that China's claims based on an ongoing obligation under Article XIII:1 and XIII:2 to reallocate or reassess the TRQs applicable to the products covered by the First and Second Modification Packages are outside the Panel's terms of reference.[664] Nevertheless, China's inability, in this case, to clearly specify the time frame, frequency and the basis upon which the redetermination of the TRQ allocation should be made, further highlights that insofar as there is an obligation to reallocate under Article XIII:4, there is no indication, in the text of this provision, as to when that reallocation should be made.

7.480. Finally, we note that the prevalence and centrality of historical market shares in TRQ share allocations also suggest that, insofar as there is indeed an obligation to reallocate the shares allocated among supplying countries upon the request of a Member holding a substantial supplying interest under Article XIII:4, there is no obligation to do within any specified time frame, or with any particularly frequency.[665]

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[655] See paragraph 9 of the Bananas Framework Agreement, reproduced in Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 420.

[656] Appellate Body Reports in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 428.

[657] China's second written submission, para. 196.

[658] China's second written submission, para. 121.

[659] China's second written submission, para. 127.

[660] China's second written submission, para. 137; see also para. 147.

[661] China's second written submission, para. 165.

[662] China's response to Panel question No. 121(a), para. 111. See also China's response to the EU's question No.2, para. 14.

[663] China's response to the EU's response to Panel question No.2, para. 14.

[664] See section 7.3.2.3 above.

[665] See e.g. J. Jackson, *World Trade and the Law of GATT* (Bobbs-Merrill Company, Inc., 1969) pp. 323-324; P. Mavroidis, *Trade in Goods, 2nd Edition* (Oxford, 2012), p. 85 ("Art. XIII GATT thus, by preserving historic shares, does not account for changes in supply and demand"); S. Schropp and D. Palmeter, "Commentary on the Appellate Body Report in *EC–Bananas III (Article 21.5)*: Waiver-Thin, or Lock, Stock, and Metric Ton?" *World Trade Review*, Volume 9, Issue 01, January 2010, pp. 7-57, at p. 42 ("even after some careful study, the authors are unaware of a single case where uncompensated reallocation among quota holders occurred in accordance with Article XIII:2(d), first sentence"); T. Josling, "Agriculture and the Next

7.481. The issue raised in this case is whether Article XIII:4 can be interpreted as establishing a legal obligation on the importing Member to reallocate TRQ shares among supplying countries, to reflect an updated reference period or a reappraisal of special factors, in situations where import shares held by different countries have changed in the years immediately following the initial TRQ allocation agreed among substantial suppliers on the basis of historical market shares. For the foregoing reasons, we conclude that insofar as such an obligation arises from Article XIII:4, there is no obligation to reallocate the TRQ shares within any particular time frame, and at least not in the years immediately following the initial TRQ allocation.

7.482. Accordingly, we find that the European Union did not violate Article XIII:4 when it refused to reallocate the TRQ allocations arising from the Second Modification Package in May 2014. Accordingly, we reject China's claim of violation under Article XIII:4, insofar as this claim is based on the fact that the European Union did not reallocate the TRQ allocation among supplying countries in May 2014, following China's request for consultations under Article XIII:4.

7.10.3.4 Whether the European Union refused to consider the need for an adjustment of the TRQ shares or the reference period or reappraisal of special factors

7.483. The remaining issue is whether the European Union failed to discharge its obligation to consult with China in the sense of refusing to consider the need for an adjustment of the TRQ shares determined, for an adjustment of the reference period selected, or for the reappraisal of the special factors involved. In approaching this issue, we are guided by several principles that constitute the framework for our review of the facts before us.

7.484. First, we consider that the obligation to consult pursuant to Article XIII:4 should not be interpreted in an overly formalistic manner. In our view, the fact that the European Union apparently did not consider Article XIII:4 to be legally applicable in the circumstances, and agreed to consult with China only on a "without prejudice" basis and without acknowledging that China was entitled to invoke Article XIII:4[666], does not suffice, in and of itself, to establish a violation of this provision.[667] On the other hand, the fact that the European Union held a meeting with China on 19 May 2014 is not, in and of itself, sufficient to establish that the European Union discharged its obligation to consider the need for an adjustment of the TRQ shares determined, the reference period selected, or the reappraisal of special factors. Rather than adopting a formalistic approach, we consider that it is necessary to consider the totality of the information provided to the Panel regarding the exchanges that took place between the parties.

7.485. Second, we recall that as the complaining party alleging a violation of Article XIII:4, the burden of proof is on China to demonstrate that the European Union refused to consider the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors. We recognize that this may not be an easy burden to discharge.

WTO Round", in J. Schott (ed.), *The WTO After Seattle* (Institute for International Economics, Washington, July 2000), pp. 91-118, at 101 ("[i]n some cases, allocation is done on a government-to-government basis, usually in accordance with historical market shares. But this perpetuates distortions in trade"); S. Tangermann, "The European Common Banana Policy", in T. Josling and T. Taylor (eds.), *Banana Wars: The Anatomy of a Trade Dispute* (CABI Publishing, Cambridge, 2002), at p. 55 ("the systems based on a historical reference period … tend to freeze the market"); D. Skully, "Tariff rate quotas" in W. Kerr and J. Gaisford (eds.), *Handbook on International Trade Policy* (Edward Elgar, Cheltenham, 2007), at p. 273 ("[t]he prior-market-share rule, although imperfect, has been deemed practical and legitimate. An obvious problem with the prior-market-share rule is that things change: suppliers can gain or lose comparative advantage. Ideally, one would reallocate quota shares to reflect such changes. But this proves difficult to negotiate, suppliers who face an erosion of their quota shares tend to be adamantly opposed to any change. As a result, historical allocation is infrequently revised"); A. Sykes, *The WTO Agreement on Safeguards: A Commentary* (Oxford University Press, 2006), pp. 223-224 ("[t]o be sure, in dynamic industries where market shares change significantly and quickly, an allocation of shares on historical information may be quite imperfect, but a workable alternative may be difficult to devise"). At the second meeting of the Panel, the European Union posed the rhetorical question of how it was possible "that all scholars that ever wrote about Article XIII have never seen this yearly updating obligation?" (EU's opening statement at the second meeting of the Panel, para. 40)

[666] See EU's first written submission, para. 291; Exhibit CHN-40

[667] To find otherwise would mean that the European Union breached its obligation under Article XIII:4 to enter into consultations, not on the grounds that it refused to enter into consultations, but on the grounds that it entered those consultations without acknowledging that it was legally required to do so, and without acknowledging that the consultations were being conducted, legally speaking, pursuant to Article XIII:4.

We note that in assessing whether China has discharged its burden, we are confined to the facts that the parties have provided to us.

7.486. Third, we consider that consultations must be meaningful, and cannot be "mere formalities".[668] As indicated by the International Court of Justice in the *North Sea Continental Shelf* cases, State parties to international negotiations "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insist upon its own position without contemplating any modification to it".[669] While Article XIII:4 speaks of consultations, rather than negotiations, the principle that discussions between states be meaningful also applies to consultations.

7.487. There is no disagreement between the parties that a meeting was held between them on 19 May 2014, subsequent to China's request for consultations under Article XIII:4 on 19 December 2013. In its panel request and first written submission, China even characterizes this meeting as "consultations held on 19 May 2014".[670] China claims, however, that the European Union refused to enter into "meaningful consultations", because the European Union denied during those consultations that Article XIII:4 applied to the determination of the TRQs on the poultry products at issue in this dispute,[671] and "failed to reappraise the quota allocation to account for the SPS measures."[672] According to China, its "right to consultation under Article XIII:4 was effectively denied".[673]

7.488. The European Union responds however that China did not duly justify its claim of being a Member with a substantial interest when it lodged its request.[674] It submits that China's 19 December 2013 request was "formulated in very general terms"[675], and did not provide any import figures to justify its request nor did it indicate on which yearly period its request was based.

7.489. We recall that China's request for consultations under Article XIII:4 stated that:

> China has a substantial supplying interest in several of the tariff lines concerned, as evidenced by the statistics of imports of the European Union from China in the most recent years prior to the adopting of the new tariff regime. However, the new tariff regime, particularly the discriminatory allocation of tariff quotas contained therein, seriously prejudiced China's export interest. Indeed, in the eight months starting from March 1, 2013, imports from China under the tariff lines concerned declined by more than 50% in value, compared with the same period in 2012.[676]

7.490. The letter also referred to China's previous requests to enter into negotiations or consultations under Article XXVIII, dated 9 May 2012 and 2 October 2012, and to the European Union's notification of the conclusion of the Article XXVIII negotiations for the Second Modification Package.

7.491. We note that China's request to enter into consultations under Article XIII:4 does not contain any reference to the specific tariff lines upon which its request is based. The Note Verbale refers to Council Regulation (EC) No. 1218/2012, through which a new tariff regime on the tariff

[668] See *Lac Lanoux Arbitration (Spain v. France),* (1957) 12 R.I.A.A. 281, 315 at para. 22; 24 I.L.R. 101, 139 at para. 22.

[669] *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, I.C.J. Reports 1969, at para. 85.

[670] The panel request includes, as the relevant measure, the "[r]efusal by the European Union in consultations held on 19 May 2014 under Article XIII of the GATT 1994 to adjust the TRQs on the basis of recent import statistics establishing China's substantial supplying interests as had been requested by letter of Ambassador Yu of 19 December 2013" (China's request for the establishment of a panel, Section I.B item(v), p. 3). The claim under Article XIII:4 likewise refers to "The EU's refusal in consultations with China on 19 May 2014 to consider an adjustment of the allocation of the TRQs based on a change in the base period or a reappraisal of the special factors involved is inconsistent with GATT 1994 Article XIII:4" (China's request for the establishment of a panel, Section II.B item (viii)). At paragraph 256 of its first written submission, China states that the European Union "denied during consultations in May 2014 that Article XIII applied".

[671] China's first written submission, paras. 253-257.

[672] China's second written submission, para. 194.

[673] China's first written submission, para. 256.

[674] EU's response to Panel question No. 123, para. 121.

[675] EU's response to Panel question No. 123, para. 124.

[676] Exhibit CHN-39.

items concerned had been adopted, suggesting that the request for consultations may have been in respect of all of the tariff lines concerned by Council Regulation (EC) No. 1218/2012; however, the Note Verbale refers to China's substantial supplying interest in "several of the tariff lines concerned", implying that in others it did not have a substantial supplying interest. It appears from the submissions of the European Union that it was not until the meeting of 19 May 2014 that China indicated that its request was more precisely based on its belief that it held a substantial supplying interest in products classified in tariff lines 1602 39 29 and 1602 39 85.[677] This has been recognized by China in these proceedings.[678] We also note that China's request does not indicate the issues on which China was seeking to consult upon under Article XIII:4. China simply referred to the provisions of Article XIII:4 requiring a Member imposing a TRQ to consult upon request with a Member holding a substantial interest regarding the need for an adjustment of the TRQ shares, the selection of a base period and the consideration of special factors. It did not state on which of these grounds, specifically, it sought to consult with the European Union. Again, it appears from the record that it was not until the 19 May 2014 meeting that China informed the European Union that it was seeking the readjustment of the TRQ shares of tariff lines 1602 39 29 and 1602 39 85 on the basis of a different reference period, taken into account the existence of the SPS measures as special factors.[679] Furthermore, China's request for consultations under Article XIII:4 referred to its multiple earlier requests to be recognized as a substantial supplier in the different context of the negotiations under Article XXVIII, and those requests had been based on several different grounds. In response to a question by the Panel, China has indicated that it did provide the European Union with the trade data showing that it had, at least for tariff lines 1602 39 29 and 1602 39 80, a substantial supplying interest.[680]

7.492. We are sympathetic to China's argument that there is no specific guidance in Article XIII:4 on how a Member should make its request for consultations under that provision, and we do not consider that there is any particular "specificity" requirement that can be read into Article XIII:4.[681] However, we note that China has consistently taken an "all inclusive" approach with respect to its claims of interest in supplying the products covered by the First and Second Modification Packages, in the sense of alleging a substantial or principal supplying interest in all of the tariff lines at issue, without distinguishing between the different products at issue, and the different levels of importation into the European Union from China in respect of those products. China's reference in its letter dated 19 December 2013 to its requests for negotiations or consultations under Article XXVIII is illustrative in this regard. To recall, on 9 May 2012, China requested to enter into negotiations with the European Union, under Article XXVIII, on the basis that it was a Member with a principal supplying interest "with respect to relevant tariff lines".[682] China also provided statistics on imports into the European Union from China of products classified under four tariff lines (1602 20 10, 1602 39 29, 1602 39 40 and 1602 39 80) for the years 2009, 2010 and 2011. On 2 October 2012, China reiterated its request to enter into consultations with respect to "relevant tariff lines of poultry products" as notified by the European Union, and contested the use of the 2006-2008 reference period.[683] In these proceedings, China has confirmed that it claimed a substantial supplying interest under Article XXVIII "for all of the tariff lines covered by the First Modification Package"[684] and it claimed a "principal supplying interest with regard to the relevant tariff lines mentioned in the EU's notification of its intention to withdraw concessions" under the Second Modification Package.[685] With respect to its request for consultations under Article XIII:4, China has confirmed that it was claiming a substantial supplying interest "for all of the tariff lines covered by the Second Modification Package".[686] These statements by China highlight that China has consistently adopted an "all inclusive" approach to its claims of interests in the products covered by both the First and the Second Modification Package. China's general approach to extend its claims of interests to all the products covered by the

[677] EU's first written submission, para 292; EU's response to Panel question No. 47(a), para. 140. See also the EU's response to Panel question No. 123, para. 126.

[678] China's comment on the EU's response to Panel question No. 123, para. 74.

[679] EU's response to Panel question No. 47(a), para. 140. See also the EU's second written submission, para. 179.

[680] China's response to Panel question No. 128, para. 123.

[681] China's comment on the EU's response to Panel question No. 123, para. 73.

[682] Letter from China to the EU requesting to enter into negotiations under Article XXVIII (9 May 2012) (Exhibit CHN-50).

[683] Letter from China to the EU (2 October 2012) (Exhibit CHN-30). See also China's opening statement at the first meeting of the Panel, para. 37.

[684] China's response to Panel question No. 17(b), para. 101, referring to Exhibit CHN-16.

[685] China's response to Panel question No. 17(b), para. 102, referring to Exhibit CHN-29.

[686] China's response to Panel question No. 17 (b), para. 103.

modification packages further confirms that China's request to consult under Article XIII:4, based on its substantial supplying interest in "several of the lines concerned", was lacking in specificity regarding which tariff lines and special factors were concerned, and on which grounds.

7.493. In addition, we note that there is disagreement between the parties as to the events that took place after the 19 May 2014 meeting. The European Union has indicated that it invited China to provide it with more information, including the trade figures upon which it based its claims, but that China did not follow-up.[687] China has indicated that the European Union did not seek clarification or question China's claim of substantial supplying interest for the purpose of Article XIII:4, "either at or after the meeting".[688] China has also informed us that it again sought to consult with the European Union regarding the need for a readjustment of the TRQ shares in September 2015, after the beginning of the current proceedings.[689] The European Union has for its part indicated that the Article XIII:4 consultations between the parties could be considered as still ongoing.[690] China responds that the European Union agreed to "continue consultation in form, not in substance".[691]

7.494. We have concluded that China held a substantial supplying interest in tariff lines 1602 39 29 and 1602 39 85 at the time of its request under Article XIII:4. However, having considered the limited information that has been provided to the Panel regarding the issues touched upon at the May 2014 meeting, and the limited information provided to the Panel regarding further exchanges between the parties following that meeting, we consider that there are insufficient agreed facts concerning the conduct of the consultations to determine whether the European Union acted inconsistently with Article XIII:4. Accordingly, recalling that China has the burden of proof, we conclude that China has failed to discharge its burden of demonstrating that the European Union refused to consider the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved.

7.10.4 Conclusion

7.495. Based on the foregoing, we find that China has failed to demonstrate that the European Union violated Article XIII:4 by refusing to enter into meaningful consultations with China.

7.11 Claims under Article II:1 of the GATT 1994

7.11.1 Introduction

7.496. China claims that the European Union's application of the higher out-of-quota tariff rates arising from the First and Second Modification Packages is in violation of Article II:1 of the GATT 1994 because those rates exceed the bound rates currently inscribed in the EU Schedule of concessions.[692] We understand China to argue that because the changes have not yet been incorporated into the EU Schedule through the certification procedure, they have no legal effect to replace the existing bound duties. In China's view, therefore, the absence of certification means that the bound rates that existed in the EU Schedule prior to the completion of the Article XXVIII negotiations remain unchanged, and that the European Union's application of the higher out-of-quota tariff rates violates Article II:1.

7.497. The European Union submits that its application of the higher out-of-quota rates does not violate Article II:1.[693] We understand the European Union to argue that there is no violation of

[687] EU's first written submission, para. 293; EU's second written submission, para. 179; EU's comment on China's response to Panel question No. 128, para. 81.

[688] China's comment on the EU's response to Panel question No. 125, para. 78.

[689] China's second written submission, para. 195.

[690] EU's opening statement at the second meeting of the Panel, para. 105, EU's comments on China's response to Panel question No. 128, para. 80 and EU's response to Panel question No. 47, para. 139.

[691] China's response to Panel question No. 128, para. 123.

[692] China's arguments regarding its claim under Article II and related points are found in China's first written submission, paras. 260-270; China's opening statement at the first meeting of the Panel, paras. 113-118; China's responses to Panel question Nos. 50, 55-57; China's second written submission, paras. 197-201; parties' responses, and comments on one another's responses, to Panel question Nos. 94-105.

[693] The European Union's arguments regarding the claim under Article II and related points are found in EU's first written submission, paras. 298-302; EU's responses to Panel question Nos. 51-54, 56-57; EU's

Article II:1 because, contrary to what China argues, the certification of the changes to its Schedule is not a legal prerequisite for giving effect to the modifications agreed in Article XXVIII negotiations.

7.11.2 Factual background

7.498. The in-quota tariff rate for each of the TRQs at issue in this dispute is the same or lower than the bound rate currently inscribed in the EU Schedule for the tariff line in question. However, it is not in dispute that the out-of-quota rates that the European Union currently applies to the poultry products at issue resulting from its Article XXVIII negotiations are in excess of the bound rates currently inscribed in its Schedule.[694]

7.499. As regards the First and Second Modification Packages, we recall that, at the time of this Report, the bound rates inscribed in its Schedule (the prior tariff rate) and the rates that the European Union currently applies (the new out-of-quota tariff) are as follows[695]:

First Modification Package

Tariff item number	Prior tariff rate	New in-quota tariff rate	New out-of-quota tariff rate
0210 99 39	15.4%	15.4%	1,300 EUR/MT
1602 31	8.5%	8.5%	1,024 EUR/MT
1602 32 19	10.9%	8.0%	1,024 EUR/MT

Second Modification Package

Tariff item number	Prior tariff rate	New in-quota tariff rate	New out-of-quota tariff rate
1602 32 11	867 EUR/MT	630 EUR/MT	2,765 EUR/MT
1602 32 30	10.9%	10.9%	2,765 EUR/MT
1602 32 90	10.9%	10.9%	2,765 EUR/MT
1602 39 21	867 EUR/MT	630 EUR/MT	2,765 EUR/MT
1602 39 29	10.9%	10.9%	2,765 EUR/MT
1602 39 40	10.9%	10.9%	2,765 EUR/MT
1602 39 80	10.9%	10.9%	2,765 EUR/MT

7.500. As regards both the First and Second Modification Packages, the changes that the European Union, Thailand and Brazil agreed upon in the negotiations under Article XXVIII:5 have been notified to all Members, but those changes have not yet been incorporated into the EU Schedule by means of certification.

7.501. The European Union has submitted for certification the changes to its Schedule resulting from the Article XXVIII:5 negotiations relating to the First Modification Package, but at the time of the Report the draft Schedule has not yet been certified. Specifically, on 24 March 2014, the European Union communicated for certification a revised Schedule which contained "consolidations, modifications and rectifications in this Schedule, in relation to the previous certified CXL schedule of the EU" (Schedule CXL – EC15).[696] The draft Schedule of the European Union (Schedule CLXXIII – EU25), was circulated to the WTO Membership on 25 April 2014, in

second written submission, paras. 184-188; parties' responses, and comments on one another's responses, to Panel question Nos. 94-105.

[694] See EU's response to Panel question No. 51, para. 151, p. 44; China's second written submission, para. 8.

[695] See the import statistics in section 7.2.4 above.

[696] G/MA/TAR/RS/357, 25 April 2014, page 1.

document G/MA/TAR/RS/357.[697] The European Union confirmed in these proceedings that the results of the Article XXVIII negotiations under the First Modification Package are included in this draft Schedule[698], and that the certification process of the changes to the draft Schedule communicated on 24 March 2014 was still ongoing.[699]

7.502. At the time of this Report, the European Union has not yet submitted for certification the changes to its Schedule resulting from the Article XXVIII:5 negotiations relating to the Second Modification Package. The European Union explained that as the Second Modification Package was concluded in 2012, after the enlargement of the European Union to 27 member States, it was considered "more appropriate to submit for certification the changes included in that package as part of the draft schedule EU27" which will be submitted "as soon as the draft EU25 draft schedule is certified".[700]

7.503. Furthermore, we recall that although China does not contest that the changes that the European Union, Thailand and Brazil agreed upon in the negotiations under Article XXVIII:5 have been notified to all Members in accordance with paragraph 6 of the Procedures for Negotiations under Article XXVIII, the European Union confirms that it did not notify all Members of the date on which the changes agreed in the negotiations under Article XXVIII:5 entered into force as referred to in the second sentence of paragraph 7 of those same procedures. Specifically, the European Union indicated that although it had informed all of the Members with a principal or substantial supplying interest, "[t]he date [of] entry into force of those changes has not been notified" under paragraph 7 of the Procedures for Negotiations under Article XXVIII.[701]

7.11.3 Paragraph 1 of the Procedures for Modification and Rectification of Schedules and paragraph 7 of the Procedures for Negotiations under Article XXVIII

7.504. The Procedures for Modification and Rectification of Schedules and the Procedures for Negotiations under Article XXVIII set forth a number of requirements that Members are expected to follow when they seek to modify or withdraw concessions pursuant to Article XXVIII. In the light of the importance of the certification procedures and the objective of ensuring that the authentic texts of Schedules annexed to the General Agreement are up to date and properly reflect the legal rights and obligations of Members, it is important to recall at the outset that several issues fall outside of the scope of the Panel's terms of reference in the present case.

7.505. Paragraph 1 of the Procedures for Modification and Rectification of Schedules confirms that "[c]hanges in the authentic texts of Schedules annexed to the General Agreement which reflect modifications resulting from action under … Article XXVIII shall be certified by means of Certifications", and requires that a "draft of such change *shall* be communicated to the Director-General *within three months* after the action has been completed".[702] As regards both the First and Second Modification Packages, the European Union accepts that the "action was completed" no later than the time that it notified Members of the conclusion of the negotiations pursuant to paragraph 6 of the Procedures for Negotiations under Article XXVIII.[703]

7.506. Paragraph 7 of the Procedures for Negotiations under Article XXVIII provides that Members will be free to give effect to the changes agreed upon in negotiations under Article XXVIII:5 as from the date on which the conclusion of all the negotiations have been notified, but then requires that a "notification *shall* be submitted … of the date on which these changes will come into force". This requirement, set forth in the second sentence of paragraph 7, is linked to the requirement,

[697] An addendum (G/MA/TAR/RS/357/Add.1) was circulated on 1 September 2016, and a corrigendum to the addendum was circulated on 19 September 2016. In light of this addendum, the three-month period of review is currently ongoing.

[698] EU's response to Panel question No. 54, para. 158.

[699] EU's first written submission, para. 299. See also the EU's response to Panel question No. 52, para. 153.

[700] EU's response to Panel question No. 54(c), para 159.

[701] EU's response to Panel question No. 97.

[702] Emphasis added.

[703] EU's response to Panel question No. 52, para. 152. The European Union states that "[i]n the case at hand, the relevant 'action' is the conclusion of modification agreements with Brazil and Thailand, as required by Article XXVIII. As explained in the EU's first written submission (para. 302), such action has been completed and notified to the WTO in accordance with paragraph 6 of the Procedures for negotiations under Article XXVIII."

set forth in the chapeau of the Ad Note to Article XXVIII, that Members "shall be *informed immediately* of all changes in national tariffs resulting from recourse to this Article".[704] These requirements both support the objectives of transparency, security and predictability.

7.507. We recall that, in this case, China has stated that "[t]he Panel is not required nor requested to make a finding that the EU acted inconsistently with paragraph 7 and paragraph 1".[705] We have found that insofar as China is making any claims of inconsistency with these procedural requirements, such claims have not been made in a sufficiently clear and timely manner, and are therefore not properly before the Panel.[706] Accordingly, our analysis of China's claims under Article II:1 of the GATT 1994 is confined to the issues that fall within the scope of the Panel's terms of reference. This does not mean or imply that the European Union is in any way absolved or exempted from complying with the requirements set forth in the Procedures for Modification and Rectification of Schedules and the Procedures for Negotiations under Article XXVIII.

7.11.4 Analysis by the Panel

7.508. The issue raised by China's claim is whether the European Union has acted inconsistently with Article II:1 by applying the higher out-of-quota tariff rates agreed with Brazil and Thailand in the Article XXVIII:5 negotiations prior to the changes being incorporated into its Schedule through the applicable certification procedure. To resolve this issue, the Panel must determine whether certification is 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, without violating Article II of the GATT 1994.

7.509. China's claims and the arguments of the parties concern the meaning of and relationship between various provisions of the GATT 1994, the Procedures for Negotiations under Article XXVIII, and the Procedures for Modification and Rectification of Schedules. We will begin our analysis by examining the issue raised in the light of the relevant provisions of the GATT 1994, and we will then proceed to consider the provisions found in the two sets of Procedures.

7.510. Article II is entitled "Schedules of Concessions". Article II:7 provides that "[t]he Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement". Article II:1 sets forth the following obligations:

> (a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

7.511. Article II is one of the key provisions of the GATT 1994, and of the entire WTO legal system. The importance of Schedules of concessions, as sources of predictable and enforceable legal obligations, has been recognized by numerous panels and by the Appellate Body. Among other things, it has been recognized that "a basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule".[707]

7.512. On the other hand, one of the specific objects and purposes of Article XXVIII is to allow Members to make tariff concessions by providing them with flexibility to withdraw or modify those concessions subsequently, if necessary, in accordance with the procedures provided for therein. In this way, the right to modify or withdraw concessions supports the overarching object and purpose, which finds reflection in the preambles of both the GATT 1994 and the WTO Agreement,

[704] Emphasis added.
[705] China's response to Panel question No. 99, para. 74.
[706] See section 7.3.3.1.
[707] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

of Members "*entering into* reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade".

7.513. Article II of the WTO Agreement stipulates that "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members." The general rule for amending provisions of the covered agreements is set forth in Article X of the WTO Agreement, entitled "Amendments". Article X:2 provides that amendments to certain provisions shall "take effect only upon acceptance by all Members"; Article X:3 provides that amendments to other provisions "shall take effect for the Members that have accepted them upon acceptance by two third of the Members"; and Article X:4 states that amendments "of a nature that would not alter the rights and obligations of Members" shall "take effect for all Members upon acceptance by two thirds of the Members".

7.514. However, in *EC – Bananas III (Article 21.5 – Ecuador II)* / *EC – Bananas III (Article 21.5 – US*), the Appellate Body confirmed that the modification of Schedules "does not require formal amendment" pursuant to Article X of the WTO Agreement, and is not subject to the "formal acceptance process" provided for in Article X:7 of the WTO Agreement. The Appellate Body set forth its understanding of the relationship between Article X of the WTO Agreement and Article XXVIII of the GATT 1994 as follows:

> Article X of the *WTO Agreement* sets out rules and procedures to amend the provisions in the Multilateral Trade Agreements. Article X specifies the process and quorum required to amend particular provisions or covered agreements. Amendments, unlike waivers, are not limited in time and create new or modify existing rights and obligations for WTO Members. Special rules on acceptance and entry into force apply, depending on the provisions that are being amended and on whether the amendment "would alter the rights and obligations of the Members". Amendments to the *WTO Agreement* and to a Multilateral Trade Agreement in Annex 1 enter into force following a formal acceptance process pursuant to Article X:7.
>
> The modification of Schedules of Concessions, which are an integral part of the GATT 1994, does not require a formal amendment pursuant to Article X of the *WTO Agreement*, but is enacted through a special procedure set out in Article XXVIII of the GATT 1994 or through multilateral rounds of tariff negotiations. Pursuant to Article XXVIII, a Member may modify or withdraw a concession annexed to the GATT 1994 by negotiation and agreement with other Members that are "primarily concerned", and in consultation with Members that have a substantial interest in the concession. Article XXVIII:2 provides that, in an agreement on the renegotiation of a concession, which may include compensatory adjustment, WTO 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". If an agreement cannot be reached, the modifying Member is free to modify or withdraw the concession, while other Members that are primarily concerned or have a substantial interest in the concession are free to withdraw substantially equivalent concessions initially negotiated with the modifying Member.[708]

7.515. Thus, the Appellate Body explained that Article XXVIII is a "special procedure" through which the "modification" of a Schedule "is enacted". China has suggested that "[c]onsistent with the principle set forth in Article 40 of the Vienna Convention on the Law of Treaties, unless the treaty otherwise provides, amendments to a multilateral treaty can only occur with the participation of all contracting States".[709] We observe however that Article 40 of the Vienna Convention is, by its own terms, a default rule that applies "[u]nless the treaty otherwise provides".[710] In stating that Article XXVIII is a "special procedure" through which the "modification" of a Schedule "is enacted", the Appellate Body has recognized that Article XXVIII is a *sui generis* procedure.

[708] Appellate Body Reports, *EC – Bananas III (Art. 21.5 – Ecuador II)* / EC – *Bananas III (Art. 21.5 – US*), paras. 384-385.

[709] China's response to Panel question No. 50, footnote 70.

[710] Article 40(1) of the Vienna Convention states that "[u]nless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs."

7.516. Article XXVIII is entitled "Modification of Schedules". Paragraph 1 provides that on the first day of every 3-year period a Member may seek to modify or withdraw a concession included in the appropriate Schedule annexed to the Agreement through negotiation with those Members with initial negotiating rights and a principal supplying interest, and in consultation with those Members with a substantial supplying interest. Paragraph 3 of Article XXVIII addresses the 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. In the case of reserved negotiations under paragraph 5, a Member may reserve "the right … to modify the appropriate Schedule" in accordance with the procedures of paragraphs 1 to 3. Paragraph 5 states that if a Member so elects, other Members with initial negotiating rights or the requisite supplying interest "shall have the right", during the same period, "to modify or withdraw", in accordance with the same procedures, concessions initially negotiated with that Member.

7.517. 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".

7.518. 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.[711] 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", 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.[712]

7.519. 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".[713] These provisions specify the conditions, including the

[711] China's response to Panel question No. 103(a).

[712] We recall our earlier finding, in the context of examining China's claims under Article XXVIII:1 of the GATT 1994, that China has failed to demonstrate that it held a principal or substantial supplying interest in the concessions at issue in the First and Second Modification Packages.

[713] Article XVIII relates to Governmental Assistance to Economic Development. Section A: paragraph 7 provides that countries with a low standard of economic development may, in order to promote the establishment of a particular industry, negotiate with those Members with initial negotiating rights or substantial supply interest. If agreement is reached "they shall be free to modify or withdraw concessions under the appropriate Schedules to this Agreement in order to give effect to such agreement". Even if agreement is not reached, in certain circumstances the Member "shall be free to modify or withdraw the concession" or "shall be free to proceed with such modification or withdrawal". Paragraph 6 of Article XXIV

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.

7.520. Continuing with our examination of the text of the GATT 1994, we note that the chapeau of the Ad Note to Article XXVIII states that negotiations to modify or withdraw concessions under Article XXVIII should be conducted "with the greatest possible secrecy in order to avoid premature disclosure of details of *prospective changes*", and then states that Members "shall be informed immediately of all *changes in national tariffs resulting* from recourse to this Article".[714] Thus, the chapeau distinguishes the "prospective changes" that are the subject of negotiations from the subsequent "changes in national tariffs resulting from" those negotiations. By distinguishing the "prospective changes" from the "changes in national tariffs resulting from" Article XXVIII, and requiring that Members be informed immediately of the latter, the wording of the chapeau implies that Members may be informed of those changes in national tariffs after they have already been made.[715]

7.521. Thus, our review of the foregoing provisions of the GATT 1994 reinforces the Appellate Body's statement that Article XXVIII is a special procedure through which the "modification" of a Schedule "is enacted".[716] We now turn to the Procedures for Negotiations under Article XXVIII, which set forth the procedural arrangements to be followed when a Member seeks to modify or withdraw a concession in its Schedule. As explained earlier in our Report, we agree with the parties and third parties expressing a view on the matter that these procedures qualify, at a minimum, as "decisions", "procedures" or "customary practices" within the meaning of Article XVI:1 of the WTO Agreement.[717]

7.522. These Procedures provide in relevant part as follows:

> 6. Upon completion of all the negotiations the contracting party referred to in paragraph 1 above should send to the secretariat, for distribution in a secret document, a final report on the lines of the model in Annex C attached hereto.
>
> 7. Contracting parties *will be free to give effect to the changes agreed upon in the negotiations* as from the first day of the period referred to in Article XXVIII:1, or, in the case of negotiations under paragraph 4 or 5 of Article XXVIII, *as from the date on which the conclusion of all the negotiations have been notified as set out in paragraph*

provides that in the establishment of a customs union or free trade area, where a Member proposes to increase any rate of duty inconsistently with the provisions of Article II, "the procedure set forth in Article XXVIII shall apply". Paragraph 5 of the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 elaborates on the procedures in paragraph 6 of Article XXIV. It includes the following: "[w]here, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII of GATT 1994 cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected Members shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII". Article XXVII, which deals with countries which do not or cease to become WTO Members provides: "[a]ny Member shall at any time be free to withhold or to withdraw in whole or in part any concession, provided for in the appropriate Schedule annexed to this Agreement, in respect of which such Member determines that it was initially negotiated with a government which has not become, or has ceased to be, a Member."

[714] Emphasis added. We note that this Ad Note appears to be the basis for the requirement, in paragraph 6 of the Procedures for Negotiations under Article XXVIII, that the Member concerned notify the Secretariat of the completion of negotiations. As discussed further below, the text of paragraph 7 of those Procedures for Negotiations under Article XXVIII provides that the Member shall be free to give effect to the changes agreed from the date that the conclusion of negotiations has been notified pursuant to paragraph 6.

[715] Furthermore, we note that Paragraph 1 of the Procedures for Modification and Rectification of Schedules provides that the draft of the Schedule containing the changes resulting from Article XXVIII negotiations shall be communicated by the Director-General to all Members. Insofar as the "changes in national tariffs" correspond to the "changes resulting from Article XXVIII negotiations", then those changes in national tariffs would have already been previously communicated to all Members in the course of the certification procedure. Thus, if certification were a legal prerequisite for giving effect to the changes agreed in Article XXVIII negotiations, then it is not clear why the chapeau of the Ad Note would require that all Members be "informed" immediately of "all changes in national tariffs resulting from" recourse to Article XXVIII.

[716] Appellate Body Reports, *EC – Bananas III (Art. 21.5 – Ecuador II)* / EC – *Bananas III (Art. 21.5 – US*), para. 385.

[717] See paragraphs 7.22 to 7.27.

> *6 above.* A notification shall be submitted to the secretariat, for circulation to contracting parties, of the date on which these changes will come into force.
>
> 8. *Formal effect* will be given to the changes *in the schedules* by means of Certifications in accordance with the Decision of the CONTRACTING PARTIES of 26 March 1980. (emphasis added)

7.523. The current Procedures for Negotiations under Article XXVIII were adopted in 1980. However, paragraphs 7 and 8 of those procedures are based on similar provisions in the arrangements for Article XXVIII negotiations that had been followed since the 1950s. In the 1957 "Arrangements for Negotiations under Article XXVIII in 1957" (L/635), GATT Contracting Parties agreed on the arrangements for the first three-year period referred to in the text of Article XXVIII:1, which would begin 1 January 1958. The arrangements contained in L/635 subsequently served as a guideline for the procedural arrangements for all subsequent negotiations under Article XXVIII for the next twenty years.[718] Paragraphs 7 and 8 of the 1980 Procedures for Negotiations under Article XXVIII are based on paragraphs 12 and 14 of L/635, which provided that:

> 12. Contracting parties *will be free to give effect to the changes* agreed upon in the negotiations *as from 1 January 1958*.
>
> 13. Contracting parties should notify the Executive Secretary of *the date on which they give effect to* the agreed schedules, and compensatory concessions should be made effective not later than that date.
>
> 14. *Formal effect* will be given to the changes *in the schedules* by a protocol of rectifications and modifications. (emphasis added)

7.524. Paragraph 7 of the Procedures for Negotiations under Article XXVIII states that the Member "will be free to give effect to the changes" agreed in Article XXVIII:5 negotiations "as from the date on which the conclusion of all the negotiations have been notified". We consider that there might well have been reasons for the GATT Contracting Parties to have followed a different approach, and drafted paragraph 7 so as to instead authorize Contracting Parties to be "free to give effect to the changes agreed upon in the negotiations" only as from the date on which the changes have been introduced into the authentic text of the Schedule through certification (or alternatively, only as from the date that the draft of such changes had been communicated to the Director-General for certification in accordance with paragraph 1 of the Procedures for Modification and Rectification of Schedules, or only from the date that the notification of the date when these changes will come into force was made in accordance with the second sentence of paragraph 7 of the Procedures for Negotiations under Article XXVIII). However, had the GATT Contracting Parties intended to make certification of these other actions the legal prerequisite for a Contracting Party being free to give effect to the changes agreed in Article XXVIII negotiations, we would expect paragraph 7 of the Procedures for Negotiations under Article XXVIII to use different words to that effect.

7.525. China has not attempted to argue that the phrase "as from the date on which the conclusion of all the negotiations have been notified" is capable of being understood in more than one way. Rather, China focuses on the terms "free to give effect to the changes", and submits that these terms must be interpreted to allow only "the adoption by the WTO Member of the national legal provisions providing for the tariff rate quotas but not the actual implementation of these tariff rate quotas until certification has occurred".[719]

7.526. We are unable to agree with China's restrictive interpretation of the terms "free to give effect to the changes". China's interpretation of these terms, as we understand it, is that they serve the limited purpose of allowing a Member to begin to put in place domestic legal provisions

[718] The introductory note to the 1980 Procedures for Negotiations under Article XXVIII explained that "[o]n 31 May 1957 the Executive Secretary in compliance with instructions given to him by the CONTRACTING PARTIES (L/641, BISD 6S/158), issued a note concerning arrangements for negotiations under Article XXVIII in 1957 (document L/635). This note has served as a guideline for the procedural arrangements for all subsequent negotiations under Article XXVIII."

[719] China's response to Panel's Question No 50, para. 197-198.

or processes to eventually give effect to the changes agreed, but that Member could not actually "give effect to" or "implement" the changes agreed (nor could a Member "give effect to" or "implement" the domestic legal provisions being put in place). In our view, such a reading is at odds with the ordinary meaning of the terms "free to give effect to the changes".

7.527. This reading is also at odds with the wording of paragraph 7 in the French and Spanish versions of the Procedures. These provide, respectively, that "*[i]l sera loisible aux parties contractantes de mettre en vigueur les modifications agréées au cours des négociations*", and "*[l]as partes contratantes podrán poner en vigor las modificaciones acordadas en las negociaciones*". Furthermore, we consider that a WTO Member does not need to be 'allowed' by the WTO to begin to put in place domestic legal provisions or processes if they are not actually implemented. Therefore, in addition to being at odds with the ordinary meaning of the terms used in paragraph 7, China's restrictive interpretation of the terms "free to give effect" would appear to render paragraph 7 legally redundant and inutile.

7.528. Of course, we must read all of the relevant provisions of the Procedures in a way that gives meaning to all of them, harmoniously, rather than taking any one provision in isolation.[720] Thus, we must read paragraph 7 in a manner that gives full weight to paragraph 8 of the same Procedures, which provides that "*[f]ormal effect* will be given to the changes *in the schedules* by means of Certifications in accordance with the Decision of the CONTRACTING PARTIES of 26 March 1980".[721] The need for a harmonious interpretation of paragraphs 7 and 8 is compelled by the fact that these provisions appear side-by-side in the same set of Procedures. In addition, the Procedures for Modification and Rectification of Schedules referenced in paragraph 8 and the Procedures for Negotiations under Article XXVIII were adopted only a few months apart in 1980. It is well established that "in public international law there is a presumption against conflict", and that "this presumption is especially relevant" in respect of instruments that "were negotiated at the same time, by the same Members and in the same forum".[722]

7.529. Paragraph 8 refers to "formal effect" being given to the changes in a Schedule. The ordinary meaning of the term "formal" includes "[o]f or pertaining to the form or constitutive essence of a thing; essential", "[o]f, pertaining to, or in accordance with recognized rules or conventions…", "[m]ade in proper form, complete; veritable, unmistakable", "[h]aving a definite principle; regular, methodical", "[w]ell formed, regular, shapely", and "[v]alid or correctly so called in virtue of its form; explicit and definite, not merely tacit or accepted as equivalent".[723] Thus, the ordinary meaning does not in any way suggest a diminutive reading of the concept of "formal effect", or of paragraph 8, or of certification more generally.

7.530. However, we do not consider that interpreting paragraph 7 in accordance with its ordinary meaning conflicts with the fact, reflected in paragraph 8, that "formal effect" is given to the changes "in the schedules" by means of certification. Rather, it appears to us that, if anything, the interpretation of paragraph 7 arising from the ordinary meaning of its terms is reinforced by the ordinary meaning of the terms of paragraph 8. By its terms, the subject-matter of paragraph 7 is the point in time at which a Member is "free to give effect to the changes agreed upon" (i.e. "as from the date that the conclusion of all the negotiations have been notified"). By its terms, the subject-matter of paragraph 8 is something different, namely, the point in time when "formal effect" will be given to the changes "in the schedules" (i.e. "by means of Certifications"). The terms of paragraphs 7 and 8, and the very fact that these two provisions are juxtaposed side-by-side in the same set of Procedures, makes clear that each provision is addressing a different issue. Thus, when read together, these provisions make clear that the question of when and under what conditions a Member is "free to give effect to the changes agreed" in Article XXVIII negotiations is different from the question of when and under what conditions "formal effect" will be given to the changes "in the schedules". If paragraph 8 served as the answer to both questions, then there would be no need for paragraph 7 (and vice versa). The reference to "formal effect" in paragraph 8 further reinforces that the subject-matter of this provision concerns "changes in the Schedules", and that this is different from the point in time that a Member is "free to give effect to the changes".

[720] Appellate Body Report, *Korea – Dairy*, para. 81.
[721] Emphasis added.
[722] Panel Report, *Indonesia – Autos*, para. 14.28.
[723] *Shorter Oxford English Dictionary*, 5th ed, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1014.

7.531. We further note that paragraph 10 of the Procedures for Negotiations under Article XXVIII states that "[t]hese procedures are in relevant parts also valid for renegotiations under Article XVIII, paragraph 7, and Article XXIV, paragraph 6". Article XVIII:7 and the Understanding on Article XXIV also provide, in terms similar to Article XXVIII:3, that the relevant Member is "free to modify or withdraw" concessions. Paragraph 7 of the Procedures for Negotiations would also therefore be applicable to these negotiations, and is consistent with the language of those provisions. It follows that the language of paragraph 3 of Article XXVIII, which provides that a Member is "free to modify or withdraw" concessions (the same procedures which apply to reserved negotiations under paragraph 5 of Article XXVIII), is consistent with the language in paragraphs 7 and 8 of the Procedures for Negotiations. This further suggests that certification is not a legal prerequisite for implementing the results of negotiations under Article XXVIII.

7.532. We note that the wording of paragraph 7 of the Procedures for Negotiations under Article XXVIII is significantly different from the wording used in the context of the procedures that apply to the modification of Schedules annexed to the GATS. Paragraph 6 of the Procedures for the Implementation of Article XXI, adopted by the Council for Trade in Services in 1999, states:

> A modifying Member which has reached agreement with all Members that had identified themselves under paragraph 3 above shall, no later than fifteen days after the conclusion of the negotiations, send to the Secretariat a final report on negotiations under Article XXI, which will be distributed to all Members in a secret document. *After completing the certification procedure* under paragraphs 20 to 22, *such a modifying Member will be free to implement the changes* agreed upon in the negotiations and specified in the report, and it shall notify the date of implementation to the Secretariat, for circulation to the Members of the WTO. Such changes shall not exceed the modification or withdrawal initially notified and shall include any compensatory adjustment agreed upon in the negotiations.[724] (emphasis added)

7.533. There is more than one possible explanation as to why this difference exists in the case of services. It might be that Members considered that the drafting of paragraphs 7 and 8 of the Procedures for Negotiations under Article XXVIII should be changed in the light of the importance of certification in the WTO legal system, and desired not to replicate the same approach, in the services context. It might be that Members considered that a different approach was warranted in the context of services as a consequence of the different subject-matter and the differences between the rules governing the modification of Schedules in Article XXI of the GATS, as compared with those found in Article XXVIII of the GATT 1994. Whatever the reason, the wording of paragraph 6 of the Procedures for the Implementation of Article XXI of the GATS stands in stark contrast to the wording used in paragraphs 7 and 8 of the Procedures for Negotiations under Article XXVIII of the GATT. The wording of paragraph 6 is that the Member modifying its concessions "will be free to implement the changes agreed upon" in the negotiations "[a]fter completing the certification procedure", whereas the wording of paragraph 7 is that the Member "will be free to give effect to the changes agreed upon in the negotiations ... as from the date on which the conclusion of all the negotiations have been notified" with paragraph 8 addressing the separate question of when the formal effect is given to the changes "in the schedules".

7.534. China argues that allowing a Member to give effect to changes agreed in Article XXVIII negotiations prior to those changes being introduced in its Schedule through certification would reduce to inutility the certification procedures which, as China emphasizes, are mandatory in nature.[725] China states that such an interpretation would entail the consequence that "the process of certification is meaningless and is reduced to no more than paper"[726], and "would run contrary to the object and purpose of all the WTO rules regarding certification, which is to allow the entire Membership to acquiesce in modifications to Schedules"[727] and to "review and accept the modifications that a WTO member proposes to make".[728]

[724] Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services, adopted by the Council for Trade in Services on 19 July 1999, WTO doc. S/L/80, para. 6.
[725] China's first written submission, paras. 262-263.
[726] China's opening statement at the first meeting of the Panel, para. 116.
[727] China's response to Panel question No. 50, para. 198.
[728] China's response to Panel question No. 56, para. 200.

7.535. The 1980 Procedures for Modification and Rectification of Schedules, which supersede the certification procedures originally adopted in 1968, set forth the procedures through which rectifications and modifications to a Member's Schedule are certified. As noted earlier in our Report, we agree with the parties and third parties expressing a view on the matter that these procedures qualify, at a minimum, as "decisions", "procedures" or "customary practices" within the meaning of Article XVI:1 of the WTO Agreement.[729]

7.536. In our view, a finding that Members are free to give effect to modifications to their concessions in certain situations prior to those changes being given formal effect in its Schedule, including in the situation where the changes have been agreed in Article XXVIII negotiations and notified to all other Members, would not imply that "the process of certification is meaningless". As we have already noted, the ordinary meaning of the terms "formal effect" does not in any way suggest a diminutive reading of the concept of certification. Furthermore, we do not doubt that there are other situations where the introduction of changes into the text of a Schedule is a legal prerequisite for effecting any change in Members' substantive rights and obligations. For example, a proposed rectification to correct an alleged error in a Schedule would have no legal effect until such time as the text of the Schedule is changed through certification.[730] Likewise, an agreement among Members to reduce tariffs may not be legally enforceable in WTO dispute settlement until such time as the change has been introduced into the text of the Schedule through certification.[731] In our view, however, the legal consequence of certification varies in different situations, and therefore must be analysed in relation to the particular situation at hand. In the present case, the issue is whether certification is a legal prerequisite that must be completed before a Member modifying its concessions can proceed to give effect to the changes agreed upon in negotiations under Article XXVIII of the GATT 1994. With this in mind, we proceed to examine whether the Procedures for Modification and Rectification of Schedules shed light on that issue, beginning with the text of the Procedures.

7.537. We note that the preamble to the Procedures for Modification and Rectification of Schedules emphasizes "the importance of keeping the authentic texts of Schedules annexed to the General Agreement up to date and of ensuring that they tally with the texts of corresponding items in national customs tariffs". The preamble further states that, as a consequence, "changes in the authentic texts of Schedules which record … modifications resulting from action taken under Article XXVIII shall be certified without delay". Paragraph 1 of the Procedures establishes that "[c]hanges in the authentic texts of Schedules annexed to the General Agreement which reflect modifications resulting from action under … Article XXVIII shall be certified by means of Certifications", and requires that a "draft of such change shall be communicated to the Director-General within three months after the action has been completed". Paragraph 3 of the Procedures establishes that the draft will then be communicated by the Director-General to all Members, and become a Certification "provided that no objection has been raised by a contracting party within three months on the ground that, in the case of changes described in paragraph 1, the draft does not correctly reflect the modifications". Paragraph 4 of the Procedures provides that whenever practicable, certifications "shall record the date of entry into force of each modification".

7.538. Thus, the Procedures generally speak to the question of how changes in the authentic texts of Schedules are to be made. We understand the Procedures to clarify that certification is the legal prerequisite for altering the authentic text of a Schedule annexed to the General Agreement. However, the question before the Panel is not whether certification is a legal prerequisite for introducing changes into the text of a Schedule in the context of Article XXVIII negotiations. Rather, the question before the Panel is whether, a Member is free to give effect to the changes

[729] See paragraphs 7.22 to 7.27.

[730] See e.g. Panel Report, *Russia – Tariff Treatment*, para. 7.54 ("In responses to questions from the Panel, Russia acknowledged that when its proposed rectification was circulated in document G/MA/TAR/RS/406 in accordance with its request, both the European Union and Japan objected to Russia's proposed rectification. No further action was taken with respect to Russia's Schedule. In particular, no certification was circulated by the Director-General. As indicated, Russia is not challenging the European Union's objection in the context of the present proceedings and has not questioned Japan's objection. Thus, for the purposes of our task in this dispute, Russia's Schedule remains unaltered.")

[731] See e.g. Panel Report, *EC – IT Products*, paras. 7.18 ("In accordance with paragraph 2 of the ITA Annex and the *Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions* (the "1980 Procedures"), each ITA participant submitted a proposed modification to its own Schedule for review by all WTO Members. Each participant's schedule was certified following a three-month review period for that particular schedule.") (footnotes omitted)

agreed in Article XXVIII negotiations prior to the changes having been introduced into the authentic text of its Schedule. Our examination of the relevant provisions of the GATT 1994 and the Procedures for Negotiations under Article XXVIII supports the conclusion that the two questions are distinct from one another. In our view, and as elaborated below, there are several elements in the text of the Procedures for Modification and Rectification of Schedules, including the preamble and paragraphs 1, 3, and 4 thereof, that also suggest that certification is not a legal prerequisite for implementing the changes resulting from Article XXVIII negotiations.

7.539. The preamble of the Procedures states that the objective of certification is to keep the authentic texts of the Schedules "up to date" and to ensure "that they tally with the texts of corresponding items in national customs tariffs", and that, in consequence, to ensure that changes in the authentic texts of Schedules to "record" modifications are certified without delay. We consider that if a Member were not free to implement tariff changes agreed in Article XXVIII negotiations (or any other specified articles of the GATT 1994, including Article XVIII, Article XXIV, and Article XXVII) prior to introducing the changes into the authentic text of its Schedule through certification, then it would arguably be unnecessary to ensure that the authentic text of the Schedules are "kept up to date" and "tally with" the texts of the corresponding items in national customs tariffs. Insofar as modifications are concerned, the latter could never diverge from the former without violating Article II:1 of the GATT. In other words, if certification were a legal prerequisite before a Member could implement changes resulting from Article XXVIII negotiations at the national level, it would follow that Schedules would always be up to date and tally with the texts of corresponding items in national customs tariffs.

7.540. Furthermore, we note that paragraph 1 of the Procedures refers to "[c]hanges in the authentic texts of Schedules" being certified to "reflect" modifications "resulting from action under" Article XXVIII (and the other articles of the GATT 1994 specified therein). However, if certification were a legal prerequisite for being able to give effect to those modifications, then it would follow that the introduction of the changes to the authentic texts of Schedules through certification would be the action that would "give effect to", and not "reflect", any modifications resulting from action under Article XXVIII. In addition, the wording of paragraph 1 makes clear that certification reflects "modifications resulting from action" that "has been completed" prior to certification, and this is reinforced by the French and Spanish versions of paragraph 1, which respectively state that "[l]es projets de changement seront communiqués au Directeur général dans les trois mois à compter du moment *où les mesures auront été mises en place*", and "[s]e enviará al Director General un proyecto de dichos cambios dentro de los tres meses siguientes al momento en que *hayan quedado adoptadas las medidas*".[732] This too seems to presuppose that changes resulting from Article XXVIII negotiations may be implemented prior to certification.

7.541. We also find it significant that paragraph 3 of the Procedures for Modification and Rectification of Schedules provides that, in the case of changes which reflect modifications resulting from action under Article XXVIII (and also modifications resulting from the other specified Articles of the GATT 1994), Members may object to a certification only "on the ground that … the draft does not correctly reflect the modifications". The fact that objections are confined to the ground that "the draft does not correctly reflect the modifications" has at least two important implications. The first, as pointed out by the European Union, is that the certification process does not confer a "veto" right[733] upon those Members which did not participate in the negotiations and who may not be satisfied with the compensation agreed, or upon those Members which did participate in the negotiations but failed to reach an agreement. The second implication is that the absence of an objection on the part of another Member cannot be construed as a Member "acquiescing" or "accepting" that the changes introduced into the authentic text of the Member's Schedule are consistent with the Member's obligations under the GATT. In the light of the foregoing, we are not persuaded by China's argument that the "object and purpose" of the certification procedure is to ensure that all Members have the opportunity to "acquiesce in" and "review and accept the modifications that a WTO member proposes to make" in the context of Article XXVIII negotiations.[734]

[732] Emphasis added.
[733] EU's second written submission, para. 186.
[734] In response to a question from the Panel, China submits that it agrees that the grounds for raising an objection in the context of certification are limited to the situation where the changes "do not correctly reflect the modifications" agreed under Article XXVIII, but then China adds that "[i]n addition, for WTO

7.542. Continuing with our review of the text of the Procedures, we also find it significant that paragraph 4 provides that "[w]herever practicable Certifications shall record the date of entry into force of each modification and the effective date of each rectification". In our view, the significance of paragraph 4 lies in the fact that it clarifies that the "entry into force" of a modification is distinct from the point in time when the corresponding change in the authentic text of the Schedule is certified. We further note that the French and Spanish versions of paragraph 4 respectively refer to the "*la date d'entrée en vigueur*" and "*la fecha de entrada en vigor*", which recall the terms used in the French and Spanish versions of paragraph 7 of the Procedures for Negotiations under Article XXVIII ("*de mettre en vigueur*" and "*poner en vigor*").

7.543. In addition to these elements of the text of the Procedures for Modification and Rectification, we consider that the history of those certification procedures sheds light on the issue before us. Shortly after its adoption, the GATT 1947 and the annexed Schedules had been subject to several amendments by the Contracting Parties.[735] In the early years of the GATT, attempts to amend Schedules of concessions were carried out by means of "Protocols", providing that the rectifications or modifications contained therein would "become an integral part of the General Agreement on the day on which this Protocol has been signed by all the Governments which are on that day contracting parties to the General Agreement."[736] A series of "Protocols of Rectifications and Modifications" were circulated in the 1950s.[737] The Protocols were collections of rectifications and modifications, and intended to amend the Schedules of concessions to reflect those rectifications and modifications, including modifications arising from negotiations under Article XXVIII. The preamble to most of the protocols that were circulated stated that their aim was:

> [T]o make certain modifications in the authentic text of certain Schedules to the General Agreement, which reflect modifications of concessions *which have already been made effective* in accordance with established procedures under the General Agreement.[738] (emphasis added)

7.544. This means that the GATT Contracting Parties considered that the modifications had "already been made effective" by operation of the relevant provision of the General Agreement, and that the purpose of modifying the text of the Schedule was to reflect those modifications.[739]

Members that did not participate in the negotiations or consultations of the changes, it is the only opportunity to review and accept the modifications that a WTO Member proposes to make through changes to this Member's Schedule" (China's response to Panel question No. 56, para. 200).

[735] Due to their provisional nature, tariff commitments made in the 1947 Geneva negotiations had an initial validity of three years. Consequently, the original drafting of GATT Article XXVIII contained no provision for the modification or withdrawal of these commitments before 1 January 1951. Contracting Parties initially extended the validity of these Schedules through "Declarations on the Continued Application of Schedules". During the Torquay Tariff Conference of 1950 the negotiations for new concessions took place in parallel with some renegotiations. The Review Session of the GATT that took place subsequently disposed of the need to extend the validity of the Schedules periodically. It also proposed amendments to several Articles of the GATT (including Article XXVIII) and proposed the incorporation of a new Article XXVIII*bis* entitled "Tariff negotiations". These amendments were formally adopted through the Protocol Amending the Preamble and Parts II and III of the General Agreement of 10 March 1955, which entered into force on 7 October 1957.

[736] *GATT Analytical Index: Guide to GATT Law and Practice*, p. 1005.

[737] There were in all five protocols of rectifications, one protocol of modifications, and nine protocols of rectifications and modifications.

[738] See Fourth Protocol (7 March 1955); Fifth Protocol (3 December 1955); Sixth Protocol (11 April 1957); Seventh Protocol (30 November 1957); Eighth Protocol (18 February 1959); Ninth Protocol (17 August 1959).

[739] See J.S. Stanford, "Treaty Amendment: the Problem of the GATT Tariff Schedules" (1969) *The Canadian Yearbook of Internal Law* 1969, at 263-264:

> The first and most obvious fact that the conduct of the parties discloses is that the right of the parties to take internal action to modify their national tariffs following action taken pursuant to one of the modification articles of the General Agreement does not depend upon the entry into force of the protocols. If it did, the protocols could not refer to modifications "which have already been made effective." Both the language of the protocols and the conduct of the contracting parties make it clear that the entry into force of the protocols is not the measure which affects the rights and obligations of the contracting parties under Article II:1. What then is the function of the protocols? [...] With respect to modifications they set out changes to be made to the authentic text of the Schedules to reflect modifications which have already been made legally effective in accordance with procedures established by the General Agreement. Both of these

7.545. On 29 August 1968, the Director-General circulated a draft decision establishing new procedures for modifications and rectifications to Schedules (L/3062). The introduction to the new draft procedures set forth the following understanding:

> Several provisions of the GATT - contained in Articles II, XVIII, XXIV, XXVII and XXVIII - permit action by contracting parties, in certain circumstances and subject to specified procedures and conditions, to modify concessions in their schedules. *The modifications are legally valid upon the completion of the action and the contracting parties are informed of the results of each action.* But there remains the *formality* of making the changes, in appropriate form, in the authentic texts of the schedules. It is proposed that this be done by means of *certifications* issued by the Director-General after all contracting parties have had an opportunity to examine the text.[740] (emphasis added)

7.546. Thus, it was understood that "[t]he modifications are legally valid upon the completion of the action and the contracting parties are informed of the results of each action" with respect to modifications under Article XXVIII (and also under Articles II, XVIII, XXIV, and XXVII). As we noted earlier, Articles XVIII, XXIV and XXVII 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". It was understood that certification relates not to the legal validity of the modifications, which occurs "upon completion of the action" and the GATT Contracting Parties being informed thereof, but rather to "the *formality* of making the changes, in appropriate form, in the authentic texts of the schedules".

7.547. The Procedures for Modification and Rectification of Schedules were adopted by the Council on 19 November 1968.[741] Similar to the language used in the earlier Protocols, paragraph 1 of the 1968 Procedures provided that changes in the authentic texts of the Schedules to "reflect modifications *which have entered into force* in accordance with the provisions of paragraph 6 of Article II, Article XVIII, Article XXIV, Article XXVII or Article XXVIII, shall be certified by means of Certification."[742] As we noted earlier in connection with the Protocols pre-dating the certification procedures, if certification were a legal prerequisite for a Member being free to give effect to changes agreed in Article XXVIII negotiations, then it would not have been possible for those modifications to "have entered into force" prior to certification. Thus, the wording of paragraph 1 of the 1968 Procedures suggests that GATT Contracting Parties adopted those Procedures on the understanding that they could give effect to the agreed changes pursuant to Article XXVIII negotiations prior to their incorporation into the Schedules of concessions through certification.[743]

7.548. On 26 March 1980, the revised Procedures for Modifications and Rectification of Schedules were approved by the Council.[744] The 1980 Procedures are similar to the 1968 Procedures in many respects. However, one difference is that, in paragraph 1, the reference to changes to the Schedules being made to reflect modifications "which have entered into force" in accordance with Article XXVIII (and the other specified articles of the GATT) was replaced with a reference to

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> functions are textual and non-substantive. It is clear that the sole object of the protocols of rectifications and modifications is to assure that the authentic texts of the Schedules constitute an accurate and up-to-date reflection of the tariff obligations of the contracting parties as these have been established in accordance with the terms of the General Agreement. [...] once the requirements of the appropriate article of the General Agreement have been fulfilled, the modifying contracting party is then free to take internal action, if it wishes, to alter its national tariff, and its Schedule no longer accurately represents its tariff obligations to all the other contracting parties. Withholding of signature by a contracting party cannot alter this situation. Its sole effect is to prevent the authentic text of the Schedule from accurately reflecting the duly established legal rights and obligations of the modifying party, with the result that the "authentic text" is out-of-date.

[740] L/3062.

[741] L/3131.

[742] L/3131, paragraph 1. (emphasis added)

[743] L/3062, pages 1-2. J.S. Stanford, "Treaty Amendment: the Problem of the GATT Tariff Schedules" (1969) *The Canadian Yearbook of Internal Law* 1969, at 267 (stating, with regard the 1968 Procedures for Modification and Rectification of Schedules, that "[t]he wording of the decision clearly establishes that the certification relates only to effecting textual changes and does not relate to the actual implementation of modifications in accordance with the General Agreement").

[744] C/M/139 page 6. The Decision was circulated in L/4962.

changes to Schedules being made to reflect modifications "resulting from action" under the respective provision.[745] We are not aware of the reason for this change, but we do not see that it signals that the Contracting Parties were seeking to effect a substantive change in the existing procedures, so as to make certification a legal prerequisite for giving effect to changes agreed in Article XXVIII negotiations. Among other things, in the same year the revised Procedures for Negotiations under Article XXVIII were adopted, with no substantive change to the provision expressly authorizing that Contracting Parties "will be free to give effect to changes" agreed upon in Article XXVIII negotiations "as from the first date of the period referred to in Article XXVIII:1" or, in the case of negotiations under Article XXVIII:4 or XXVIII:5, "as from the date on which the conclusion of all the negotiations have been notified" as set out in accordance with paragraph 6.[746]

7.549. It appears to the Panel that there is no subsequent practice in the application of Article XXVIII establishing the agreement of Members on whether certification is a legal prerequisite that must be completed before a Member modifying its concessions can proceed to apply the changes agreed upon in Article XXVIII negotiations. China submits that "there is no practice among Members whereby certification is not required for a modification reached under Article XXVIII negotiations to enter into force and to take formal legal effect", and notes that "though there are instances where a modification entered into force before a certification was officially issued", "Members do submit requests for a certification prior to the planned implementation date, and leave time for the certification process".[747] The European Union submits that "[t]he certification of changes to a Member's schedule is often delayed, sometimes for very long periods of time, due to the unjustified reservations made by some Members", and that "[a]s a result, the changes agreed in accordance with Article XXVIII are sometimes implemented many months, or even years, prior to the certification of such changes".[748] The parties have provided examples of cases in which certification occurred after the entry into force of changes resulting from Article XXVIII negotiations, and where certification occurred before such changes were made effective.[749] The absence of agreement among Members on whether certification is a legal prerequisite that must be completed before a Member modifying its concessions can proceed to

[745] There appear to be three other differences between the 1980 Procedures and the 1968 Procedures: (i) two paragraphs were added on the importance of "keeping the authentic texts of Schedules annexed to the General Agreement up to date" and that "changes in the authentic texts of Schedules shall be certified without delay"; (ii) also in paragraph 1, the time-bound submission of changes, which "shall be communicated to the Director-General within three months after the action has been completed", was added for the first time; and (iii) in paragraph 3, the time-limit for review and objection was changed to three months as compared to sixty days under the 1968 procedures.

[746] A 1978 "Explanatory Note" by the Secretariat explained that the new paragraphs 7 and 8 of the Procedures for Negotiations under Article XXVIII were not meant to introduce any substantive change to the corresponding provisions in L/635:

> 7. Paragraph 7 of document L/4651/Rev.1 corresponds to paragraph 12 of document L/635. Since the old text was related to the particular situation in 1957, the new text has been made more general. The essence of the text of paragraph 13 of document L/635 has also been included in this paragraph.
>
> 8. Paragraph 8 of document L/4651/Rev.1 takes account of the modifications that have been agreed upon as regards the legal instruments in question but has otherwise the same content as paragraph 14 of document L/635. (Procedures for Negotiations under Article XXVIII, Explanatory Note by the Secretariat, 13 September 1978, C/W/306.)

Furthermore, A. Hoda states the following with respect to the 1980 Procedures for Modification and Rectification of Schedules:

> An important aspect of the decision on the procedures for certification has to be highlighted here. As in the case of protocols to which the list of modifications and rectifications was attached, *the certifications do not have any effect on the entry into force of the proposed modification* or rectification. The idea is to formally incorporate in the schedules of Members modifications and rectifications *which, in most cases,* have *already entered into force*. In the case of modifications, *the procedures to bring about changes in the legal obligations of the Members have already to be followed as a prerequisite* for action to bring about changes in the authentic text. Thus, in the case of renegotiations under Article XXVIII, for instance, the procedures for these renegotiations should have already been complied with, before a request for modification of the schedule is made. (emphasis added) (A. Hoda, *Tariff negotiations and renegotiations under the GATT and the WTO, Procedures and Practices* (Cambridge University Press, 2001) pp. 115-116.)

[747] China's response to Panel question No. 96, para. 70.

[748] EU's response to Panel question No. 96, para. 55.

[749] Parties' responses to Panel question No. 96.

apply the changes agreed upon in Article XXVIII negotiations is also demonstrated by the diverse views presented by the third parties in this case.[750]

7.550. We are well aware of the importance of certification in the context of the WTO legal system. However, having carefully considered the existing provisions of the GATT 1994, the Procedures for Negotiations under Article XXVIII, and the Procedures for Modification and Rectification of Schedules, it does not appear to be the case that certification is 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.

7.11.5 Conclusion

7.551. In the present case, China has not suggested that the tariff rates applied by the European Union exceed those agreed upon in the Article XXVIII negotiations with Brazil and Thailand.[751] Accordingly, having 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, we are unable to uphold China's claims that the European Union violated Article II by giving effect to the modifications arising from the Article XXVIII negotiations prior to the changes being reflected in the authentic text of its Schedule through certification.

7.552. In arriving at this conclusion, we wish to stress that pursuant to Article 3.2 of the DSU, the task of panels in the dispute settlement system of the WTO is "to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions* of those agreements in accordance with customary rules of interpretation of public international law."[752] As the Appellate Body has previously confirmed, determining what the applicable rules and procedures ought to be is not "the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO".[753]

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. In respect of the Panel's terms of reference,

i. China's contention that the European Union acted inconsistently with the chapeau of Article XIII:2 of the GATT 1994 by failing to set aside TRQ shares for "all others" at

[750] See responses of Argentina, Brazil, Canada, Russia, Thailand and the United States to Panel question No. 10 to third parties. Argentina states that "pursuant to Article II of the GATT and similar WTO provisions, the lack of the fulfillment of the certification obligation could put into question the consistency of the change introduced in the national custom tariff with a Member's Schedule of Concessions and, as a result, with its WTO obligations". Russia agrees with China that "changes that were agreed upon in Article XXVIII negotiations and include tariff rates in excess of a Member's bound rates cannot be implemented prior to certification" of the modified schedule. Canada states that "[a]t the point where negotiations are concluded and the relevant period (for negotiations under Article XXVIII:1) or notice (for negotiations conducted under Article XXVIII:4 or Article XXVIII:5) has occurred, then the substantive changes to Schedules have been determined" and "[w]hat remains is to formally incorporate the substantive changes into the Schedules through use of the 1980 Procedures". Thailand states that certification is "an administrative procedure that allows for the incorporation of the new tariff concessions in the modifying Member's Schedule", and "is not a substantive requirement that must be completed before a Member can implement the changes in its modified Schedule". Brazil states that "[s]ince Schedules are an integral part to the covered Agreements, it is certainly useful that any changes to them be certified accordingly", but then states that "[i]t seems, however, that GATT/WTO practice indicates that the certification is not indispensable prior to the modification of the Schedule by the Member". The United States indicates that the Member modifying concessions "may 'give effect to' such changes *before* they are formally certified pursuant to paragraph 8 of the Procedures for Modification and Rectification of Schedules of Tariff Concessions" (emphasis original); however, the United States then states that because "formal effect" will only be given to those changes after the modified schedule is certified, then "so long as the modified schedule remains uncertified, the prior, certified schedule would continue to constitute the formal legal basis for the Member's rights and obligations under the WTO Agreements".

[751] We recall that paragraph 7 of the Procedures for Negotiations under Article XXVIII provides that a Member will be free to give effect to "the changes agreed upon" in the negotiations.

[752] Appellate Body Report, *US – Certain EC Products*, para. 92. (emphasis original)

[753] Appellate Body Report, *US – Certain EC Products*, para. 92.

levels that allow other WTO Members to achieve a substantial supplying interest going forward falls within the scope of the panel's terms of reference;

ii. China's contentions that the European Union acted inconsistently with the chapeau of Article XIII:2 and Article XIII:4 of the GATT 1994 by failing to proactively disclose the historical trade data, the representative period selected or the special factors appraised are new claims that are outside the Panel's terms of reference;

iii. China's contentions that the European Union acted inconsistently with Article XIII:1 and the chapeau of Article XIII:2 of the GATT 1994 by failing to annually update the initial TRQ allocations constitute new claims that are outside the Panel's terms of reference;

iv. Insofar as China is claiming that the European Union acted inconsistently with paragraph 7 of the Procedures for Negotiations under Article XXVIII or paragraph 1 of the Procedures for Modification and Rectification of Schedules, such claims are not properly before the Panel;

v. Insofar as China is claiming that the European Union acted inconsistently with Article II of the GATT 1994 by implementing the higher out-of-quota rates arising from the First Modification Package over the period 2007-2009, such claim is not properly before the Panel;

b. China has not demonstrated that the European Union acted inconsistently with Article XXVIII:1 of the GATT 1994 by not recognizing China as a Member holding a principal or substantial supplying interest in the concessions at issue in the First and Second Modification Packages;

c. China has not demonstrated that the tariff rates and the TRQs negotiated and implemented by the European Union under the First and Second Modification Packages are inconsistent with Article XXVIII:2 of the GATT 1994, read in conjunction with paragraph 6 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994, by failing to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that existing prior to the modification;

d. In respect of China's claims under Article XIII:2(d) of the GATT 1994,

i. China has not demonstrated that the European Union acted inconsistently with Article XIII:2(d) by determining which countries had a substantial interest in supplying the products concerned on the basis of their actual share of imports into the European Union, rather than on the basis of an estimate of what import shares would have been in the absence of the SPS measures restricting poultry imports from China;

ii. China has demonstrated that the increase in imports from China over the period 2009-2011 following the relaxation of the SPS measures in July 2008 was a "special factor" that had to be taken into account by the European Union when determining which countries had a substantial interest in supplying the products concerned, and the European Union acted inconsistently with Article XIII:2(d) by not recognizing China as a Member holding a substantial interest in supplying the products under tariff lines 1602 39 29 and 1602 39 80[754] and by failing to seek agreement with China on the allocation of the TRQs for those particular tariff lines;

e. In respect of China's claims under the chapeau of Article XIII:2 of the GATT 1994,

i. China has not demonstrated that the European Union acted inconsistently with the chapeau of Article XIII:2 by determining the TRQ shares allocated to "all others" on the basis of actual share of imports into the European Union, rather than on the

[754] Tariff line 1602 39 80 merged with tariff line 1602 39 40 into tariff line 1602 39 85, effective 1 January 2012.

basis of an estimate of what import shares would have been in the absence of the SPS measures restricting poultry imports from China;

ii. China has demonstrated that the increase in imports from China over the period 2009-2011 following the relaxation of the SPS measures in July 2008 was a "special factor" that had to be taken into account by the European Union when determining the size of the TRQ shares to be allocated to "all others", and that the European Union acted inconsistently with the chapeau of Article XIII:2 by not allocating a greater "all others" share under tariff lines 1602 39 29 and 1602 39 80[755];

iii. China has failed to demonstrate that the European Union acted inconsistently with the chapeau of Article XIII:2 by not allocating an "all others" share of at least 10% for all of the TRQs under the First and Second Modification Packages;

f. China has not demonstrated that the European Union acted inconsistently with Article XIII:1 of the GATT by allocating all or the vast majority of the TRQs to Brazil and Thailand;

g. China has not demonstrated that the European Union acted inconsistently with Article I:1 of the GATT 1994 by allocating all or the vast majority of the TRQs to Brazil and Thailand;

h. China has not demonstrated that the European Union acted inconsistently with Article XIII:4 of the GATT 1994 by refusing to enter into meaningful consultations with China; and

i. China has not demonstrated that the European Union acted inconsistently with Article II:1 of the GATT 1994 by giving effect to the modifications resulting from the Article XXVIII negotiations prior to the changes being reflected in the authentic text of its Schedule through certification.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with Article XIII:2(d) and the chapeau of Article XIII:2 of the GATT 1994, they have nullified or impaired benefits accruing to China under the GATT 1994.

8.3. Pursuant to Article 19.1 of the DSU, having found that the European Union has acted inconsistently with its obligations under Article XIII:2(d) and the chapeau of Article XIII:2 of the GATT 1994, the Panel recommends that the Dispute Settlement Body request that the European Union bring its measures at issue into conformity with its obligations under the GATT 1994.

_____

[755] Tariff line 1602 39 80 merged with tariff line 1602 39 40 into tariff line 1602 39 85, effective 1 January 2012.

WORLD TRADE ORGANIZATION

WT/DS492/R/Add.1

28 March 2017

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EUROPEAN UNION – MEASURES AFFECTING TARIFF CONCESSIONS ON CERTAIN POULTRY MEAT PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS492/R.

LIST OF ANNEXES

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WORKING PROCEDURES OF THE PANEL

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ANNEX C

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ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 16 December 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute ("party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU ("third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier)

following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the attached WTO Editorial Guide for Panel Submissions, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by China. If the European Union chooses not to avail itself of that right, the Panel shall invite China to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is

needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 5 paper copies of all documents it submits to the Panel. Exhibits may be filed in 4 copies on CD-ROM and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org, and ****.****@wto.org. If a CD-ROM is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

AMENDED WORKING PROCEDURES OF THE PANEL

Adopted on 16 December 2015
Amended on 3 February 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute ("party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU ("third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the attached WTO Editorial Guide for Panel Submissions, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by China. If the European Union chooses not to avail itself of that right, the Panel shall invite China to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the

end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party may be present during the entirety of the substantive meetings with the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 5 paper copies of all documents it submits to the Panel. Exhibits may be filed in 4 copies on CD-ROM and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org, and ****.****@wto.org. If a CD-ROM is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its first and second written submissions, written responses to questions and comments, and related exhibits. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. Introduction

1. In this dispute, China challenges the European Union's determination and allocation of tariff rate quotas (TRQs) which are the sole compensation for the withdrawal of its unlimited tariff concessions for poultry meat.

2. China is the second largest producer of poultry in the world and a significant exporter of poultry meat products, including to the European Union. Yet, in denying China's principal or substantial supplying interest, the European Union stated that China's share in the trade affected by the concessions was insufficient, while choosing to ignore the effect of the sanitary measures (SPS) measures that it had imposed on Chinese poultry meat products which had acted effectively as a ban on imports into the European Union of Chinese products.

3. China contends that the European Union's TRQs for poultry meat products (1) do not maintain the balance of tariff concessions existing prior to the withdrawal, (2) do not give due credit to China's future trade propects or its share of the European Union market absent the TRQs, and (3) do not offer to Chinese poultry meat products the share of imports into the European Union commensurate with their comparative advantages.

II. The European Union's SPS Measures Imposed On Imports Of Poultry Meat Products From China And Their Impact

4. China is not challenging the European Union's SPS measures *per se*. China nevertheless submits that the the impact of these SPS measures on the trade flows of the products in question should have been taken into account in the process of determining the TRQs, their level and their allocation.

5. Imports of Chinese poultry meat were completely banned in the European Union from 23 May 1996 through 8 February 2000 and from 14 March 2002 to 30 July 2008. Even when special heat treatment requirements allow certain types of cooked poultry meat products from China to be imported into the EU as exceptions to the import ban on all poultry meat products from China, between 8 February 2000 to 14 March 2002 and after 30 July 2008, uncooked poultry meat or cooked poultry that did not undergo the specific heat treatment could not be imported into the EU.

III. Legal Claims

A. China's Claims Under Article XXVIII

6. Pursuant to Article XXVIII:1, a WTO Member may withdraw or modify a concession *provided that* it negotiates with the WTO Members who have initial negotiating rights and a principal supplying interest (PSI) or consult with WTO Members who have a substantial supplying interest (SSI). Paragraphs 4 and 7 of Note *Ad* Article XXVIII:1 establish the rules on how to appropriately determine which Members have PSI or SSI, i.e. by the actual share of imports or the share of imports that should have been obtained in the absence of the discriminatory quantitative restrictions. Essentially, all products are equally expected to have access to the EU market based on the tariff concessions that were negotiated and extended to all on an MFN basis. Accordingly, any discriminatory quantitative restriction that has affected the shares of imports should be taken into account and allowance should be made for such restriction. To do otherwise would mean that the Article XXVIII:2 requirement to maintain a general level of reciprocal concessions would not be satisfied.

1. The European Union Violated Article XXVIII:1 By Failing To Recognise China's PSI or SSI Status

a. The European Union Import Bans Were Discriminatory Quantitative Restrictions

7. The fact that the European Union subjects Chinese poultry meat to import bans is not in question. What is at issue is whether the import bans are "discriminatory quantitative restrictions" within the meaning of paragraphs 4 and 7 of Note *Ad* Article XXVIII:1.

8. The term "restriction" has a broad scope which identifies not just a condition placed on importation but a condition that has a limiting effect. As a result of the EU's various SPS measures, from 2002 to 2008, there was an effective import ban on poultry meat products from China. An import ban, by its nature, is a "prohibition" that not only restricts but prevents imports of the product subject to the regulatory measure. Accordingly, the import ban resulting from the EU's SPS measures falls within the scope of "quantitative restrictions".

9. The concept of "discriminatory" quantitative restrictions covers not only those that are prohibited by the covered agreements but also others that are justifiable under relevant provisions of the covered agreements. China agrees with the Appellate Body that the determination of "discriminatory" should be based on the provision concerned, which in this case is Article XXVIII. The overall purpose, as provided in Article XXVIII:2, is to "endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided in this Agreement". By only taking actual import volumes into consideration but not import bans due to SPS measures when identifying WTO Members for Article XXVIII negotiations or consultations, this would mean that:

(i) WTO Members whose imports were affected by import bans due to SPS measures would be prevented from participation in the negotiations or consultations;

(ii) The condition of "in the absence of discriminatory restrictions" in paragraphs 4 and 7 of the Note *Ad* Article XXVIII:1 would be rendered meaningless; and

(iii) The TRQ or the TRQ plus compensation would not result in the maintenance of concessions at the general level of reciprocity and mutual advantages that had existed before the modification of concessions.

10. Negotiations under Article XXVIII aim to maintain a general level of reciprocal and mutually advantageous concessions not less favourable than what existed in the period preceding the withdrawal of concessions. What that level is should be a function of the tariff bindings for unlimited import volumes that existed prior to their withdrawal or modification, and not a function of imports that are affected by differential treatment. The import bans on all Chinese poultry meat products from 2002 to 2008, clearly show that a distinction was made between imports from China and those from other WTO Members, and have affected the shares of China's imports of poultry products in the European Union. In other words, the EU's SPS measures are "discriminatory quantitative restrictions" for the purpose of the application of Article XXVIII within the meaning of Notes 4 and 7 of *Ad* Article XXVIII:1.

b. The European Union Used Non-representative Periods To Determine PSI or SSI

11. The identification of the reference period for the determination of PSI or SSI must be compatible with the purpose of the determination of WTO Members with PSI or SSI, that is to identify which of the WTO Members have or would have had large enough exports of the subject products in the absence of discriminatory quantitative restrictions. In keeping with that purpose and in light of the rights and interests of other Members that will otherwise be excluded from negotiations or consultations, the period to be taken into account must be *representative* so as to permit an accurate determination of the Members with a PSI or SSI.

12. The adjustment of the reference period is necessary where the three-year period preceding the notification of the intention to withdraw or amend a concession was tainted by the existence of

discriminatory quantitative restrictions and/or data for a more recent period has become available before the end of the negotiations and consultations.

13. China has submitted sufficient factual evidence to support its claims of a substantial or a principal supplying interest. The evidence includes, *inter alia*, China's poultry meat production capacity, its poultry meat imports to the world in general and to specific other countries, as well as to the European Union following the partial lifting of the import bans.

14. In protracted negotiations such as those for part of the TRQs that lasted three years, China submits that at the very least, re-assessment should occur as soon as there is evidence of the developments materially affecting the determination of who holds a PSI or SSI, or affecting the determination of the future trade prospects. By failing to account for import developments since the relaxation of its import ban, the reference period used by the European Union is not "representative".

15. In the present case, China higlights three facts (1) the three-year period mentioned in the European Union's initial notification was affected by the import bans; (2) the negotiations and consultations by the European Union were so protracted as to render the trade data for the period used by the EU ancient history; and (3) the statistical data show resumption of imports into the European Union of China poultry meat after the partial relaxation of the import bans. China submits that, based on this data and the information generally available on China's production and competitiveness in the field of poultry meat, the European Union should have reconsidered whether it was negotiating or consulting with all WTO Members holding a PSI or SSI.

2. The European Union Violated Article XXVIII:2 and Paragraph 6 of the Understanding on the Interpretation of Article XXVIII of GATT 1994

16. Article XXVIII allows WTO Members to modify concessions bound under Article II but requires the balance in the general level of reciprocal concessions to be maintained. There is no discretion in this regard, especially since tariff liberalisation is one of the fundamental goals of the WTO.

17. Article XXVIII:2 directs the Members involved in negotiation and consultations to maintain a general level of reciprocal and mutually advantageous concessions not only *vis-à-vis* themselves but also *vis-à-vis* all other WTO Members. The use of the word "general" in Article XXVIII:2 supports that view. If Article XXVIII:2 only intended to maintain the level of concessions as between the withdrawing WTO Member and the WTO Members with which it negotiates or which it consults, the provision should have read that the aim was to maintain "the level of reciprocal and mutually advantageous concessions" or "the level of reciprocal and mutually advantageous concessions between them".

18. This also finds support in the findings by the Appellate Body who agreed with the panel in *EC – Poultry*, which stated that:

> If 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*. (emphasis added)

19. It is further supported by the negotiating history of Article XXVIII of the GATT 1994.

20. Thus, the outcome of a modification of concessions must:

(i) Achieve an overall balance of concessions assessed within the multilateral context, taking into consideration the interests of WTO Members without an initial negotiating right, PSI or SSI;

(ii) Maintain a general level of reciprocal and mutually advantageous concessions as provided in its Schedule of Concessions prior to the modification; and

(iii) Be extended to all other WTO Members on an MFN basis.

21. What that outcome should be is further guided by paragraph 6 of the Understanding on the Interpretation of Article XXVIII of GATT 1994, which specifically applies to the replacement of an unlimited tariff concession by a TRQ, as well as provides the basis for the calculation of compensation.

22. Where TRQs are allocated during the modification negotiations, compliance with Article XXVIII:2 necessitates a comparison at the level of the WTO Members to which the quota was allocated rather than at the global level only. It would not make any sense to fix a global TRQ taking into account overall future prospects without taking into account future trade prospects at the level of the separate TRQs in which the global TRQ is broken down. To do otherwise would result in over-compensation for some and under-compensation for others, thereby creating discrimination. Thus, in reading Article XXVIII:2 together with paragraph 6 of the Understanding and applied in the context of the current dispute, the assessment must be at the level of the allocated TRQ as well as at the level of the global TRQ.

23. In order for the TRQs to be compensation, they should be set at the level allowing China to import such quantities of poultry meat products into the European Union within the TRQ as are in line with its future trade prospects. Pursuant to paragraph 6 of the Understanding, the WTO Member replacing an unlimited tariff concession by a TRQ must accord compensation based on the greater of (i) trade "in the most recent representative three-year period increased by the average annual growth rate or 10 percent or (ii) trade in the most recent year increased by 10 percent". In other words, the volume of the TRQ should reflect the natural growth level of exports of Chinese poultry meat products to the European Union.

24. In the case of protracted negotiations, the period for determination of compensation should be adjusted in light of latest available trade data. Adjustments should also be made to account for the existence of the import bans. Being kept out of a market due to import bans as a result of sanitary requirements is different from being shut out due to modified concessions. Chinese poultry meat producers understood that they would have access to the European Union's market based on the European Union's tariff commitments, as soon as they/their products meet the European Union's sanitary controls. But now, because of the European Union's modified concessions in the form of TRQs, most Chinese poultry meat products would be subject to the higher out-of-quota tariff rates (because the compensatory TRQs for "Others" are small), even though their improved sanitary controls and practices meet the European Union's sanitary requirements.

25. By using a period tainted by a ban on imports of Chinese poultry meat products into the European Union, the TRQs determined by the European Union are not at a level reflecting future growth prospects. The European Union's modifications of concessions have disturbed its balance of concessions *vis-a-vis* China. It also means that the European Union has in effect extended the effect of the SPS measures it imposed on China permanently.

B. China's Claims Under Article XIII

1. The European Union's Administration of TRQs Is Discriminatory And Violates Article XIII:1

26. China contends that the general application of the provisions of Article XIII are necessarily applicable to all TRQs. As explicitly acknowledged by the Appellate Body in *EC – Poultry*, irrespective of the status of the TRQs instituted under the provisions of Article XXVIII, they must equally respect Article XIII of the GATT 1994. Otherwise, the object and purpose of the non-discrimination provision of Article XIII would be defeated.

27. First, the requirement of Article XIII:1 is that imports from all third countries must be similarly restricted. As the Appellate Body in *EC – Bananas II (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)* established, there can be *no* discrimination in the level of access

that is given to the import market. The mere fact the the European Union allocated a share of the TRQs for poultry meat to "others" does not mean that products from such other Members are similarly restricted to those from Thailand and/or Brazil. In the present case, for those poultry meat products where the European Union has allocated TRQ shares to WTO Members other than Brazil and/or Thailand, it did so in volumes and portions that are so small as to allow no meaningful access to or participation in the TRQs. Thus, the benefit afforded by the TRQ is reserved nearly exclusively to two WTO Members and other WTO Members, especially China which had and has substantial supplying interests, are precluded *de facto* from having access to (and participating in) the TRQs in violation of Article XIII:1 of the GATT 1994.

28. Second, if all countries must be similarly restricted, then all Members with a substantial supplying interest must be similarly restricted. In the present case, the European Union negotiated with and allocated country-specific shares to Brazil and Thailand which it recognised as having principal or substantial supplying interests. China submits and has demonstrated that it held a substantial supplying interest and thus accordingly, should have been (but was not) allocated a country-specific share of the TRQ, similar to those allocated to Brazil and Thailand.

29. Third, where there is an allocation of a TRQ, "[m]embers not having a substantial supplying interst will be able, if sufficiently competitive, to gain market share in the "others" category and possibly achieve "substantial supplying interest" status which, in turn, would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4", as noted by the panel in *EC – Bananas III (Ecuador)*. In the present dispute, the European Union has allocated very small "others" shares in the TRQs (and for certain tariff lines, none) and the new out-of-quota tariff rates are much higher than the in-quota rates. The only conclusion here is that all WTO Members are not given "access and an opportunity of participation", and are not "similarly restricted".

30. Finally, where import bans due to SPS measures are applied to a WTO Member but not to others, the determination of TRQs without taking into account the existence and impact of such import bans would lead to a long-term freezing of those SPS measures, hardly a situation where all third countries are "similarly restricted".

2. The European Union's Failure To Establish TRQs Based On A Representative Period And Take Into Account The Import Bans And Comparative Advantages Violates Article XIII:2

31. The chapeau of Article XIII:2 of the GATT 1994 sets forth a general non-discriminatory obligation with respect to the allocation of tariff quota among Members, whether they hold an SSI or not. The Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* confirmed that the standard for compliance with the chapeau of Article XIII:2 is high; the TRQs must be set at levels such as to be the *least* trade-distortive possible. The TRQs must afford:

(i) all WTO Members access to the TRQs; and

(ii) all WTO Members competitive opportunities under the TRQs that mimics "their comparative advantage" *vis-à-vis* other WTO Members participating in the TRQs.

32. TRQs must be allocated such that WTO Members are in a position to exploit their comparative advantages -- be that in terms of their cost of production, the nature and properties of their products or other factors -- and, thus, to make use of competitive opportunities to increase their trade with the WTO Member imposing the TRQs. They will then achieve the share they would have obtained in the absence of the TRQs.

33. In line with the panel reports in *US – Line Pipe* and in *EEC – Chilean Apples*, the historical trade patterns used for the determination of the share that WTO Members might be expected to obtain in the absence of TRQs must be the trade patterns during a period *preceding the imposition or allocation* of the TRQs. By using 2006-2008, a period remote from the allocation of the TRQs in the Second Modification Package, as the reference period, the EU violated the chapeau of Article XIII:2.

34. In addition, Article XIII:2(d) provides that the representative period must be selected with due account being taken of special factors, such as import bans due to SPS measures which curb the natural comparative advantages of a WTO Member. They are not themselves an element of competition. The facts in this case demonstrate that China could satisfy the sanitary requirements and that its exports of poultry meat to the European Union increased significantly after the lifting of the import bans. As such, the natural comparative advantages of the WTO Member once the SPS measures are lifted or relaxed must be the basis for the determination of the TRQs.

35. Accordingly, determining TRQs based on a reference period that is affected by import bans due to SPS measures violates the requirements of the chapeau of Article XIII:2. As stipulated by Article XIII:2(d), the reference period must also take into account special factors. Import bans clearly affect trade in the product; trade flows in a period where import bans are in place can not be said to be representative. Thus, the reference period affected by import bans must be adjusted. Otherwise, the country-specific TRQs and the "other" shares would not reflect the comparative advantages nor accord competitive opportunities that WTO Members might have expected to obtain in the absence of the TRQs.

36. China has shown that the import bans due to the European Union's SPS measures have affected Chinese poultry meat imports into the European Union for all periods taken into account by the EU. Older periods were also not representative because they too were affected by import bans. As a result, adjustments should have been made to neutralize the impact of the import bans. In light of the Havana Reports and the GATT panel findings in *EEC – Chilean Apples*, such adjustments could have been made by considering China's comparative advantages in terms of its cost of production, the nature and properties of its products, export capacity, the position of China's exports of poultry meat products to non-EU markets.

37. Finally, the TRQs that are allocated to "all others" must be at a sufficient level in order to allow the relevant WTO Members going forward to make use of their comparative advantages so as to obtain an SSI. What that level is will depend on the circumstances of each case, and as the panel in *EC – Banana III* noted, the level might vary based on the structure of the market.

38. Relying on Article XIII:4, the Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* established that a country-specific TRQ may not lead to long-term freezing of the shares of imported products and cannot be applied in such a way as to create an artificial hurdle preventing the natural evolution of the import market structure. A stifling of the trade flows that could be anticipated without the imposition of the TRQ is especially likely to happen when the out-of-quota tariff rate is set at a very high level in both absolute and relative terms.

39. In this dispute, the "all others" shares of the TRQs for poultry meat for one tariff heading is non-existent while those for four tariff headings fall below five percent. In contrast, China's poultry meat imports to the European Union had reached very significant levels in the years preceding the imposition of the TRQs in 2012. Thus, based on the evidence provided by China, China had a substantial supplying interest that should have been recognized by the EU and should have led to the attribution of a commensurate country-specific share in the TRQs. Absent such attribution, the "all others" share should have been established at a much higher level than is currently the case, to allow China to reach SSI.

3. The European Union's Failure To Enter Into Meaningful Consultations Violates Article XIII:4

40. Article XIII:4 provides for consultations. However, mere consultations followed by no adjustment of a TRQ when the conditions for an adjustment are met, would mean that the consultations under Article XIII:4 are a dead letter. That cannot be the purpose and objective of the mandatory consultations provided for in Article XIII:4. It would also be inconsistent with the findings of the Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)* that a country-specific TRQ may not lead to long-term freezing of the shares of imported products and cannot be applied in such a ways as to create an articifical hurdle preventing the natural evolution of the import market structure. As such, consultations under Article XIII:4 must consider issues of substance, i.e. they must relate as mentioned in Article XIII:4 to "the need for an adjustment of the proportion determined or of the base period

selected, or for the appraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilisation".

C. China's Claims Under Article II

41. According to Article II:7 of the GATT 1994, the schedules of concessions are an integral part of the GATT 1994. In line with the Decision of 26 March 1080 on the Procedures for Modification and Rectification of Schedules of Tariff Concessions and pursuant to paragraph 8 of the Procedures for Negotiations under Article XXVIII, the modification of schedules is subject to certification. Thus, in the context of modification of schedules of concessions, certification of modified schedules is a requirement that a WTO Member *must* undertake before the application *erga omnes* of any revised concession; otherwise, implementation of the modification will be in violation of the Schedule annexed to the GATT 1994.

42. Nothing in paragraph 7 of the Procedures for Negotiations under Article XXVIII explicitly waives the obligations in Article II. If paragraph 7 of the Article XXVIII Procedures were to be read as waiving the obligation in Article II for the results of Article XXVIII negotiations, the certification process to which it refers would be reduced to inutility, contrary to the principle of effective interpretation. It would also run contrary to the object and purpose of all the WTO rules regarding certification, which is to allow the entire Membership to acquiesce in modifications to Schedules, since Schedules contain obligations that are an integral part of the WTO Agreement and give rise to rights enjoyed by all Members.

43. The tariffs and TRQs implemented by the EU have not been certified nor been given legal effect. And by applying tariffs well in excess of the tariff rates that are certified in its Schedule of Concessions, the European Union violated Article II:1.

D. China's Claims Under Article I

44. Article I:1 of the GATT 1994 prohibits discriminatory measures in connection with importation that confer an "advantage, favour, privilege or immunity" to products from certain countries and not to like products from other countries.

45. The preparatory work of Article XXVIII of the GATT supports the view that Article I of the GATT 1994 is applicable to any action taken and outcome resulting from modification of concessions under Article XXVIII of the GATT 1994. The Appellate Body in *EC − Bananas III (Article 21.5-Ecuador II)* also found that it is possible for a more favourable TRQ allocation to violate Article I of the GATT 1994.

46. The majority of the TRQs for the products at issue are allocated to only two WTO Members -- Brazil and Thailand. Imports of the products at issue from China are subject to the higher out-of-quota rates under the 2007 and 2012 Modification Packages − that is, they face vastly different and more adverse market access conditions in the EU market as compared to like products from Brazil and Thailand.

47. As such, the tariffs and TRQs negotiated by the European Union and implemented under the First and Second Modification Packages are *per s*e violations of Article I:1.

IV. Conclusion

48. The legal possibility of withdrawing tariff concessions is not at dispute here. However, such a withdrawal must occur in the strictest respect of the legal requirements so as to maintain the balance of concessions and the predictability and security that tariff commitments are supposed to achieve. Moreover, where TRQs are imposed and allocated, these TRQs should respect the share of imports that each WTO Member would have had in the absence of the TRQs based on its own comparative advantages. All China is seeking here is for the European Union to honor its obligations under the WTO.

ANNEX B-2

SECOND EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. Introduction

1. In this Second Executive Summary China focuses on the key issues in this dispute that were discussed during the Panel's second substantive meeting with the Parties and the responses to the Panel's questions.

II. China's Claims Under Article XXVIII

A. China's Claims Under Article XXVIII:1

1. The European Union's SPS Measures Are Discriminatory Quantitative Restrictions

2. China submits, with support from various panels and the Appellate Body, that prohibitions or restrictions on importation under Article XI:1 may be taken in the form of sanitary and phytosanitary ("SPS") measures. Even the European Union ("EU") itself admits that "[f]ailure to comply with such requirements may entail the imposition of import restrictions, including the prohibition of the imports concerned". China has clearly demonstrated that the EU's SPS measures had a material impact on imports of poultry meat products from China. They in fact resulted in an import ban. Even when special exceptions were given to (1) fresh poultry meat from certain production areas in China; and (2) poultry meat products subject to special heat treatment requirements, these only had the effect of narrowing the scope of the import bans (i.e. the limitation on production areas and the heat treatment requirements had a limiting effect on China's imports of the products in question into the EU). Thus, the volume of imports under each of the tariff lines in question would not fully reflect nor would it be truly representative of China's full import potential.

3. There are several instances where the impact of the EU's SPS measures during the relevant reference periods were different as between China and Thailand.. These instances clearly show that the effect of adopting the import bans is straightforward: products from certain countries may be imported while products from other countries may not. Therefore, a distinction − a differentiation − is made between poultry originating in one country and poultry originating in another. Whether such disparate treatment is justifiable is not relevant in assessing whether a measure constitutes a "discriminatory quantitative restriction" in the sense of *Ad* Note Article XXVIII:1. Article XXVIII and paragraphs 4 and 7 of *Ad* Note Article XXVIII:1 are concerned with the impact that such restrictions had on the imports from supplying World Trade Organization ("WTO") Members. That being the case, import bans, whether WTO-consistent or not, must be taken into account to determine whether the WTO Members affected should have had a principal or substantial supplying interest in the absence of the import bans.

4. Contrary to the EU's flawed assertions, China is not suggesting that the EU must abolish or replace its SPS regime, nor is it requesting compensation for measures that are presumably WTO consistent. First, China is not advocating for the *replacement* of WTO consistent measures in the form of import bans based on SPS measures. China and Chinese poultry meat producers have every reasonable expectation that their products would have access to the EU market upon meeting the EU's SPS requirements in accordance with the EU's commitments under its Schedule of Concessions. What is being replaced is the withdrawn concession. Before the re-binding exercise, China was entitled to un-limited access for its poultry meat at the bound rate set forth in the EU's Schedule of Concessions. And following the re-binding, the balance of concessions and future prospects must be maintained in order to have full effect for the time when compliance with the EU's SPS measures is achieved. Second, compensation under Article XXVIII is for the modification of concessions, it is not to address other WTO obligations. Just because an SPS measure is WTO compliant − which is not at issue here − does not mean that it can serve as a basis for the determination of compensatory tariff-rate quotas ("TRQs") in case of withdrawn tariff

bindings. In order to achieve the purpose of maintaining a general level of reciprocal and mutually advantageous concessions not less favourable than what existed in the period preceding the withdrawal of concessions pursuant to Article XXVIII:2, the determination of the total quantity of each TRQ and its allocation among supplying countries should be based on the future trade prospects of China's poultry meat exports to the EU taking into account the impact of import bans imposed by the EU.

2. The European Union Used Non-representative Periods To Determine Which WTO Members Held Principal Or Substantial Supplying Interests

5. The identification of the reference period for the determination of principal supplying interest ("PSI") or substantial supplying interest ("SSI") must be compatible with the purpose of a reference period, which is to identify the WTO Members having sufficiently large exports of the subject products (or who would have had such exports in the absence of discriminatory quantitative restrictions). In keeping with that purpose and in light of the rights and interests of other Members that will otherwise be excluded from negotiations or consultations, the period to be taken into account must be *representative* so as to permit an accurate determination of the Members with a PSI or SSI.

6. The adjustment of the reference period or at least an adjustment to the data for the reference period is necessary where the three-year period preceding the notification of the intention to withdraw or amend a concession was tainted by the existence of discriminatory quantitative restrictions and/or data for a more recent period has become available before the end of the negotiations and consultations. Brazil supports China's view, stating that "there is no reason to consider that adjustments cannot happen if the circumstances require. In many cases they may actually be necessary in light of the very purpose of Article XXVIII".

7. Furthermore, in the case of protracted negotiations (such as those in connection with the so-called "Second Modification Package"), China submits that at the very least, re-assessment should occur as soon as there is evidence of the developments materially affecting the determination of who holds a PSI or SSI, or affecting the determination of the future trade prospects. Both Brazil and Argentina lends support to China's position on re-assessment. By failing to account for import developments since the relaxation of its import ban, the reference period used by the European Union was not "representative".

8. In the present case, China highlights three facts. First, the three-year period mentioned in the EU's initial notification was affected by the import bans. Second, the negotiations and consultations by the EU were so protracted as to render the trade data for the period used by the EU "ancient history". Third, the statistical data show resumption of imports into the EU of China poultry meat after the partial relaxation of the import bans. China submits that, based on this data and the information generally available on China's production and competitiveness in the field of poultry meat, the EU should have reconsidered whether it was negotiating or consulting with all WTO Members holding a PSI or SSI. An inappropriate determination of Members with a PSI or an SSI would not yield negotiations consistent with Article XXVIII.

3. There Is No Bright Line Rule On Using A 10% Import Share Threshold To Determine SSI

9. While now stating that it did not "apply a rigid 10 percent test", the EU then strangely questions that "China has nowhere identified the specific characteristics of the poultry market that would make inappropriate the use of the customary 10% threshold". As provided in paragraph 7 of the *Ad* Note to Article XXVIII:1, China consistently argues against a bright line rule for determining who is or is not an SSI; there is nothing "customary" about the 10% threshold. China is of the opinion that one needs to take into account the circumstances of each case, such as the structure of the market, and special factors or discriminatory quantitative restrictions affecting the Member's import share.

10. The EU's insistence on the 10% threshold is not supported by its own trade statistics. For example, the EU imported zero volume of tariff heading 1602 39 21 from Thailand in the three years prior to the conclusion of the negotiations for the Second Modification Package in 2012,

namely 2009, 2010 and 2011. Moreover, total Thai imports over the period 1996-2015 accounted for less than 2% of the total imports by the EU28. Yet, the EU allocated 100% of the TRQ for tariff heading 1602 39 21 to Thailand based on the import statistics for the period 2006-2008.

11. In this case, the EU (a) failed to establish 10% as the appropriate threshold that reflected a "significant share" as regards the market concerned, and (b) applied a 10% test to actual import columes without taking into account the quantitative restrictions and special factors affecting China's market share in the EU.

B. China's Claims Under Article XXVIII:2

1. Article XXVIII:2 And Paragraph 6 Of The Understanding Address The Allocation Of Compensation In The Form Of TRQs

12. Article II of the GATT 1994 specifically requires Members to be bound by their schedule of concessions. Contrary to the EU's assertion, China submits that Article XXVIII does not leave a wide margin of discretion when allowing WTO Members to modify Article II concessions lest the fundamental goals of the WTO are undermined. Furthermore, TRQs are inherently more trade restrictive than unlimited tariff concessions. China notes that this is the reason why paragraph 6 of the Understanding provides that compensation must exceed the amount of trade affected. Otherwise, the compensation would not reflect future trade prospects.

13. The EU argues that Article XXVIII:2 and paragraph 6 of the Understanding do not address the allocation of TRQs among supplying countries. China is not suggesting that these provisions require Members to allocate compensation in the form of TRQs among supplying countries. However, where a Member chooses to allocate (or break down) the total compensation among supplying countries and records the shares of the compensation as part of its modification of concessions, as the EU did in this case, China contends that the sufficiency of the compensation under Article XXVIII:2 and paragraph 6 of the Understanding must be examined not only at the level of total compensation, but also at the level of the compensation received by each supplying country or group of countries. Brazil supports China's views, stating that "in negotiations under Article XXVIII, the provision of the total amount of compensation in the form of TRQs is intrinsically tied to the specific amount given to each participating Member".

2. Compensation Must Reflect Future Trade Prospects Exempt From The Impact Of Import Bans And Calculated Based On The Formula In Paragraph 6 Of The Understanding

14. To the EU, the wording of paragraph 6 of the Understanding, read with paragraph 6 of *Ad* Note Article XXVIII:1, means that the most recent three-year period preceding the notification of the intention to withdraw concessions should always be used as the reference period. China disagrees.

15. Paragraph 6 of *Ad* Note Article XXVIII:1 provides that compensation should be judged "in the light of the conditions of trade at the time of the proposed withdrawal or modification". The moment of the "proposed withdrawal or modification" is not the moment of the notification of the mere intention to withdraw or modify concessions. It is the moment at which the details of the withdrawal or modification are agreed immediately preceding their implementation. And the reference to "future" in paragraph 6 of the Understanding confirms the intention to make sure that the compensation is as close as possible to economic reality at the time of the implementation of the withdrawal of the concession.

16. Furthermore, for the general balance of concessions to be restored pursuant to Article XXVIII:2, the future trade prospects under paragraph 6 of the Understanding should take into account *the future trade prospects of all WTO Members exempt from the impact of import bans*. In other words, where warranted in light of the circumstances of a particular case, another period which is more representative should be used, or alternatively, the trade data during the most recent period should be duly adjusted. In fact, the EU itself has modified the reference period from that initially notified for two tariff headings covered by the First Modification Package.

17. The EU claims that compensation in the form of the global volume of the TRQs is at least equal to, but most often in excess of, the formula set out in paragraph 6 of the Understanding. However, a quick calculation by China shows that not only do the global volumes of several TRQs fall short of the requirements of paragraph 6 of the Understanding, the allocation to 'all others' is extremely small and falls short of what is required under paragraph 6 of the Understanding. Indeed, for some tariff lines, even if the periods selected by the EU are used as the basis for calculation, the allocation falls short as well. That said, certain Chinese poultry meat under the tariff lines in question could not be imported into the EU due to the import bans in place during the periods selected by the EU. The EU did not take these bans into account in determination of the global volume of the TRQs, nor in their allocation.

18. The EU further claims that allocation of unusable shares to China "would have reduced the size of the shares allocated to imports from other sources which do comply with the EU's SPS requirements and, consequently, limited the total volume of imports under the TRQs for as long as China remains unable to comply with the EU's SPS requirments". First, to be clear, the EU is not under an obligation to allocate its TRQs on a country-specific basis. However, having decided to do so, the EU was under an obligation pursuant to Article XXVIII to, among other things, ensure that the modified concessions 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". Assuming the SPS measures are in place and the EU allocates a TRQ to China, Chinese poultry products will not be imported into the EU, a situation similar to that prior to modification. If China subsequently complies with the SPS measures, Chinese products should be able to access the EU market, as it was able to under concessions prior to modification. As for imports from other sources that comply with the EU's SPS requirements, they would still have the same access, as the global volume of the TRQs would be adjusted accordingly to account for China's share.

III. China's Claims Under Article XIII

19. China submits that Article XIII imposes an *ongoing* obligation to ensure that the actual allocation of shares in the TRQs throughout their entire period of validity is not discriminatory. Not only did the EU act inconsistently with Article XIII in its disciminatory *initial* allocation of shares in the TRQs in the First and Second Modification Packages, the EU continues to act inconsistently with Article XIII because of the *continuous* application of this discriminatory allocation from one quota year to another without adjustment, notwithstanding subsequent trade developments. In the present dispute, China argues that (a) the allocated shares in the TRQs as applied by the EU (since 2007 and 2012, respectively) and going forward during their period of validity must be updated from time to time to reflect the share that each WTO Member could have had without the TRQs, and (b) such updating must be based on trade flows during a representative period preceding the continued application of the allocated shares. The EU should not rely on outdated trade data to allocate TRQs concerned among supplying Members.

A. China's Claims Under Article XIII:1

20. The EU partially concedes that Article XIII:1 applies to the allocation of TRQs "for aspects of the allocation of TRQs that are not covered by Article XIII:2 ... to the extent that its [Article XIII:1] application does not lead to results that would conflict with the outcome resulting from the application of Article XIII:2". The EU's new position is built upon the *EC-Banana III (Ecuador)* panel's statement that "[Article XIII:2(d)] may be regarded, to the extent that its practical application is inconsistent with [Article XIII:1], as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned". However, China notes that the panel in that dispute referred to substantial suppliers only and only to the extent that the practical application of Article XIII:2(d) is inconsistent with Article XIII:1. The panel was not (and certainly not China) suggesting that Article XIII:2(d) overrides Article XIII:1.

21. China submits that the "similarly restricted" provision in Article XIII:1 requires, *inter alia*, that:

(i) If all countries must be similarly restricted, then, all Members with an SSI must be similarly restricted. This means that the process for determining the TRQs should be the same for all WTO Members holding an SSI (i.e. negotiations must be held

with all Members holding an SSI; if negotiations are held with some and not with others, that means that all Members holding an SSI are not similarly restricted).

(ii) If a country-specific share is allocated to some Members with an SSI, a country-specific share must be allocated to all Members with an SSI. If not, these Members are not similarly restricted.

(iii) Where there is an allocation of the TRQs, not only the WTO Members with an SSI must be granted a share of the quota that is proportionate to the share they would have had absent the TRQs, but all other countries as well. In the absence thereof, all countries are not similarly restricted.

22. And, as mentioned above, these requirements must be complied with on an ongoing basis throughout the period of validity of the allocated shares in the TRQs.

23. In the present case, the EU failed to negotiate with or similarly allocate a country-specific share of the TRQs to China, which was a Member holding an SSI, unlike what it did with Brazil and Thailand.

24. China further notes that the EU omitted to take into account a very important statement by the panel in *EC – Bananas III (Ecuador)*. Specifically, the panel noted that in the case of an "others" category for all Members not having a substantial interest in supplying the product, the allocation must comport with the object and purpose of Article XIII, which includes Article XIII:1, to have a significant share of a tariff quota assigned to "others" such that the import market will evolve with the minimum amount of distortion and "[m]embers not having a substantial supplying interest will be able, if sufficiently competitive, to gain market share in the "others" category and possibly achieve "substantial supplying interest" status which, in turn, would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4". In the instant case, China argues, with support from Argentina, that when a very small TRQ share is allocated to "others" and the new out-of-quota tariff rates are much higher than the in-quota rate, every Member is not given "access and an opportunity of participation" in each TRQ similarly and the importation of the products concerned from all third countries is not similarly restricted under Article XIII:1.

B. China's Claims Under Article XIII:2

1. The TRQs Established By The European Union Violate The Chapeau of Article XIII:2 And Lead To A Permanent Allocation of TRQ Shares

25. The EU argues that its TRQ allocation was conducted under Article XIII:2(d), which provides a safe harbour such that the allocation was not required to be based on a different reference period for all others, nor make adjustments for special factors. It states that this safe harbour extends to the allocation or non-allocation of TRQs to all other Members.

26. However, the Appellate Body has clarified that Article XIII:2(d) provides a safe harbour "as far as substantial suppliers are concerned". It does not exempt the importing Member from its obligations, such as those under the chapeau of Article XIII:2 as regards non-substantial suppliers. China argues that the chapeau of Article XIII:2 of the GATT 1994 sets forth a general non-discriminatory obligation with respect to the allocation of TRQs among Members, separate from the provisions of Article XIII:2(a) to (d) and thus requires a separate analysis.

27. China addresses the EU's violation of Article XIII:2(d) when it failed to negotiate with China as a WTO Member with an SSI in supplying the poultry meat concerned, as it did with Brazil and Thailand, in the section below. But even if assuming that China is not a WTO Member with an SSI, the EU would still need to comply with the requirements of the chapeau of Article XIII:2 in setting the TRQs for all other countries (i.e. the TRQs for all others should reflect the shares of imports that these other Members could have been expected to obtain in the absence of the TRQs). And that share will not be achieved if the allocation does not take into account the special factors that affect the share of imports of the other WTO Members. The mere use of objective and pertinent criteria is not enough. The special factors that affect imports of the other WTO Members must be taken into account and must be reflected in the allocation of the TRQs. Moreover, to measure the

shares Members might be expected to obtain in the absence of allocation, the trade during the most recent period preceding the *allocation* provides an objective basis, provided that trade is representative and there are no special factors. This is confirmed by the findings of the WTO panel in *US – Line Pipe* and the GATT panel in *EEC – Chilean Apples*. Trade data for an outdated period, even if it is "objective" and somehow "pertinent", cannot be representative of the shares that various Members could be expected to obtain in the absence of the TRQs or in the absence of the allocation of the TRQs among supplying Members.

28. The EU states there is no freezing of trade flows, even if a small or no share is allocated to "Other" suppliers, when a TRQ is allocated pursuant to Article XIII:2; after all says the EU, these "Other" suppliers can always import outside the TRQ. As Argentina points out, in this present dispute, the "Other" suppliers wishing to increase their market share would face high tariff rates, while domestic suppliers and Members with country-specific TRQs enjoy a competitive advantage simply due to the existence of the TRQs. Even if there are still imports at the higher out-of-quota tariff rate, the much higher tariff rate must have a stifling effect; normal trade flows are thus distorted, leading to a permanent allocation of TRQ shares. Such a result would not be consistent with the reasoning of the panel in *EC – Bananas III*, which states that an "all others" share of TRQ is required in all circumstances to allow new entrants to compete in the market and to avoid the long-term freezing of market shares.

2. The European Union Acted Inconsistently With Article XIII:2(d) By Denying SSI Status To China

29. China now turns to the EU's reiteration of its argument that: (a) the terms "substantial supplying interests" in Article XIII and Article XXVIII have the same meaning; (b) the import bans are not "special factors"; and (c) the evidence available at the time that the EU notified its intention to negotiate the modification of the concession did not demonstrate China's SSI status.

30. As to the EU's first argument, China has previously noted the differences between the notion of SSI in Article XIII and that in Article XXVIII. One key difference is the reference period. Assuming that there is no "discriminatory quantitative restrictions" nor "special factors", the reference period to be used under Article XXVIII:1 should be the most recent representative period preceding the initiation of a modification negotiation or preceding the conclusion of the negotiations if they are prolonged, while the reference period to be used under Article XIII shall be the most recent representative period preceding the allocation of the TRQs for any given period. To put it another way, allocation under Article XXVIII if undertaken is done once during a modification of concessions; while allocation under Article XIII needs to be re-examined as warranted in order to ensure that the allocation for a given quota year is based on the most recent trade data with special factors being taken into account. Second, China contends, and Brazil, Canada and the United States agree, that the concept of "special factors" is broader than that of "discriminatory quantitative restrictions". Paragraph 7 of *Ad* Note Article XXVIII:1 provides that the expression "substantial interest" is "intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonable by expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession". On the other hand, Article XIII:2 does not refer to "discriminatory quantitative restrictions", but to "special factors" that must be taken into account for the determination of the WTO Members holding a substantial interest as well as for the allocation of the shares in the tariff rate quotas. In this dispute, the import bans that affected Chinese poultry meat were both discriminatory quantitative restrictions and special factors that should be taken into account in affording to China its supplier status under Article XXVIII and under Article XIII:2. However, if ever the import bans were not considered to be discriminatory quantitative restrictions, they should at least be considered as special factors and be taken into account both for the determination of the supplier status and the allocation of TRQ shares under Article XIII:2.

31. Regarding its second argument that the import bans are not special factors, the EU maintains that the ability of a WTO Member to comply with a set of SPS requirements is an element of competition and, where this led to the imposition of an import ban, it would allow the exclusion of this WTO Member from the TRQs. The EU is wrong. First, compliance with sanitary requirements is not a factor of competition; the EU's views to the contrary are unfounded and without support in WTO law and practice. Second, the EU's views are based on the unfounded assumption that a WTO Member may never be able to comply with the sanitary requirements.

Third, the facts in this case demonstrate that China could satisfy the sanitary requirements and that its exports of poultry meat to the EU increased significantly after the lifting of the import ban. This demonstrates that Chinese poultry meat has comparative advantages that are precisely the conditions of competition that must be taken into account when determining and allocating the TRQs. Thus, in this dispute, by failing to account for the import bans (special factors), the EU has failed to properly identify China as a Member having substantial supplying interests.

32. Without repeating China's rebuttal of the EU's third argument, China stresses two key points:

(i) The reference period to determine SSI status under XIII is not a period preceding the EU's notification of its intention to modify its concessions. Therefore, whether sufficient evidence is available at the time of the EU's notification is irrelevant.

(ii) China has already presented evidence supporting its SSI status, such as its production capacity, in view of the existing import bans which are "special factors". Instead, it is the EU that has failed to disclose the historical trade data, the base period, the basis for the allocating the shares and the presence or absence of special factors. Without such data, WTO Members will be in the dark and will not be in a position to determine SSI and request the Member allocating the TRQs among supplying countries to enter into consultation regarding "the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved" pursuant to Article XIII:4. Argentina agrees with China on the disclosure requirements. Argentina points out that the information submitted by the EU in G/SECRET/25/Add.1 and G/SECRET/32/Add.1 did not explain the procedure used to determine the TRQs, or whether a single methodology was used for the TRQ distribution among the supplying Members, or the calculation of the growth rate under paragraph 6 of the Understanding, or the methodology used to determine the representative reference period and whether they have taken into account special factors.

IV. China's Claims Under Article II

33. Certification is the act, at the international level, that modifies the terms of a Member's Schedule, which is an integral part of the multilateral WTO Agreements. Even though there are instances where a modification entered into force before a certification was officially issued, Members do submit requests for a certification prior to the planned implementation date, and leave time for the certification process. In any event, China submits that a practice cannot supersede the law.

34. The applicant Member must certify to the WTO's Director General the proposed changes to its concessions pursuant to paragraph 1 of the Procedures for Modification and Rectification of Schedules of Tariff Concessions, within three months after the action has been completed. This paragraph is couched in mandatory terms but this three-month period has in fact not been respected by the EU either for the First or for the Second Modification Package. The EU itself concedes that very significant delays have occurred and the fact is that the changes in the EU's bound tariffs as a result of the First and Second Modification Packages have not been the subject of certifications and thus do not have formal legal effect. Thus, in applying the out-of-quota tariff rates for poultry meat originating in China, which are substantially higher than the bound rates currently still provided for in the EU's Schedule of Concessions, the EU is in violation of Article II.

ANNEX B-3

FIRST EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. CLAIMS UNDER ARTICLE XXVIII:1 OF THE GATT 1994

1.1. CHINA DID NOT CLAIM ANY PSI IN THE FIRST MODIFICATION PACKAGE AND FAILED TO MAKE A TIMELY CLAIM OF INTEREST IN RESPECT OF THE SECOND MODIFICATION PACKAGE

1. The European Union was not required to take into account either China's claims of PSI in the First package of modifications, which China has put forward for the first time in these panel proceedings, or China's claims of interest in the Second package of modifications, which were not raised by China until nearly three years after the deadline provided for in the Procedures, when agreements had already been negotiated with both Brazil and Thailand.

2. The Procedures for Negotiations under Article XXVIII provide that "claims of interest should be made within ninety days following the circulation of the import statistics". This provision underlines the importance of submitting the claims of interest in a timely manner. Members are not free to submit a claim of interest at any point in time during the Article XXVIII procedures. It would be manifestly unreasonable to force a Member seeking to modify a concession to take into account late claims of interest where doing so would cause undue delay in ongoing negotiations or, as in the present case, require the re-opening of negotiations already concluded.

1.2. THE SPS MEASURES CITED BY CHINA ARE NEITHER "QUANTITATIVE RESTRICTIONS" NOR "DISCRIMINATORY"

3. The EU's sanitary regime for animal products (including poultry products) is based on the fundamental principle that imported products must comply with the same or equivalent sanitary requirements as the EU domestic products. The SPS measures at issue are part of a comprehensive system of regulations put in place by the EU authorities in order to enforce at the border those sanitary requirements with regard to imported products. Therefore, in accordance with the Note *Ad* Article III, those measures are not "quantitative restrictions" within the meaning of either Article XI:1 or, consequently, of the Note *Ad* Article XXVIII:1.

4. Furthermore, the SPS measures at issue are not "discriminatory". The principle that imported products must comply with the same or equivalent sanitary requirements as the domestic products applies equally to all imports of poultry products, irrespective of the country of origin. Whether or not imports from a given country are restricted will depend on whether they comply with those sanitary requirements. In turn, this will depend on the sanitary situation in each country of origin. Where the sanitary situation in any two countries is the same or equivalent the European Union will treat imports from those two countries in the same manner.

5. China contends that the term "discriminatory" covers any situation "where imports from a WTO Member are treated differently from other WTO Members, irrespective of the ground of such disparate treatment". The European Union disagrees: treating differently two different situations is not discriminatory. Quite to the contrary, it would be discriminatory to treat in identical manner the imports from a Member which comply with the EU sanitary requirements and the imports from another Member which do not comply with the same or equivalent requirements.

6. The Appellate Body Report in *Canada – Wheat* does not support China's position. The findings of the Appellate Body in *EC – Tariff Preferences* confirm that, contrary to China's assertions, when used in the WTO Agreement, the term "non-discriminatory" can be interpreted as covering different treatment of Members which are in different situations. Further confirmation of this is provided by the respective preambles to the WTO Agreement and the GATT, which both cite among the objects and purposes of those agreements "the elimination of *discriminatory* treatment in international commerce". Clearly, in this context the term "discriminatory" cannot be read as referring to any situation "where imports from a WTO Member are treated differently from other WTO Members, irrespective of the ground of such disparate treatment", as it is beyond doubt that the WTO Agreement does not seek to "eliminate" all such differences of treatment.

7. It is necessary, therefore, to examine the term "discriminatory" in the context of Article XXVIII:1 and having regard to the objective pursued by that provision, as well as the

objects and purposes of the GATT and the WTO Agreement. Article XXVIII:1 seeks to facilitate the negotiation of the modification of tariff concessions, so as to limit the uncertainty which is inherent in such negotiations. This is achieved by providing that those modifications are to be negotiated, or consulted, with a few Members having a special interest, rather than with the entire WTO membership; and by laying down a straightforward, easy-to-apply rule for identifying those Members, namely the share of imports over a previous representative period. This objective, in turn, contributes to one of the objects and purposes of both the GATT and the WTO Agreement: to increase the predictability and security of tariff concessions. The overbroad reading of the term "discriminatory" invoked by China would undermine the described objective. Sanitary requirements, such as those at issue in this dispute, and many other legitimate regulatory requirements often have the effect, in law or in fact, of restricting imports from certain countries which fail to comply with such requirements (for example, by reason of deficiencies in their own regulatory systems). Making adjustments to the import shares for all such restrictions would be an extremely complex task involving the use of highly speculative estimates. The results would be necessarily inaccurate and likely to be a source of disputes. Furthermore, since those regulatory requirements are often a necessary and permanent feature of the markets for the products concerned, the import shares estimated by making allowance for those requirements would fail to capture the genuine relative importance of each Member's supplying interest. As a result, China's interpretation could have the anomalous result that negotiations would have to be undertaken with Members whose supplying interest is largely theoretical, at least in the short or medium term, instead of other Members with a far more immediate supplying interest. This would be detrimental to all WTO Members since a Member with a genuine supplying interest is more likely to commit the necessary efforts to ensure adequate compensation for the benefit of all WTO Members.

8. China's interpretation of the term " discriminatory" would have required the European Union to make allowance not only for the specific SPS measures applied to China, but also for the SPS measures applied to many other WTO Members and, more generally, for the entire sanitary regime applied to imports of poultry products. Indeed, that regime rests on the fundamental principle that the SPS measures applied to the imports from any given country must address the specific sanitary situation in that country, a principle which China regards as being inherently "discriminatory". Therefore, on China's interpretation of the term "discriminatory", the European Union would have been required to estimate what would have been the import shares of all potential suppliers of poultry products in the absence of the EU's sanitary regime for imports of those products. In practice, that estimate would have been extremely complicated and grossly inaccurate.

9. Even more important, that estimate would not reflect the import shares which each Member could have reasonably expected to achieve either during the period of reference or in the foreseeable future. China does not contest that, even if the EU's sanitary regime for imports of poultry products was "discriminatory" (as contended by China), it would be compatible with the WTO Agreement. In view of this, there is no reason to expect that the European Union will replace that regime with another regime which China would regard as "non-discriminatory" (i.e. a regime where imports from all sources are treated in identical way, irrespective of the sanitary situation in each country of origin). Since there can be no reasonable expectation that the European Union will replace the current sanitary regime with a "non-discriminatory" regime (according to China's interpretation), making allowance for the existing EU's sanitary regime would have gone against the rationale behind the requirement in Note *Ad* Article XXVIII:1 to make allowance for the "discriminatory quantitative restrictions". This confirms that China's reading of the term "discriminatory" cannot be correct in the context of that provision.

1.3. In the alternative, if the European Union had been required to make allowance for the SPS measures, the evidence available at the time when the EU notified its intention to negotiate the modification of the concessions did not warrant China's present claims of PSI or SSI

10. Most of the evidence relied upon by China was not provided to the European Union in support of China's claims of interest pursuant to paragraph 4 of the Procedures for Negotiations under Article XXVIII. China cannot rely on evidence that was not made available to the European Union in a timely manner in the course of the Article XXVIII procedures, in particular given that most of such evidence does not concern the EU market.

11. Paragraph 4 of the Note *Ad* Article XXVIII:1 makes it clear that the existence of a PSI must be determined on the basis of the import share which a Member had, or would have had in the

absence of discriminatory quantitative restrictions "over a reasonable period of time *prior to the negotiations*". Moreover, the determination of a PSI must, by definition, be made before the opening of the negotiations. Accordingly, in assessing whether the European Union fulfilled its obligations under Article XXVIII:1, only the evidence that was available to the European Union prior to the opening of the negotiations can be taken into consideration. Therefore, the import data for the period 2009-2015 provided by China is not pertinent for assessing this claim and must be disregarded.

12. Having regard to the above considerations, the European Union submits that the import data concerning the period immediately preceding the entry into force of Decision 2002/69/EC, of 30 January 2002, is both the most pertinent and the most reliable source of evidence in order to estimate the import share that China would have had in the absence of the SPS measures..

13. China has argued that prior to the entry into force of Decision 2002/69/EC in 2002, its imports into the European Union were "growing". However, during the years preceding 2002 China's import shares for all the tariff lines concerned were negligible. The fact that China was the second largest world producer of poultry meat products during the two reference periods is only to be expected given the very large size of China's own domestic market. Similarly, China's share of the world exports of poultry meat is not a reliable indicator of its export prospects to the EU market. China's import share may vary considerably from one country market to another. Moreover, China's share of world exports varies considerably among the various categories of poultry products concerned by this dispute. In any event, the European Union observes that China's share of world export trade fell from 5 % in 2003 to just 3 % in 2009. These percentages are well below the 10 % benchmark for recognising a SSI. China provides data on China's share of world imports only for tariff items 1062 32 and 1602 39. This suggests that the shares for the remaining tariff items covered by this dispute are not regarded as "significant" even by China. As regards item 1602 39, according to China's own data, China's share was on average 5.16 % during the first reference period and 5.71 % during the second reference period. Both percentages are well below the 10 % benchmark. China's share of world imports was above 10 % during both reference periods only for item 1602 32 (on average, 19.87 % during the first reference period; and 18.20 % during the second reference period). Nevertheless, these are global figures. Given these broad variations among geographically close countries where China is a major supplier, China's share of global imports of 1602 32 cannot be reliably used to estimate what would have been China's share of the EU imports of the item 1602 32. The data on China's share of imports in a handful of selected import country markets where China holds a "major share" is manifestly unrepresentative and unreliable. China has not explained why the markets of the selected countries are analogous to the EU market and can be considered as sufficiently representative.

1.4. As regards the Second modification package, the European Union was not required to re-determine the Members having a PSI or SSI on the basis of import data subsequent to the initial determination

14. Neither Article XXVIII:1 nor the Procedures provide for a re-determination of the Members having a PSI or SSI after the initiation of the negotiations. China suggests that the obligation to make such a re-determination would arise when negotiations are not completed within the time limits provided for in Article XXVIII:1. However, those time limits do not apply to 'reserved' negotiations pursuant to Article XXVIII:5. The European Union is not aware of any single instance where the Member seeking to modify a concession has, during the course of the negotiations, proceeded to re-determine the Member having a PSI on the basis of more recent import data and resumed the negotiations with a different Member.

15. Article XXVIII:1 seeks to facilitate the negotiation of modification of tariff concessions with a view to putting an end as quickly as possible to the uncertainty created by such negotiations. Reading into Article XXVIII:1 an obligation to "re-assess" on a continuous basis the reference period on the basis of the most recent import data at each point in time during the negotiations and to re-determine as many times as necessary the Members having a PSI or a SSI would undermine that objective.

2. CLAIMS UNDER ARTICLE XXVIII:2 OF THE GATT 1994

2.1. THE UNDERSTANDING DO NOT ADDRESS THE ALLOCATION OF TRQS AMONG SUPPLYING COUNTRIES

16. The objections raised by China as part of its claims under Article XXVIII:2 relate to the country allocation of the TRQs, rather than the total amount of compensation provided by the European Union in the form of TRQs. Since, Article XXVIII:2 and paragraph 6 of the Understanding do not address the allocation of TRQs, the Panel should reject the claims brought by China under those two provisions.

17. China's position has no basis on the wording of either Article XXVIII:2 or paragraph 6 of the Understanding. China contends that paragraph 6 of the Understanding is equally applicable in respect of each of the country-specific shares of an allocated TRQ because that provision refers to "a tariff rate quota" in the singular. Yet a "tariff quota" is not the same as a "share" of an allocated tariff quota. Moreover, reading additional rules on the allocation of TRQs into the provisions of Article XXVIII:2 and paragraph 6 of the Understanding would result in the application of two different and potentially conflicting sets of requirements.

2.2. THE AMOUNT OF COMPENSATION PROVIDED BY THE EUROPEAN UNION IN THE FORM OF TRQS IS FULLY CONSISTENT WITH ARTICLE XXVIII:2, READ IN CONJUNCTION WITH PARAGRAPH 6 OF THE UNDERSTANDING

18. The amount of trade covered by each of the three TRQs included in the First modification package equals or exceeds the greatest of the amounts that would result from applying each of the three formulae set out in paragraph 6 of the Understanding. Likewise, the amount of trade covered by each of the TRQs included in the Second modification package exceeds largely the greatest of the amounts that would result from applying each of the three formulae included in paragraph 6 of the Understanding.

19. The European Union was not required to use import data for the period following the initiation of the negotiations, including data for the period 2009-2011. Paragraph 6 of the Note *Ad* Article XVIII:1 makes it clear that the adequacy of compensation must be judged in the light of the conditions prevailing at the moment where the modification of the schedule is proposed, rather than at the time where the modification is eventually agreed. In view of this, the terms of paragraph 6 of the Understanding terms must be read as referring to the most recent year or three-year period preceding the moment where the Member concerned formally initiates the modification process. The guidelines set out in paragraph 6 of the Understanding seek to facilitate the negotiations by providing a benchmark that the negotiators can use as a "basis" for the calculation of compensation. In order to achieve that purpose, the benchmark must be known in advance of the negotiations and fixed. The use of import data pre-dating the initiation of the negotiations as a benchmark for negotiating the amount of compensation offers certainty and predictability to both negotiating sides and is not inherently biased in favour of either of them. Rather, the opposite is true: the uncertainty created by the opening of negotiations can have a chilling effect on imports. In contrast, the use of a 'moving' benchmark based on the most recent post-initiation data available at any point in the course of the negotiations would create an incentive for the parties to delay the conclusion of negotiations while waiting for more favourable trade data to emerge.

3. CLAIMS UNDER ARTICLE XIII OF THE GATT 1994

3.1. ARTICLE XIII:1 DEALS NEITHER WITH THE ALLOCATION OF SHARES WITHIN A TRQ NOR WITH LEVEL OF ACCESS TO BE GRANTED TO EACH MEMBER

20. Article XIII:1 establishes a principle of non-discriminatory access to, and participation in, a TRQ. It requires that a TRQ is applied by a Member on a product-wide basis without discrimination as to the origin of the product. On the other hand, it deals neither with the allocation of shares within a TRQ nor with the level of access to be granted to that each Member.

21. The TRQs at issue in this dispute are defined only by reference to the tariff line and there is manifestly no discrimination between products based on the origin. Hence, imports of every Member are given access and an opportunity of participation in each TRQ within the meaning of Article XIII:1.

22. The access to the TRQs and their allocation to different suppliers are two conceptually distinct questions. The share allocated to each Member within each TRQ results from the application of the rules contained in Article XIII:2. Since, Article XIII:2 is *lex specialis* with respect to Article XIII:1, the arguments of China concerning the allocation of the TRQ are to be examined in the light of that provision.

3.2. THE EU WAS REQUIRED NEITHER TO BASE THE ALLOCATION OF THE TRQS ON A DIFFERENT REFERENCE PERIOD NOR TO MAKE ADJUSTMENTS FOR SPECIAL FACTORS

23. The European Union agreed with the substantial suppliers (i.e. Brazil and/or Thailand) the method for the allocation of the TRQs. This allocation was based on the share of EU imports held by Brazil and/or Thailand and "all others" over the same period used to calculate the total amount of each individual TRQ.

24. It is manifest that the European Union followed the first allocation method set out in Article XIII:2(d), which provides a "safe harbour" to the Member applying the TRQ. In turn, the European Union was not required to comply with the requirements of the second allocation method provided for by Article XIII:2(d), including the use of a "representative period" or making adjustment for "special factors".

25. By providing that a TRQ can be allocated by agreement with the substantial suppliers, Article XIII:2(d) admits implicitly that the Member allocating the TRQ and its negotiating partners have a certain margin of discretion in choosing the allocation key. Panels should not interfere with the discretion accorded to the negotiating Members under Article XIII:2, notably in a case as the present one where the method selected by the European Union and its partners is based on objective factors (i.e. import shares over a past reference period), it is not inherently biased in favour of any supplier, it is in line with past practice and, furthermore, it reflects the method used for calculating the total amount of the TRQs, which in turn is based on paragraph 6 of the Understanding.

26. In summary, even though the European Union negotiated only with substantial suppliers, as explicitly provided for by Article XIII:2(d)), the resulting agreements treat substantial suppliers and non-substantial suppliers in the same way by applying an impartial allocation method based on objective factors.

27. Moreover, neither Article XIII nor the WTO jurisprudence concerning that Article imposes a rule whereby a Member allocating a TRQ must always set aside a minimum share for Members that are not substantial suppliers, regardless of the level of imports from those suppliers in the past.

28. Finally, the SPS sanitary measures mentioned by China are not special factors as their objective is to ensure equal treatment between domestic and foreign suppliers and among foreign suppliers, from the point of view of the EU sanitary requirements. Moreover, the willingness and ability of one country to produce poultry products in compliance with a given set of SPS requirements at any point in time is part of the elements that contribute to determine the comparative advantage of that country in the production and export of poultry products. Therefore, no Member should be required to allocate a TRQ by making abstraction of the sanitary situation prevalent in any other country over the period used for the allocation of the TRQ, because that would not describe the real supplying interest of that country and ultimately it would lead to highly speculative results, to the detriment of those suppliers that complied with those sanitary requirements over the same period.

3.3. THE CHAPEAU OF ARTICLE XIII:(2) DOES NOT REQUIRE THE EUROPEAN UNION TO ALLOCATE A SHARE FOR "ALL OTHER" COUNTRIES IN EACH TRQ AT LEVELS THAT ALLOW THEM TO ACHIEVE AN SSI

29. The European Union submits that this is a new legal claim developed for the first time in China's first written submission, which was neither mentioned nor implied in China's Panel request. It is therefore a new claim that falls outside the scope of the Panel request and thus also outside the terms of reference of the Panel pursuant to Article 7(1) of the DSU.

30. In any event, the EU submits that neither Article XIII nor the WTO jurisprudence concerning that Article imposes a rule whereby a Member allocating a TRQ must always set aside a minimum

share for Members that are not substantial suppliers, regardless of the level of imports from those suppliers in the past, let alone a share allowing suppliers going forward to claim a substantial interest.

31. The Appellate Body Report in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* does not support that claim. In any event that Report contains some *obiter dicta* concerning Article XIII:2 and Article XIII:4, which were made by the Appellate Body *ad abundantiam*. As a consequence the Panel is not legally obliged to follow those *obiter dicta*.

32. Finally, China's claim cannot be justified by the objective to avoid a freezing the TRQ allocation. Indeed, China' idea would not prevent a freezing of the TRQ allocation, but just postponing that effect. Moreover, China's reasoning does not take into account that TRQs do not prevent imports outside the quota and indeed China has been able to export to the EU market also outside the TRQs.

3.4. THE EUROPEAN UNION DID NOT VIOLATE THE CHAPEAU OF ARTICLE XIII:2 AND ARTICLE XIII:4 BY NOT EXPLICITLY IDENTIFYING THE DATA THAT IT TOOK INTO ACCOUNT TO DETERMINE THE TRQS

33. China's first written submission develops these two legal claims for the first time. They are neither mentioned, nor implied in China's Panel request. They are therefore new claims that fall outside of the scope of the Panel request and thus also outside the terms of reference of the Panel pursuant to Article 7(1) of the DSU.

34. In any event, these claims are groundless, because nothing in Article XIII:2 or in Article XIII:4 refers, even implicitly, to an obligation to disclose proactively the trade data on the basis of which the allocation is done (or has been done).

35. Moreover, the EU considers that such an obligation is not implicit in Article XIII:4 as any Member can assess for itself if it holds a substantial supplying interest in exporting a given product to another Member, on the basis of available export statistics or during consultations with the Member imposing the TRQ. In any event China argues that it had a substantial supplying interest in supplying the products concerned for the purpose of Article XIII:4, and not that it could not appreciate whether or not it had such interest.

36. Finally, the disclosure invoked by China is not foreseen in Article XIII:3, which sets out the disclosure obligations that a Member applying a restriction should respect.

3.5. THE EUROPEAN UNION DID NOT VIOLATE ARTICLE XIII:2(D) OF THE GATT 1994 BY DENYING SSI STATUS TO CHINA

37. There is no reason to interpret the notion of SSI in a different way in Article XXVIII and Article XIII. That notion is only defined in the context of Article XXVIII by Ad Article XXVIII(1), paragraph 7, and the negotiation of a TRQ pursuant to Article XXVIII and the subsequent allocation of the shares within that TRQ in accordance with Article XIII, are closely related issues. In the present case, moreover, the Article XXVIII negotiations on the opening of the TRQs and the negotiations on the allocation of the TRQs took place concomitantly. It would be both illogical and unpractical to have negotiations under Article XXVIII with some Members considered to have a substantial supplying interest in respect of the overall amount of the TRQ and, in parallel, to hold negotiations with other Members considered to have a different substantial supplier interest in respect of the allocation of the same TRQ in compliance with Article XIII:2(d).

38. Second, China has not demonstrated that the specific context or object/purpose of each of those two Articles requires giving to the terms "substantial supplying interest" a different meaning in each of them.

39. Third, WTO jurisprudence confirms that it is reasonable to give to the notion of SSI the same meaning in Article XXVIII and Article XIII.

40. Therefore, since China did not have a substantial supplying interest in the tariff items covered by the TRQs at issue in the present case under Article XXVIII, the European Union

complied with Article XIII:2(d), first sentence by negotiating and agreeing the allocation of the TRQ with all substantial suppliers (i.e. Brazil and Thailand).

3.6. THE EUROPEAN UNION DID NOT VIOLATE ARTICLE XIII:(4) BY REFUSING TO ENTER INTO MEANINGFUL CONSULTATIONS WITH CHINA

41. China and the EU held consultations at the request of China on 19 May 2014, which explicitly invoked Article XIII:4. The EU clarified that it was accepting to hold the consultations without prejudice to its interpretation of Article XIII.

42. During the consultations, it emerged that the EU was not convinced that Article XIII:4 applied in the present case. Nevertheless, the European Union agreed to look into China's arguments in that respect and showed its openness to look at additional information that China had undertaken to send following the 19 May meeting, but then did not send. During the 19 May meeting, China requested the EU to adjust the shares allocated to other partners, specifically in relation to two tariff lines based on a different reference period, and in the light of special factors (the SPS measures).

43. China's assertion that the European Union refused to enter into consultations under Article XIII:4 is, therefore, unfounded as a matter of facts.

3.7. CLAIMS UNDER ARTICLE II:1 OF THE GATT 1994

44. The certification of the changes to the schedule has the sole purpose of formally incorporating into a Member's schedule the modifications made in accordance with Article XXVIII or other relevant provisions, but it is not a prerequisite for implementing such changes. This is made clear by the Procedures for Negotiations under Article XXVIII, which state that:

> 7. Contracting parties will be free to give effect to the changes agreed upon in the negotiations as from the first day of the period referred to in Article XXVIII:1, or, in the case of negotiations under paragraph 4 or 5 of Article XXVIII, as from the date on which the conclusion of all the negotiations have been notified as set out in paragraph 6 above. A notification shall be submitted to the secretariat, for circulation to contracting parties, of the date on which these changes will come into force.

45. The European Union notified the conclusion of the negotiations in accordance with paragraph 6 of the Procedures on Negotiations under Article XXVIII on 27 May 2009, as regards the First modification package, and on 20 December 2012, as regards the Second modification package. Hence, in accordance with paragraph 7 of the same Procedures, the European Union was free to give effect to the agreed changes as of the date of the relevant notification. Therefore, by implementing those changes before the certification of the changes to its schedule, the European Union has not acted in violation of its tariff bindings pursuant to Article II:1 of the GATT 1994.

3.8. CLAIMS UNDER ARTICLE I:1 OF THE GATT 1994

46. According to the Appellate Body Report in *EC – Bananas III (Article 21.5 – Ecuador II) /* EC – Bananas III (Article 21.5 – US), Article I:1 is violated when a Member imposes differential in-quota duties on imports of like products from different supplier countries within a TRQ. In the present case, it is plain that the in-quotas duties are the same for all suppliers. It is also uncontested that the TRQs are defined on a product-wide basis and taking into account only the custom classification of the products concerned.

47. It follows that China's claim is groundless.

4. CONCLUSION

48. For the reasons set out in this submission, the European Union requests the Panel to reject all the claims submitted by China.

ANNEX B-4

SECOND EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. CLAIMS UNDER ARTICLE XXVIII:1 OF THE GATT 1994

1.1. CHINA DID NOT CLAIM ANY PSI IN THE FIRST MODIFICATION PACKAGE AND FAILED TO MAKE A TIMELY CLAIM OF INTEREST IN RESPECT OF THE SECOND MODIFICATION PACKAGE

1. In response to a question from the Panel, most Third Parties have agreed that the Member seeking the modification of a concession is entitled to disregard claims of interest which have not been submitted in a timely manner and that the 90-day period mentioned in Paragraph 4 of the Procedures for Negotiations under Article XXVIII provides guidance for assessing whether a claim has been timely submitted. China itself concedes that it may be possible to depart from the 90-day time limit provided for in Paragraph 4 of the Procedures only with "due cause".

2. As regards the First modification package, China has confirmed that it never made a claim of PSI until the present proceedings. China has not invoked any circumstance in order to justify its failure to submit its claims of PSI within the 90-day time limit. As regards the Second modification package, none of circumstances cited by China may justify China's delay of more than three years in submitting the claims of interest.

1.2. THE EUROPEAN UNION WAS NOT REQUIRED TO MAKE ALLOWANCE FOR THE SPS MEASURES APPLIED TO CHINA, AS THEY ARE NEITHER QUANTITATIVE RESTRICTIONS NOR DISCRIMINATORY

3. China appears to agree that the European Union is not required to make allowance for measures that have the effect of limiting imports but are not "discriminatory quantitative restrictions" within the meaning of *Ad* Article XXVIII:1. China also appears to agree that the notion of "discriminatory quantitative restriction" must be interpreted in the light of Article XI of the GATT 1994 and, therefore, of the note *Ad* Article III of the GATT 1994. Nevertheless, China contends that the SPS measures which it has identified in this dispute are "discriminatory quantitative restrictions". China has failed to substantiate this allegation.

1.2.1. The SPS measures are not "quantitative restrictions"

4. China has not contested that the SPS measures at issue are applied in order to enforce at the border sanitary requirements which apply also to the domestic EU products. Instead, China limits itself to argue, in the abstract, that "different aspects" of a measure may fall under Article III or under Article XI of the GATT 1994. But China has not shown that, in the case at hand, the SPS measures which it has identified include any restrictive "aspect" without equivalent in the sanitary requirements applied to the EU's domestic products.

5. China misrepresents the panel's findings in *EC – Seal Products*. The measure at issue in that case prohibited the placing on the market of seal products. In the case of imports this prohibition was enforced at the border. The finding cited by China was not reached under Article XI of the GATT 1994, but instead under Article 2.2 of the TBT Agreement. Moreover, the panel did not find that the measure at issue was "a restriction on importation", but rather that it was "trade restrictive" within the meaning of Article 2.2 TBT.

6. The panel report in *US – Shrimp (Article 21.5)* does not support China's position. The United States did not argue in that case that the measure fell within the scope of Article III of the GATT 1994. Indeed, the import prohibition at issue in *US – Shrimp* had no domestic equivalent.

1.2.1.1 The SPS measures are not "discriminatory"

7. China has not alleged, let alone proven, that imports from other countries posing similar sanitary risks as the imports from China are not similarly restricted. Instead, China limits itself to argue that the term "discriminatory" covers any situation "where imports from a WTO Member are

treated differently from other WTO Members, irrespective of the ground of such disparate treatment".

8. In its first oral statement China has conceded that "whether a restriction is discriminatory must be determined based on the text as well as the object and purpose of the provision in which the word is used". Nevertheless, China goes on to argue that its reading of the term "discriminatory" is necessary in order to achieve the objective pursued by Article XXVIII, which China describes as "reinstating the general level of concessions that had existed before the increase of the bound rates".

9. The specific objects and purposes of Article XXVIII are not limited to the single objective mentioned by China. They may be described as follows:

1) encouraging Members to make tariff concessions by providing them with flexibility to withdraw or modify those concessions subsequently, if necessary;

2) ensuring that the modified or withdrawn concessions are replaced with equivalent concessions, so as to maintain the "general level of reciprocal and mutually advantageous concessions"; and

3) facilitating the negotiation of the modification or withdrawal of tariff concessions, so as to limit the uncertainty which is inherent in such negotiations.

10. The reading of the term "discriminatory" invoked by China would undermine the first and the third of the objects and purposes of Article XXVIII described above by rendering unduly complicated the negotiation of the modification of concessions. Sanitary requirements, such as those at issue in this dispute, and many other legitimate regulatory requirements often have the effect, in law or in fact, of restricting imports from certain countries which fail to comply with such requirements (for example, by reason of deficiencies in their own regulatory systems). Making adjustments to the import shares for all such restrictions would be an extremely complex task involving the use of highly speculative estimates.

11. In the present case, China's interpretation of the term " discriminatory" would have required the European Union to make allowance not only for the specific SPS measures applied to imports from China, but also for the SPS measures applied to many other WTO Members and, more generally, for the entire sanitary regime applied to imports of poultry products. Indeed, it must be emphasised that that regime (like the sanitary regimes applied by most, if not all, countries) rests on the fundamental principle that the SPS measures applied to the imports from any given country must address the specific sanitary risks posed by the imports from that country, a principle which China regards as being inherently "discriminatory". Therefore, on China's interpretation of the term "discriminatory", the European Union would have been required to estimate what would have been the import shares of all potential suppliers of poultry products in the absence of the EU's sanitary regime for imports of those products.

12. For example, if China's interpretation were upheld, the European Union would have had to make allowance also for *inter alia*:

- the restrictions applied pursuant to Regulation 798/2008and its predecessors, which lay down the list of countries from which imports of fresh poultry meat are authorized;
- the restrictions adopted by the Commission in order to address specific sanitary risks, such as the decisions restricting imports from China, Thailand and other countries on grounds of avian influenza; or
- the restrictions applied pursuant to Directive 96/23/EC.

13. Moreover, contrary to China's allegations, its reading of the term "discriminatory" is not required in order achieve the second objective described above i.e. the objective of maintaining the general level of concessions. To the contrary, China's interpretation would have the consequence that, in order to modify a concession, a Member could be required to provide compensation which is well in excess of the value of the modified concession. The value of any tariff concessions made by a Member is implicitly limited by the regulatory restrictions, such as

sanitary restrictions, which a Member is entitled to impose or maintain in accordance with the relevant provisions of the WTO Agreement. China has not argued that the SPS measures at issue are WTO inconsistent. Nor has China argued that those SPS would otherwise impair or nullify the concessions within the meaning of Article XXIII:1 of the GATT 1994. Since those SPS measures do not diminish the original value of the concessions granted by the European Union, there is no reason why the European Union should make allowance for such measures in order to maintain the general level of concessions.

14. Moreover, China's interpretation could have the anomalous result that negotiations would have to be undertaken with Members whose supplying interest is largely theoretical, instead of other Members with a far more immediate supplying interest. This would be detrimental to all WTO Members, since a Member with a genuine supplying interest is more likely to commit the necessary efforts to ensure adequate compensation for the benefit of all WTO Members.

1.2.2. In the alternative, if the European Union had been required to make allowance for the SPS measures, the evidence in China's first written submission does not substantiate China's claims of PSI or SSI

15. In its opening oral statement, China claimed that the issue before this Panel is whether the European Union should have taken into account the SPS measures identified by China and that it is irrelevant whether or not China has adduced evidence that it should have had a PSI or SSI in the absence of those measures. The European Union disagrees. The only obligation imposed by Article XXVIII is to negotiate or consult, respectively, with the Members holding a PSI or SSI. The note *Ad* Article XXVIII provides guidance in order to identify those Members, but it does not create self-standing process obligations. Therefore, if the Panel finds that China did not hold a PSI or SSI, there can be no violation of Article XXVIII. Moreover, China's position raises an issue of terms of reference as this claim was not included in the panel request.

1.2.2.1 China cannot rely on evidence that was not made available to the European Union during the Article XXVIII procedures

16. China concedes that it was required to submit evidence in support of its claims of PSI, but not in support of its claims of SSI. China invokes the fact that paragraph 2 of the Understanding on the Interpretation of Article XXVIII, unlike its paragraph 5, only refers to the provision of supporting evidence by the Members claiming a PSI. However, the provisions cited by China provide no basis for making that distinction.

17. China further contends that its claims of PSI in respect of the Second modification package were supported by evidence. However, as explained by the European Union, such evidence consisted exclusively of import statistics for the period 2010-2012. All the other evidence included in China's first written submission (including detailed data on China's share of world production and world trade and China's exports to third countries) was not provided in support of China's claims of PSI during the Article XXVIII procedures and, therefore, cannot be relied upon by China in this dispute.

1.2.2.2 China cannot rely on import data for a period subsequent to the opening of opening of the negotiations

18. China argues that, in view of the duration of the negotiations, the European Union was required to make a re-determination of the Members holding a PSI or SSI based on the import data available at that point in time. For the reasons explained below, the European Union submits that it was not required to make such a re-determination. At any rate, the European Union submits in the alternative that, even if it had been required to make a re-determination of the Members holding a PSI or SSI during the negotiations, the import data for the period following the conclusion of the negotiations (i.e. period 2012-2015) would still not be pertinent for assessing this claim.

19. China also invokes paragraph 3 of the Understanding in support of its position that it may be necessary to take into account import data for a period following the initiation of the negotiations. However, paragraph 3 of the Understanding does not provide for the use of such post-initiation

import data. The determination of whether trade in the affected product "has ceased" to benefit from preferences or "will do so" by the conclusion of the negotiations is to be done when the negotiations are opened. If that is the case, the trade to be taken into account is the trade "which has taken place" under the preferences prior to the initiation of the negotiations, rather than the subsequent non-preferential trade. Thus, far from supporting China's position, paragraph 3 of the Understanding comforts the EU's view that only import data pre-dating the initiation of the negotiations is to be taken into account.

1.2.2.3 The evidence in China's first written submission does not warrant China's claims of PSI or SSI

20. The European Union is providing as Exhibit EU − 40 a table showing China's import share in the top largest third-country import markets for the tariff items 0210 99, 1602 32 and 1602 39 (i.e. the same items for which China has provided import share data in its first written submission) during the period 2002-2012. The table evidences that China's share only exceeded 10 % in a few of the top largest import markets: 1 out of the 18 largest import markets in the case of 0210 99; 3 out 11 in the case of 1602 32; and 3 out of 14 in the case of 1602 39. This confirms that, in practice, China's import shares may vary considerably from one import market to another and, consequently, that neither global data nor data for a handful of unrepresentative import markets, such as the data included in China's first written submission, can be considered as a reliable indicator of China's future trade prospects in the EU market.

1.2.2.4 As regards the Second modification package, the European Union was not required to re-determine the Members having a PSI or SSI on the basis of import data subsequent to the initial determination

21. China contends that there is an obligation to make a re-determination when negotiations do not comply with the time limits provided for in Article XXVIII:1. But, as explained by the European Union, those time limits do not apply to so-called 'reserved' negotiations under Article XXVIII:5. The time limits provided for in Article XXVIII:1 are linked to the requirement to make the modifications on the first day of each three year period, the first of which began on 1 January 1958. The defining feature of the negotiations 'reserved' under Article XXVIII:5 is precisely that they are not subject to that requirement. Consequently, the time limits linked to that requirement are not applicable to 'reserved' negotiations.

22. In practice, and since the 1960s, most negotiations have been conducted as 'reserved' negotiations under Article XXVIII:5. The reason for this is that, in many cases, Article XXVIII:1 does not afford the necessary flexibility due to its tight deadlines. Applying the deadlines provided for in Article XXVIII:1 to 'reserved' negotiations under Article XXVIII:5 would eviscerate the latter provision of its *effet utile* and deprive Members of much needed flexibility in negotiating the modification of concessions. In turn, this would undermine the objective of encouraging Members to make further concessions. China insists that applying the time limits provided for in Article XXVIII:1 also to negotiations 'reserved' under Article XXVIII:5 is essential in order to ensure the objective of ending the negotiations as quickly as possible. Yet, on China's own interpretation, the Member seeking the modification of a concession would have to re-determine the Members having a PSI or SSI every six months. It is difficult to see how such a constant re-determination of the negotiating and consulting partners could have contributed to the objective of speeding up the negotiations.

2. CLAIMS UNDER ARTICLE XXVIII:2 OF THE GATT 1994

2.1. GATT ARTICLE XXVIII AND PARAGRAPH 6 OF THE UNDERSTANDING DO NOT ADDRESS THE ALLOCATION OF TRQS AMONG SUPPLYING COUNTRIES − PARAGRAPH 6 OF THE UNDERSTANDING DOES NOT APPLY AT THE LEVEL OF EACH OF THE COUNTRY SHARES OF A TRQ

23. Paragraph 6 only refers to "tariff quotas". It makes no reference whatsoever to the shares of a tariff quota allocated to certain supplying countries or groups of countries.

24. The European Union does agree with China that paragraph 6 provides guidelines for calculating the amount of compensation to be provided to all Members. But from this it does not follow that paragraph 6 must be applied separately at the level of each country share of an

allocated TRQ. Rather, the opposite is true. China further argues that, unless paragraph 6 is applied at the level of each share of the TRQ, it would "create discrimination". However, if the total amount of compensation resulting from the application of paragraph 6 of the Understanding is allocated consistently with Article XIII:2, such allocation cannot be considered as "discriminatory". Moreover, reading additional rules on the allocation of TRQs into the provisions of Article XXVIII:2 and paragraph 6 of the Understanding would result in the application of two different and potentially conflicting sets of requirements. TRQs negotiated pursuant to Article XXVIII would have to comply with the rules of Article XIII and, at the same time, with the additional requirements read by China into Article XXVIII:2 and paragraph 6 of the Understanding.

25. China argues that Article XXVIII:2 "governs the allocation of tariff quotas in the Schedule of concessions", while "what Article XIII governs is the allocation of tariff quotas in reality, i.e. in a WTO Member's domestic regulations or in the implementation of these regulations". This distinction is specious. It is beyond dispute that, "in reality", one and the same TRQ cannot be allocated simultaneously in two different ways. If a Member allocates "in reality" a TRQ in order to comply with Article XIII:2 in a manner which departs from the allocation bound in its schedule, it would violate its obligations under Article II of the GATT. Therefore, it is plain that China's position would lead to a genuine conflict between, on the one hand, Article XIII and, on the other hand, Article XXVIII:2 and paragraph 6 of the Understanding. China cannot but recognise this conflict, but seeks a way out by arguing that the Member concerned could always avoid a violation of its obligations by opening a larger TRQ than that bound in that Member's Schedule. However, a 'solution' to a conflict between two obligations which involves the imposition on the Member concerned of an additional obligation going beyond either of those two obligations is not a proper solution. Article XIII:2 of the GATT governs exclusively the allocation of TRQs. It cannot be interpreted and applied in such a way as to impose upon a Member an obligation to open a TRQ which exceeds the compensation previously agreed and bound by that Member in its Schedule consistently with Article XXVIII.

2.1.1. The appropriate reference period for the application of paragraph 6 of the Understanding is the period preceding the opening of the negotiations

26. China argues that the EU's position is contradicted by the fact that the compensation for one of the tariff items included in the First modification package (0210 99 39) was calculated on the basis of the imports for the period 2000-2002 instead of the imports for the reference period 2003-2005, whereas the compensation for another item in the same package (1602 3219) was calculated on the basis of the imports for the period July 2005-June 2006, rather than for the last calendar year of the reference period (i.e. 2005). China's criticism is misguided. The European Union has never contested that the negotiating Members *may* agree to depart from the guidelines provided in paragraph 6 of the Understanding, provided that, as in the present case, the amount of compensation exceeds that which would result from such guidelines. Indeed, if the negotiating Members could not depart from the benchmark provided for in paragraph 6 of the Understanding, it would be pointless to engage in negotiations. In particular, the negotiating Members *may* agree to use a different reference period from that provided for in paragraph 6 if that results in a larger amount of compensation. But this is not the same as saying that the negotiating Member are always required to do so. Contrary to what appears to be China's view, neither Article XXVIII:2 nor paragraph 6 of the Understanding impose any obligation to use always the reference period which is most favourable to the supplying Members, let alone to one supplying Member.

27. Moreover, in the two instances mentioned by China, the compensation agreed by the European Union was based on import data pre-dating the initiation of the negotiations, which data was, therefore, fixed and known in advance to the negotiating parties.

28. As further explained by in the EU's first written submission, there is no reason why the post-initiation import volumes should necessarily be higher than the pre-initiation volumes. The present case illustrates this. According to China's own data and calculations, the amount of the TRQs for two of the tariff items included in the second modification package (1602 39 21 and 1602 39 80) is lower if the formulae of paragraph 6 of the Understanding are applied on basis of import data for the period 2009-2011, instead of import data for the reference period 2006-2008.

2.1.2. The compensation provided by the European Union in the form of TRQs is fully consistent with paragraph 6 of the Understanding

29. China concedes that the size of the TRQs agreed by the European Union exceed the amount that would result from the application of the formulae in paragraph 6 of the Understanding, on the basis of data for the reference periods 2003-2005 and 2006-2008, in all cases but one: the TRQ for tariff item 1602 31. The difference, however, is minimal. The TRQ agreed by the European Union covers 103.896 tonnes whereas, according to China's calculations in Exhibit CHN - 49, the compensation required pursuant to paragraph 6 of the Understanding would amount to 103.953 tonnes, i.e. a difference of just 57 tonnes.

30. Moreover, the difference appears to be due to the use of a different set of import data. For the purposes of the negotiations, the European Union relied on the import data contained in the notification made by the European Union to the WTO in June 2006, which covers the imports into "EU 25" in 2006 and the imports into "EU 27" in 2007 and 2008.. In contrast, the data set used by China appears to cover all imports into "EU 28", i.e. including the imports into Romania, Bulgaria and Croatia made into those countries before they joined the European Union.

31. The data on imports into Romania, Bulgaria or Croatia before those countries joined the European Union is not representative because they may be affected by import conditions which are different from those prevailing in the European Union. Moreover, to the extent that the accession of those countries to the European Union resulted in an increase of the applicable duty rates, the European Union would have been required to provide compensation in accordance with Article XXIV:6 of the GATT 1994.

32. China also concedes that the "all others" share determined by the European Union is larger than the share calculated by China by applying the formulae of paragraph 6 of the Understanding on the basis of import data for the reference periods 2003-2005 and 2006-2008, with only two exceptions: the tariff items 1602 39 21 and 1602 39 80. In fact, however, China's calculations in Exhibit CHN 49 show that, in the case of item 1602 39 21, the share for "all others" would be nil, as there were no imports from "all others" during the reference period 2006-2008. China's calculation of the "all others" share in tariff item 1602 39 80 also appears to be incorrect. The European Union notes that, in particular, according to Exhibit CHN − 49, imports from China would have reached 201 tonnes in 2006. Yet, according to the data notified by the European Union to the WTO in 2006 (Exhibit CHN − 25) and to the 2016 Eurostat figures provided as Exhibit EU − 30, there were no imports at all from China during the reference period 2006-2008. Again, this discrepancy appears to be due to the fact that China has used import data into EU 28.

3. CLAIMS UNDER ARTICLE XIII OF THE GATT 1994

3.1. ARTICLE XIII:1 DEALS NEITHER WITH THE ALLOCATION OF SHARES WITHIN A TRQ NOR WITH LEVEL OF ACCESS TO BE GRANTED TO EACH MEMBER

33. The European Union recalls that Article XIII:1 establishes a principle of non-discriminatory access to, and participation in, a TRQ. It requires that a TRQ is applied by a Member on a product-wide basis without discrimination as to the origin of the product. The Appellate Body has stressed that access to a TRQ and its allocation to different suppliers are two conceptually distinct questions. They must therefore be appreciated separately.

34. Moreover, it results from the structure of Article XIII and from the finding of the Panel in *EC-Bananas III (Ecuador)*, that Article XIII:2 is *lex specialis* with respect to Article XIII:1. Hence, China's arguments concerning the allocation of the TRQ are to be examined in the first place in the light of the first provision. Article XIII:1 cannot be relied upon to overrule the provisions of Article XIII:2. That means that for TRQs allocation's aspects that are not covered by Article XIII:2, Article XIII:1 still applies, to the extent that its application does not lead to results that would conflict with the outcome of the application of Article XIII:2. This does not read out of Article XIII:1 the provision that imports from all WTO Members must be "*similarly* restricted".

35. In paragraph 7.76 of the panel report in *EC − Bananas III (Ecuador)*, the Panel simply made some comments on the fact that, in its view, it would be preferable not to allocate the 'all others' share among non-substantial suppliers (even if specific shares are allocated to the substantial

suppliers). Hence, that Panel statement does not support the view that Article XIII requires that an 'all others' share must be allocated to non-substantial suppliers so that, going forward, they can obtain a substantial supplying interest.

36. China's contention that Article XIII:1 requires to allocate a share to 'all others' at a level that permits the non-substantial suppliers to increase their exports so as to obtain an SSI would require either to reduce the share allocated to the substantial suppliers (possibly also to zero) or would transform the TRQ in an unlimited tariff concession.

37. Paragraph 476 of the Appellate Body report in *EC- Bananas III (Article 21.5 – USA)* does not confirm China's argument to the effect that the EU should have reserved a "significant" share for all others. That paragraph relates essentially to the interpretation of Article 3.8 of the DSU and not to Article XIII.

3.2. THE EUROPEAN UNION WAS REQUIRED NEITHER TO BASE THE ALLOCATION OF THE TRQS ON A DIFFERENT REFERENCE PERIOD NOR TO MAKE ADJUSTMENTS FOR SPECIAL FACTORS

38. In allocating the TRQs at issue the European Union followed the first allocation method set out in Article XIII:2(d), which provides a "safe harbour" to the Member applying the TRQ, and does not impose any specific obligation as to the reference period or special factors. China therefore cannot pretend that the European Union was required to comply with the same legal criteria set in the second allocation method provided for by Article XIII:2(d).

39. In any event, the agreement with the substantial suppliers on the allocation of the TRQs treats substantial suppliers and non-substantial suppliers in the same way by applying an impartial allocation method based on objective factors. It is quite obvious that a method that disregards special factors affecting any of the suppliers of a given product would not be objective and unbiased.

40. China's argument that chapeau of Article XIII:2 requires to set aside a minimum share for non-substantial suppliers, regardless of the trade data considered, would be discriminatory vis-à-vis substantial suppliers. The Appellate Body Report in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US*), is of no avail to China. That Report did not require setting aside a minimum share for Members that are non-substantial suppliers, regardless of the level of imports from those suppliers in the past.

41. Finally, the European Union demonstrated that the SPS measures mentioned by China are not "special factors", but measures that define the relevant product market and the nature of the competitive relationship between products. China, on the other hand, explains that compliance with sanitary requirements is not a factor of competition. The European Union fails to see how product's properties, which are dealt with by the SPS requirements (such as the presence in the product of pathogenic agents or substances harmful for human and animal health) can be ignored when apprehending the comparative advantage of one country and the relevant product market. Since *EC – Asbestos* the Appellate Body has clarified that properties of a product that make it dangerous for human health are relevant to determine the competitive relationship between that product and other allegedly like products.

42. China argues that when it allocates a TRQ, a Member should make abstraction of the SPS measures, even if those measures are perfectly legal, otherwise the effect of the TRQ will be to perpetuate the SPS measures. In reality, what China calls a perpetuation of the SPS measures is the effect of any allocation of a TRQ in line with Article XIII:2(d). In any event, the expected import growth in the European Union of poultry meat products that do not comply with the EU's SPS requirements was and remains zero, regardless of China's production capacity, its investments, its position in other selected export markets or its ability at a given point in time to partially meet those requirements for certain tariff lines.

43. In summary, the European Union reiterates that since the SPS measures are not special factors, the European Union was not required to adjust the 'all others' share or set aside a specific share for China or base the allocation of the TRQ on a different reference period not affected by those measures.

3.3. THE CHAPEAU OF ARTICLE XIII:(2) DOES NOT REQUIRE THE EUROPEAN UNION TO ALLOCATE A SHARE FOR "ALL OTHER" COUNTRIES IN EACH TRQ AT LEVELS THAT ALLOW THEM TO ACHIEVE AN SSI

44. According to China, the European Union violated the chapeau of Article XIII:2 because it did not establish the shares of the TRQs for 'all others' at levels that allow these countries "going forward" to achieve a substantial interest. China explained in its oral statement that it did not mean that, if a non-substantial supplier captures the entire 'all others' share, there would be no share left in the TRQ for others. However, unless the dimension of the 'all others' share and also the amount of the TRQ is a moving target (which would transform a TRQ in an open ended tariff concession), China's reasoning implies necessarily that a non-substantial supplier may at a certain point capture the whole 'all others' share. That is confirmed by China's assertion that the 'all others' share must be sufficient to allow at least one non-substantial supplier to gain an SSI. Hence, China's line of argument on top of being contradictory, it would only postpone the freezing of the TRQs allocation.

45. China is also incapable to indicate what is the minimum share that the EU should have allocated to "all others" to comply with the chapeau of Article XIII:2 when allocating the TRQs at issue, but it suggests that it should be established at a level allowing all non-substantial supplier to gain an SSI. But China's argument lead to a paradoxical situation where either the 'all others' share would overrun the shares allocated to the substantial suppliers or the TRQs would need to be transformed in unlimited tariff concessions.

46. Finally, China's claims are not confirmed by the practice of the Member. The European Union provided examples of other TRQs included in the schedule of other Members that do not contemplate an 'all others' share or contemplate only a symbolic share for 'all others'.

3.4. THE EUROPEAN UNION DID NOT VIOLATE THE CHAPEAU OF ARTICLE XIII:2 AND ARTICLE XIII:4 BY NOT EXPLICITLY IDENTIFYING THE DATA THAT IT TOOK INTO ACCOUNT TO DETERMINE THE TRQS

47. China argued that, unless the historical trade data, the base period, the basis for allocating the shares and the presence or absence of special factors are disclosed, WTO Members will be in the dark and will not be in a position to determine whether or not they hold an SSI and can ask for consultations under Article XIII:4.

48. The European Union wonders how this reasoning accords with China's claims according to which, even in the absence of that information disclosure, China has demonstrated to the Panel that it holds an SSI on the basis of its poultry meat production and its export to some other Members? Moreover, the European Union wonders why China did not ask for all the clarifications that it considered appropriate on those matters during the meeting of 19 May 2014?

3.5. THE EUROPEAN UNION DID NOT VIOLATE ARTICLE XIII:2(D) OF THE GATT 1994 BY DENYING SSI STATUS TO CHINA

49. China reiterates its arguments that the notion of SSI is different in Article XXVIII and in Article XIII and that the European Union should have assessed China's supplying interest by taking into account the SPS measures as a special factor. However, China is incapable to come up with any alternative definition of substantial supplier for the purpose of Article XIII:4. If the European Union should have recognised China's SSI because China is one of the biggest world producers of poultry meat products and it holds a leading supplying position in certain other Members, that would imply that China should be recognised as a substantial supplier of poultry meat products by all Members, regardless of their actual imports from China.

50. Moreover, by making an example China itself demonstrated that the notion of substantial supplier under Article XXVIII and Article XIII should be interpreted in a harmonious way. Indeed, if the SSI status of a Member was excluded because it was subject to a WTO incompatible import ban, that means in all likelihood that the party imposing the TRQ did not take into account the discriminatory quantitative restrictions affecting that Member. In other words, the notion of substantial interest was applied in violation of paragraph 7 of *Ad* Note Article XXVIII:1. That, in turn, would mean that the agreement reached with the other substantial suppliers for the allocation of the TRQ would not comply with Article XIII:2(d), because the agreement would not include all substantial suppliers.

3.6. THE EUROPEAN UNION DID NOT VIOLATE ARTICLE XIII:(4) BY REFUSING TO ENTER INTO MEANINGFUL CONSULTATIONS WITH CHINA

51. China's assertion that the European Union refused to enter into consultations under Article XIII:4 is unfounded as a matter of facts, given that the European Union and China met and discussed China's request to adjust the allocation of two tariff lines based on a different reference period, and in the light of special factors (the SPS measures). And indeed, consultations between the parties on those matters are still ongoing.

52. The proposition that the obligation to enter into consultations with a substantial supplier should be construed as an obligation to agree with that substantial supplier is simply untenable as Article XIII:4 only sets out a procedural obligation.

53. Finally, Article XIII:4 does not apply when the allocation among substantial suppliers is based on the first sentence of Article XIII:2(d), but only when it has been decided "unilaterally". In any event China did not make a duly justified claim of SSI when requesting consultations pursuant to Article XIII:4.

3.7. CHINA'S NEW CLAIMS UNDER ARTICLE XIII OF PERIODIC REVIEW AND ADJUSTMENT OF THE TRQ ALLOCATION

54. In its second written submission China raised new claims, according to which Article XIII would require a Member applying a TRQ to review and adjust its allocation an a periodic basis in the light of market developments.

55. Besides not being based on the text or the case law concerning Article XIII, these claims are clearly not covered by the Panel's request and therefore they fall outside the Panel's terms of reference.

4. CLAIMS UNDER ARTICLE I:1 OF THE GATT 1994

56. China response to Panel's Question No. 58, confirms that China's claims under Article I:1 are consequential to China's claims concerning Article XIII:2. In any event they are also outside the scope of Article I:1.

5. CONCLUSION

57. For the reasons set out in this submission, the European Union reiterates its request that the Panel reject all the claims submitted by China.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA[*]

1. The Argentine Republic is participating and setting out its views in this case due to its systemic and trade interest in the correct interpretation of certain obligations contained in the legal provisions invoked in this dispute.

Article XXVIII of the GATT: The definition of "substantial interest" in Article XXVIII of the GATT.

2. Argentina considers it important to reach an interpretation of the phrase "substantial interest" in accordance with the text, object and purpose of Articles XIII and XXVIII, and the GATT 1994 in general, since there is no definition in the covered agreements. Argentina notes that Note 7 to Article XXVIII:1 of the GATT 1994 states that "substantial interest" covers only those contracting parties which have or could be expected to have a "significant" share in the market of the Member seeking to modify or withdraw the concession.

3. In Argentina's view, the word "significant" must be interpreted as a share in the market of the importing Member that is *perceptible* or, in statistical terms, *measureable*, whether or not less than 10%. For Argentina, the alleged minimum threshold of 10% participation in the market of the country modifying the concession as a basis for the right to claim the existence of a "substantial interest" has no textual basis in the GATT 1994.

4. Argentina also believes that the 10% criterion cannot be considered one of the "other decisions of the CONTRACTING PARTIES" within the meaning of paragraph 1(b)(iv) of the GATT 1994. Similarly, it is Argentina's understanding that this criterion is not a "decision[…], procedure[…] [or] customary practice[…] followed by the CONTRACTING PARTIES", within the meaning of Article XVI:1 of the Marrakesh Agreement Establishing the World Trade Organization. Nor is the 10% criterion a "subsequent agreement" or a "subsequent practice" within the meaning of Article 31.3(a) and (b) of the Vienna Convention on the Law of Treaties.

Discriminatory quantitative restrictions and the determination of substantial interest

5. Furthermore, Argentina considers that when determining which Members have a substantial interest in the concession the modification of which is being sought, consideration must be given to all the circumstances that might have affected the trade that had existed on the basis of most-favoured-nation (MFN) treatment conditions, in particular, "discriminatory quantitative restrictions". Argentina takes the view that an import ban is a "quantitative restriction" within the meaning of Note 7 to Article XXVIII:1 of the GATT, given that its effect is to reduce imports to "zero".

Trade restrictions and the maintenance of a "general level of … concessions" under Article XXVIII:2

6. Argentina also points out that the determination of the general level of reciprocal and mutually advantageous concessions under Article XXVIII:2 must be made on the basis of the "concessions" that existed prior to the initiation of the negotiations, irrespective of the circumstantial trade restrictions.

7. Likewise, Argentina notes that the determination of Members with a principal supplying interest or substantial interest must take into account the share in the market they would have had "in the absence of discriminatory quantitative restrictions". Since Notes 4 and 7 to Article XXVIII:1 of the GATT do not establish how that share in the market is to be determined, paragraph 4 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994 may be relevant, as this clause applies in the absence of statistical data.

[*] Original Spanish.

8. Argentina wishes to highlight that the period used for the determination of Members with a principal supplying interest or substantial interest must be "representative" and "recent". It is not representative if there are import bans or other discriminatory quantitative restrictions. And it is not recent if, in the context of Article XXVIII, there is a significant lapse of time between notification of the intention to withdraw or modify a concession and the point in time at which it is planned to bring the modification into effect.

9. Paragraph 1 of the Understanding on the Interpretation of Article XXVIII of the GATT sheds light on the notions of "representative" and "recent". The verb "has" in the present tense in this paragraph implies that the principal supplying interest is not frozen in the period that ends when a Member notifies its intention to modify or withdraw a concession; on the contrary, its status as a principal supplier lasts for as long as it continues to have the highest ratio of exports. Therefore, if a Member did not have a principal supplying interest in the period preceding the negotiations, it could acquire that interest if the period following the notification referred to in paragraph 2 of the Procedures for Negotiations under Article XXVIII is taken into consideration when determining its status.

10. Furthermore, it is Argentina's understanding that the compensatory agreements reached by a Member modifying the concession in the context of a procedure under Article XXVIII of the GATT must ensure the maintenance of a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that obtained before the negotiations pursuant to Article XXVIII:2 of the GATT 1994, in particular for trade with those Members which had not participated in the compensatory negotiations on account of not being considered to have a principal supplying interest or a substantial interest.

Article XIII:1 of the GATT and non-discriminatory tariff quota access

11. Argentina considers that the allocation of tariff rate quotas almost exclusively to two WTO Members (and on some tariff lines an almost exclusive allocation to a single Member) may be considered inconsistent with Article XIII:1 of the GATT. Argentina also considers the term "similarly restricted" to mean, in the case of tariff quotas, that imports of like products of third countries must have access to, and be given an opportunity of, participation.

12. In addition, Argentina takes the view that the allocation of a practically insignificant segment to "other countries" implies a *de facto* impossibility for third countries to have access to, and effectively participate in, the tariff quota, and consequently establishes an allocation inconsistent with the principle of non-discrimination captured by Article XIII:1, owing to discriminatory administration of the restriction.

The chapeau of Article XIII:2 and the non-distortive distribution of the tariff quota

13. Argentina highlights the existence of the obligation to share the tariff quota among all Members supplying the product in the least distortive manner possible, on the basis of the competitive opportunities of each supplying country, so that their access to and share in the tariff quota mimics their comparative advantages.

14. Argentina considers that the allocation of an insignificant quota to "other countries", together with the establishment of out-of-quota tariffs at very high levels, places Members which only have access to the quota allocated to "other countries" at a disadvantage *vis-à-vis* other supplying Members which have a specific quota. Consequently, the distribution of the tariff quota becomes *de facto* a permanent allocation of the quota share and a long-term freeze which constitutes an impediment or obstacle to the normal development of trade, inconsistent with the chapeau of Article XIII:2.

15. Furthermore, pursuant to Article XIII:2 of the GATT, the determination of tariff quotas must be based on statistical data that discount the impact of import restrictions.

16. Argentina considers that the period used as a basis for allocation of the tariff quota must be the period immediately preceding the modification of the tariff concession, provided that the period is representative in terms of Article XIII:2(d). If a reference period were permitted that did not approach as closely as possible what the various Members might have expected in the absence of

the tariff quotas, a Member introducing a tariff quota could arbitrarily select a period of time and distribute the quota in a trade-distorting manner inconsistent with the chapeau of Article XIII:2.

17. In Argentina's view, the logic of Article XIII:2(d), especially as regards the weighing of special factors, should be applied in the interpretation of the chapeau of Article XIII:2, both to the allocation of specific quotas and to the establishment of quotas for "other countries". A Member, in determining a tariff quota for "other countries", must weigh the special factors that may be affecting or may have affected trade in the product, so as to ensure a distribution of trade that approaches as closely as possible the shares which the different Members might be expected to obtain in the absence of the tariff quota.

18. Argentina considers that the Note to Article XI of the GATT, and the interpretative note to Article 22 of the Havana Charter, could help in the interpretation of the term "special factors" under Article XIII:2(d). Evidence of the existence of a new or greater export capacity, among others, constitutes a "special factor" that must be taken into account by the Member establishing a tariff quota.

19. In short, Argentina maintains that even when acting consistently with Article XIII:2(d) in the allocation of tariff quotas, there are various instances in which the Member establishing a quota may violate the chapeau of Article XIII:2.

Articles XIII:2 and XIII:4 of the GATT and the availability of information on the method used in the establishment of a tariff quota

20. Argentina agrees with China's argument concerning the chapeau of Article XIII:2 and Article XIII:4 of the GATT 1994, to the effect that a Member that establishes a tariff rate quota must make clear the statistical methodology used to determine the representative reference period and the manner in which the special factors which may have affected or may be affecting the trade in that product are taken into account and weighed.

21. Argentina argues that it is necessary to have access to the statistical data used in the allocation of the tariff rate quotas in order for WTO Members to be able to determine whether there was a distribution of trade approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of restrictions.

22. Failure to disclose the methodology used in the establishment of a tariff rate quota violates the chapeau of Article XIII:2 and the provisions of Articles XIII:2 and XIII:4, as it encourages the exercise of discretion in the distribution of trade under a tariff rate quota.

23. Furthermore, in Argentina's view there is no legal basis for having to determine the substantial interest provided for in XXVIII:1 and XIII:2(d) on the basis of different statistical data.

Article XIII:4 of the GATT and the obligation to enter into consultations on the allocation of a quota

24. Argentina believes that the Panel should analyse whether the obligation to enter into consultations on the allocation of a quota is exhausted through the holding of such consultations, for example through the consent of the Member establishing a tariff quota to hold a meeting, or whether, on the contrary, it implies the obligation to hold a deeper discussion with the Member claiming to have a substantial interest regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved in the allocation of a quota, as provided in Article XIII:4 of the GATT 1994.

China's claims regarding the procedures for modification and rectification of schedules of tariff concessions

25. Argentina considers that the certification provided for in the Procedures for Modification and Rectification of Schedules of Tariff Concessions is mandatory under paragraph 8 of the Procedures for Negotiations under Article XXVIII.

26. Given the significance of certification, Argentina considers that the Panel should analyse the legal nature of the normative provisions relating to the procedures for modification and rectification of tariff schedules, especially if non-compliance by a Member with those rules impairs the legal validity of the modified or withdrawn concessions.

27. Argentina considers both the Procedures for Negotiations under Article XXVIII and the Procedures for Modification and Rectification of Schedules of Tariff Concessions to fall under "other decisions of the CONTRACTING PARTIES to GATT 1947" provided for in Article 1(b)(iv), as well as under "decisions, procedures [or] customary practices" referred to in Article XVI:1 of the WTO Agreement. Argentina, for its part, does not view either set of procedures as "subsequent agreement[s]" or "subsequent practice[s]" within the meaning of Article 31.3(a) or (b) of the Vienna Convention on the Law of Treaties.

28. Regarding paragraph 4 of the Procedures for Negotiations under Article XXVIII, Argentina takes the view that Members cannot dismiss claims of interest simply because they are made outside the 90-day time-frame. Paragraph 4 of the Procedures grants a degree of flexibility for both the modifying Member and the Member claiming an interest.

Request by the European Union for a preliminary Panel ruling

29. First, at various points in the panel request China claimed a violation of the chapeau of Article XIII:2. Argentina considers that this was sufficient for the European Union to have been aware that it would be required to prepare its defence on the basis of an alleged violation of that provision.

30. Similarly, Argentina believes that China's claim that "diminishing for the other WTO Members the market access commitments that the EU undertook to maintain on a non-discriminatory basis" may be seen as a claim of violation of the chapeau of Article XIII:2, as from there stems the claim that it was prevented from achieving "… a distribution of trade … approaching as closely as possible the shares which [China] might be expected to obtain in the absence of such restrictions ..." in the terms of the chapeau of Article XIII:2.

31. Argentina considers the provision of statistical data to constitute a fundamental element for the correct allocation of tariff rate quotas, and it should therefore be concluded that China's claim falls within the Panel's terms of reference. For this reason, in Argentina's view, these claims concerning both the chapeau of Article XIII:2 and Article XIII:4 are included in the request for the establishment of a panel.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. INTRODUCTION

1. Brazil has a clear and legitimate interest in the outcome of this dispute: annual poultry exports of around 1.2 billion USD rely on the Tariff-Rate Quotas (TRQ) presently challenged, and such sales have a significant impact on Brazil's poultry sector, including investment decisions and numerous jobs. Brazil would, therefore, like to summarize its views on some key issues before the Panel, in particular the scope and the dynamics of renegotiations under Article XXVIII of GATT 1994.

2. Brazil stresses the importance of safeguarding the legitimate rights acquired through such renegotiations. The outcome of the present dispute should fully comply with Article 3.5 of the DSU, pursuant to which decisions within the WTO dispute settlement system "shall not nullify or impair benefits accruing to any Member under the covered agreements, nor impede the attainment of any objective of those agreements".

3. Schedules are an integral part to the covered Agreements and, thus, the outcomes of the renegotiations with the EU under Article XXVIII (including the shared administration of quotas and its distribution among exporters), are also part of the covered Agreements within the meaning of the DSU, and should not be invalidated by the present dispute.

4. This dispute raises complex legal issues regarding the interactions of Article XXVIII of GATT 1994 with Article XIII, and also on the applicable rules and procedures for negotiations under Article XXVIII. Because a definite interpretation on such interplay has not yet been provided by the dispute settlement system, it is essential that the Panel bear in mind the potential systemic repercussions of this case and the need to safeguard the stability of existing commitments and the legitimate interests of third parties.

II. The scope of negotiations under Article XXVIII of GATT 1994 and the balance between flexibility and predictability

5. It is not uncommon that negotiations under Article XXVIII result in the establishment of country-specific quotas. Yet, the establishment of such quotas certainly poses challenges to the functioning of the multilateral trade system. In essence, they amount to a quantitative restriction within the meaning of Article XIII of GATT and as such can be trade-distortive. As a matter of fact, when combined, for instance, with prohibitively high extra-quota tariffs, TRQs may result in a virtual freeze of trade flows, contrary to WTO's long-standing purpose of progressively improving market access. In this sense, the consistency of the application of this instrument with the obligations inscribed in Article XIII is in the interest of the whole WTO Membership.

6. While Article XXVIII allows for significant flexibility to introduce modifications to commitments, Article XXVIII:2 provides that renegotiations must maintain "a general level of reciprocal and mutually advantageous concessions not less favorable to trade than that provided for in this Agreement prior to such negotiations".

7. At the same time, Article XXVIII relies on certain objective criteria and procedures established over time to facilitate negotiations and minimize uncertainty. These criteria and procedures are not mandatory, but provide a useful guidance that should help indicate whether a XXVIII negotiation is consistent with WTO rules. Predictability also being an essential goal of the proceedings, those criteria and procedures seek to facilitate the process for modification of concessions with a view to promptly ending the uncertainty created by renegotiations.

8. Criteria and procedures under Article XXVIII, thus, offer Members a significant margin of discretion in reaching a mutually beneficial agreement, encompassing new rights and obligations which should be considered legitimate. With regard to the TRQs at issue in the present dispute, it was only after long exchanges with the EU that it was possible to agree on the TRQs and their

shared administration (which, in Brazil's view, constitutes an integral part of the renegotiations).

9. A key question under the present dispute is whether the procedures and practices of Article XXVIII of GATT 1994 related to the renegotiations leading to the 2007 and 2012 modifications of the EU Schedule were consistent with EU's obligations, specifically with regard to China's claims that its export interests have not been taken into account.

10 Brazil reiterates that it acted in good faith and in full observance of the rules and related practices of Article XXVIII of GATT 1994 and of the Covered Agreements in the negotiations which resulted in the TRQs under dispute. Brazil has no reason to believe that the criteria for renegotiations under Article XXVIII were not followed. Regarding specifically the criteria adopted to establish who were the Members with "substantial interest" at the beginning of each negotiation, Brazil recalls that, based on the relevant data, even if the SPS measure applied to Chinese exports at the time were not in place, China would not have met the 10% market-share criterion usually adopted in Article XXVIII processes to define the Members with a substantial interest.

11. Another important matter before this Panel is whether adjustments in the reference periods and the definition of negotiating Members, among other criteria, can take place in the course of negotiations. There is no reason to believe that the procedures of Article XXVIII do not allow for such adjustments. How these adjustments would apply in practice can, however, only be defined on a case-by-case basis, provided that the rights of the other parties involved in the negotiation are not affected.

12. Brazil submits that the findings stemming from this dispute cannot affect the integrity of the bona fide renegotiations leading to the two packages of reconsolidation (and the resulting shared administration of quotas and allocation between importers), legally and legitimately obtained through Article XXVIII proceedings. In our view, this would reflect the balance sought between flexibility and predictability under Article XXVIII.

13. In this context, Brazil emphasizes, once again, that EU's argument that "the objections raised by China as part of its claims under Article XXVIII:2 relate to the country allocation of the TRQs, rather than the total amount of compensation provided by the European Union in the form of TRQs" has no legal ground. A similar total TRQ, but with a smaller share for Brazil due to a hypothetical participation of another Member in the process, would not have appropriately reflected the balance of mutually agreed commitments and the trade to be preserved, pursuant to Article XXVIII.

III. The relationship between Articles XIII and XXVIII

14. Concerning claims of violation of Article XIII, Brazil understands that there is no definitive precedent on whether and how Members not holding a substantial interest could be taken into account in the distribution of a TRQ in light of Article XIII. Brazil, however, agrees with Canada's contention in its Third Party Submission that Article XIII contains its own procedures that not necessarily replicate those under Article XXVIII, and considers that, depending on the specific circumstances of each situation, initial allocations made under Article XIII:2(d) may evolve due to relevant factors affecting the trade of the relevant product, as acknowledged in the panel in EC-Bananas III (Ecuador)[1]. Brazil holds that the consistency of the application of both provisions and should be assessed on a case-by-case basis.

15. In Brazil's view, Article XIII:2(d) defines a specific methodology to apply import restrictions to a product among supplying countries. That does not necessarily mean that such methodology ensures, in every case, full compliance with the obligation set in the caput of Article XIII:2, which is of a more general nature, encompassing an obligation to achieve an approximate result: "distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions."

16. Brazil insists that, should the Panel understand that, in light of Article XIII, China's interests must be taken into account in the application of the TRQs under dispute, any modification in the allocation of these quotas could only come from an increase of the total volume of the current

[1] Panel Report, *EC – Bananas III (Ecuador)*, paras. 7.91-7.92.

quotas, rather than a mere reallocation, which would otherwise disrupt the balance achieved under both negotiations under Article XXVIII.

17. In light of the above, Brazil believes that the elements underlying the dispute (namely, the agreements reached in the 2007 and 2012 modification packages and the shared administration system contained therein) are a crucial part of the balance of the general level of reciprocal and mutually advantageous concessions achieved under WTO-compliant negotiations, and as such, should not be affected by the present dispute.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. Canada has intervened in this dispute because of its systemic interest in the interpretation of the WTO Agreements and in ensuring that the Article XXVIII process remains functional and practical.

II. AD ARTICLE XXVIII AND THE MEANING OF "DISCRIMINATORY QUANTITATIVE RESTRICTIONS"

A. The Article XXVIII Process

2. The Article XXVIII process for the modification or withdrawal of tariff concessions consists of the following related provisions and procedures: Article XXVIII, Interpretative Note Ad Article XXVIII from Annex I, Understanding on the Interpretation of Article XXVIII of GATT 1994, and Procedures for Negotiations Under Article XXVIII (Procedures)[1].

3. The Procedures were adopted by Council on 10 November 1980 on the recommendation of the Committee on Tariff Concessions but, as they are non-binding in nature[2], Canada's view is that they fall within the meaning of Article XVI:1 of the WTO Agreement under all three elements of "decisions, procedures and customary practices". As noted by the panel in *US – FSC*, this means the Procedures would serve as guidance[3]. Canada submits that the Procedures also satisfy the test set out in *US – Clove Cigarettes*[4] to be considered a subsequent agreement in the context of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (Vienna Convention)[5]. As Members have followed the Procedures they have created a significant body of subsequent acts that Canada submits constitute subsequent practice under Article 31(3)(b) of the Vienna Convention.

4. An element of the Article XXVIII process has been the use of a ten per cent market share rule to identify the existence of a Member with a substantial supplying interest. Canada submits that the use of this rule has been "concordant, common and consistent"[6] and thus qualifies as "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention. It would also be logical for the rule to qualify as "customary practice" pursuant to Article XVI:1 of the WTO Agreement.

5. The Article XXVIII process has the following attributes:

i) to provide an opportunity for Members potentially most affected by the modification or withdrawal to protect rights under existing concessions by engagement with the modifying Member regarding the level of compensation[7];

ii) to provide adequate compensation to Members for the modification or withdrawal of tariff concessions[8];

iii) to be capable of timely completion, i.e. not be unduly complex or difficult and not be vulnerable to delays from claims of interest[9]; and

[1] Procedures for Negotiations Under Article XXVIII, adopted by the Council on 10 November 1980, C/113 and C/113 Corr. 1, 6 November 1980.
[2] Committee on Tariff Concessions, Minutes of the Meeting held in the Centre William Rappard on 3 November 1980, TAR/M/3, 10 March 1981, para. 4.7.
[3] Panel Report, *US – FSC*, para. 7.78.
[4] Appellate Body Report, *US – Clove Cigarettes*, paras. 262 and 265.
[5] The Vienna Convention on the Law of Treaties (Vienna Convention), done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.
[6] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13.
[7] Article XXVIII:4 of GATT 1994.
[8] Ibid.

iv) to provide for retaliation in the event that concurrence on compensation is not attained[10].

B. Meaning of "Quantitative Restriction"

6. Whether a particular measure amounts to a "quantitative restriction" in the sense of paragraphs 4, 6 and 7 of Article XXVIII must be determined on case-by-case basis, taking into consideration all relevant factors. In this regard, Article XI (General Elimination of Quantitative Restrictions) is relevant as interpretative context, but the introductory paragraph of Ad Article III must be taken into account in the interpretation of Article XI:1 and, by extension, the reference to the term "quantitative restriction" in paragraphs 4, 6 and 7 of Ad Article XXVIII:1. Whether a measure is a quantitative restriction barred by Article XI:1 or an internal regulation and thus subject to the requirements of Article III:4 calls for a detailed analysis of the measure in question.

C. Meaning of "Discriminatory"

7. The phrase "discriminatory quantitative restriction" has not been interpreted in WTO jurisprudence nor has the word "discriminatory" in the context of the Article XXVIII process been interpreted in WTO jurisprudence. The Appellate Body has noted that the plain language meaning of "discrimination" can encompass both a "neutral meaning of making a distinction" and "a negative meaning carrying the connotation of a distinction that is unjust or prejudicial" and that a full and proper interpretation of the provision is necessary to determine which meaning was intended[11].

8. It is Canada's view that the word "discriminatory" in Ad Article XXVIII bears the meaning of a distinction that is drawn on an improper basis, not a distinction drawn *per se*. Further, it is Canada's view that a measure that is otherwise consistent with WTO obligations would not be a distinction drawn on an improper basis and thus would not be "discriminatory" within the context of Ad Article XXVIII.

9. Canada's views in this regard are supported by the following:

i) it realizes the object and purpose of the Article XXVIII process to afford Members with a principal or substantial supplying interest with an opportunity to protect the contractual rights they enjoy under the Agreement while balancing the interest of Members utilizing Article XXVIII to achieve modifications or withdrawals of concessions within a reasonable period of time and thereby minimize uncertainty or disruption to trade;

ii) it maintains a functional and practical Article XXVIII process, which has been a preoccupation of Members since GATT 1947[12]; and

iii) it is consistent with the overall aims of the WTO Agreement to achieve the "substantial reduction of tariffs and other barriers to trade and [...] the elimination of discriminatory treatment in international trade relations"[13] while recognizing that Members have the right to take measures to protect a variety of interests, for example under Articles XX and XXI.

10. Were the word "discriminatory" to be interpreted as meaning a distinction regardless of reason, it becomes difficult to maintain the attributes of the Article XXVIII process. For example, a Member modifying or withdrawing its concessions cannot be expected, as a matter of course, to speculate on the market share of any number of possible suppliers that might exist in a world that is devoid of distinctions, essentially the absence of its laws, regulations and other measures, including those that are consistent with its WTO obligations. Doing so would render the

[9] Ad Article XXVIII:4 of GATT 1994 and timeframes expressed throughout Article XXVIII, Ad Article XXVIII of GATT 1994 and the Procedures.

[10] Article XXVIII:4(d) of GATT 1994.

[11] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 87.

[12] See, for example, Verbatim Report, Fourteenth Meeting of the Tariff Agreement Committee Held on Tuesday, 9 September 1947 at 2:30 PM in the Palais Des Nations, EP/CT/T/TAC/PV/14, pp. 14-15.

[13] Marrakesh Agreement Establishing the World Trade Organization, preamble.

Article XXVIII process unduly complicated and raise issues of procedural fairness *vis-à-vis* Members able to demonstrate an interest through a record of past imports. Such a process would likely result in a tariff rate quota (TRQ) not fit for its purpose as it would not be representative of genuine interests capable of supplying the market of the modifying Member. This would lead to further difficulties at the allocation stage under Article XIII and the administration and utilization of the TRQ. It is also neither logical nor just to require a modifying Member to provide compensation for the effect of measures that respect the overall requirements of the WTO agreements, especially when the Article has the limited purpose of providing compensation for lost access due to the withdrawal or modification of tariff concessions pursuant to Article XXVIII.

D. Flexibility in the Article XXVIII Process

11. It should be remembered that the Article XXVIII process provides for its own remedies and that the process also has some flexibility: it is a floor, not a ceiling in terms of the interests of suppliers to be protected and the compensation (e.g. size of TRQ) to be determined. By providing for negotiations and consultations, the Article inherently contains a degree of flexibility to permit arrival at a mutually agreed result. This includes flexibility to adjust a reference period to ensure that it is representative. However, balancing this with need to preserve the workability of the process, adjusting a reference period to something other than the usual three years immediately prior to notification would normally involve looking back further in time than three years, not employing hypothetical considerations. There is a systemic interest in quickly and clearly identifying Members holding a principal or substantial supplying interest so that negotiations can begin and the TRQ can be set. If a Member could insist that the reference period be continually adjusted forward in time to a period that it considers to be more "representative", it would impede the identification of those Members holding principal or supplying interests and the conclusion of negotiations with those Members.

12. Timely expressions of interest from Members believing they have a principal or substantial supplying interest are essential for the workability of the process. However, there may be instances (to be determined on a case-by-case basis) where it would be appropriate for a Member to accept an untimely claim of interest so long as issues of procedural fairness towards Members who have provided a timely claim of interest are taken into account.

III. THE OPERATION OF ARTICLE XIII

A. Interaction of Article XIII and Article XXVIII

13. Article XXVIII provides for the establishment of the level of compensation (e.g. a TRQ); Article XIII relates to the administration and allocation of a TRQ and may occur at times when Article XXVIII is not being used. However, if Article XXVIII is being used, it is very likely that allocation under Article XXIII will occur coincident with the establishment of a TRQ under Article XXVIII. In this instance, it is virtually certain that the Members determined to have initial negotiating rights, a principal supplying interest or a substantial interest will be the main recipients of the allocations. As the compensation (TRQ) determined under Article XXVIII might not be large enough to accommodate the introduction of another Member with a substantial interest in supplying the product into the allocation process at this stage using a different set of criteria, this could raise issues of procedural fairness *vis-à-vis* the Members involved in the determination of compensation under Article XXVIII. However, the plain language of Article XIII:2(d) would not preclude the allocating party from doing so, so long as the rights of the Members whose initial negotiating rights, or principal or substantial supplying interests were protected through negotiations or consultation (as applicable) under Article XXVIII continue to be protected at this point in time.

14. Article XIII contains its own procedures; those related to Article XXVIII are not imported into Article XIII. There are attractions of methodological ease and consistency in using a ten per cent share of imports as the means of determining "substantial interest" in Article XIII as is the practice for Article XXVIII. However, the ten per cent threshold is not a bright line and some flexibility may be desirable given the range of market situations to which Article XIII can apply[14] and that

[14] Panel Report, *EC – Bananas III (Ecuador)*, paras. 7.83-7.84. The panel did not take issue with the ten per cent threshold applied by the European Community in the context of Article XIII:2(d) but did not find it necessary to set a precise import share to determine the existence of a substantial interest in supplying a

supplying interests can evolve with time[15]. The determination of "substantial interest" in Article XIII:2(d) could vary with time or round of allocation so long as, in a particular round, the same parameters for determining substantial interest in a particular product are used *vis-à-vis* each potential supplier and allocation does not discriminate between similar situations. Consistent with the explanation of the Appellate Body[16], Canada's view is that following either method of allocation in Article XIII:2(d) satisfies the aim expressed in the chapeau of that paragraph.

B. Meaning of "Special Factors"

15. Further acknowledgement that supplying interests can evolve with time is found in the possibility of taking into account, when using the second method of allocation under Article XIII:2(d) (unilateral imposition), "special factors which may have affected or may be affecting the trade in the product". Ad Article XIII suggests that "special factors" is broader in scope than the term "discriminatory quantitative restrictions". However, Ad Article XIII also suggests that there is a desire to keep the determination of a substantial interest grounded in genuine and demonstrated market access and to ensure that the process of allocation remains practicable.

C. Establishment of an Allocation for "Others"

16. The text of Article XIII does not require a Member to establish an allocation for others: whether this is done will depend on the interests to supply a product that exist and the outcome of the process in Article XIII:2(d). In this respect, an allocating Member must have regard to the admonition in *EC – Bananas III* that it cannot discriminate by providing country specific allocations to some with a non-substantial interest in supplying the product but not to others with a non-substantial interest[17]. Should an allocation for others be established, there is also no general obligation in the text of Article XIII to set it at a particular size. This will also be an outcome of a particular fact situation and the application of Article XIII:2 taken as a whole and read in conjunction with Article XIII:4.

product, noting: "A determination of substantial interest might well vary somewhat based on the structure of the market."

[15] Panel Report, *EC – Bananas III (Ecuador)*, paras. 7.91-7.92.

[16] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 338.

[17] Appellate Body Report, *EC – Bananas III*, para. 161.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1. The Russian Federation would like to present, as a third party in this dispute, the summary of its arguments that mostly relate to the issues concerning Article II of the General Agreement on Tariffs and Trade (GATT) and the Procedures for Modification and Rectification of Schedules of Tariff Concessions adopted by the Council on 26 March 1980.

2. In its First Written Submission China claims that without certification the first and the second modifications have no legal effect and, therefore, the European Union's implementation of these modifications violate Article II of the GATT 1994.[1]

3. Article II of the GATT 1994 imposes an obligation on an importing Member to accord to the commerce of other Members treatment no less favorable than that provided for in the relevant part of its Schedule.

4. In the view of the Russian Federation all modifications of tariff concessions should be certified under the Procedures for Modification and Rectification of Schedules of Tariff Concessions adopted by the Council on 26 March 1980.

5. According to the Panel in *US – FSC* for a decision to be classified as "other decisions of the CONTRACTING PARTIES to the GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994 "it must be a legal instrument within the meaning of the chapeau to paragraph 1, *i.e.*, it must be a formal legal text which represented a legally binding determination in respect of the rights and/or obligations generally applicable to all contracting parties to GATT 1947"[2].

6. Modifications of Member's tariff commitments could be the outcome of action under various provisions of the WTO Agreement, including Articles II, XVIII, XXIV, XXVII and XXVIII of the GATT 1994, and, as the results, will probably affect the existing rights and obligations of WTO Members. Thereby, the Procedures for Modification and Rectification of Schedules of Tariff Concessions may constitute "other decisions of the CONTRACTING PARTIES to the GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994. Thus, all WTO Members should follow these Procedures as they contain a legally binding determination in respect of the rights and/or obligations generally applicable to all contracting parties to GATT 1947.

7. The Russian Federation disagrees with the EU's arguments that "*[t]he certification of the changes to the schedule has the sole purpose of formally incorporating into a Member's schedule the modifications made in accordance with Article XXVIII or other relevant provisions, but it is not a prerequisite for implementing such changes*"[3] and that "*the certifications do not have any effect on the entry into force of the proposed modification or rectification. The idea is to formally incorporate in the schedules of members modifications and rectifications which, in most cases, have already entered into force*".[4]

8. The Appellate Body in *EC – Computer Equipment* noted: "*[a] Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are general rules of treaty interpretation set out in the Vienna Convention*".[5]

9. Article 26 of the Vienna Convention requires that "*[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith*". The chapeau of the Procedures for Modification and Rectification of Schedule of Tariff Concessions requires that "*[…] changes in the authentic texts of Schedules which record […] modifications resulting from action taken under Article II, Article XVIII, Article XXIV, Article XXVII and Article XXVIII shall be certified without delay*". Furthermore, paragraph 4 of the same Procedures provides that "*[w]henever practicable*

[1] The China's First Written Submission, para. 270.
[2] Panel Report, *US – FSC*, para. 7.63.
[3] The European Union's First Written Submission, para.300. (emphasis added)
[4] Ibid., para. 301. (emphasis added)
[5] Appellate Body Report, *EC – Computer Equipment*, para. 84. (emphasis added)

Certifications shall record the date of entry into force of each modification". Taking into account that the European Union failed to obtain certification from the WTO Members, the EU's Modification Packages have no legal effect. Thus, it would appear that the European Union is obliged to comply with its current Schedule, including for the purposes of Articles II:1(a) and II:1(b) of the GATT 1994.

10. The significance of following procedural rules was noted by the Panel in *EC – Bananas III (Article 21.5-Ecuador II)*:

> There is no provision in the WTO Agreement that would allow a Member to unilaterally modify the concessions contained its Schedule, unless procedures for renegotiation of such Schedule are formally concluded.[6]
>
> Accordingly, the appropriate procedures must be finalized, before the concession can be legitimately modified or withdrawn and replaced with a new one.[7]

11. The European Union also states that the certification process of changes to the Schedule is going to start only after the conclusion of certification process started in March 2014 for changes made pursuant to Article XXIV:6 (2004 Enlargement).[8] According to the Procedures for Modification and Rectification of Schedules of Tariff Concessions, a Member should communicate a draft within three months after the negotiation has been completed. There is nothing in the Procedures that can be interpreted to suggest that certification process for modifications made pursuant to Article XXVIII should be initiated only after certification process for modifications made pursuant to Article XXIV has been completed. On the contrary, the word "or" in paragraph 1 of the Procedures for Modification and Rectification of Schedule of Tariff Concessions means that Articles XXIV and XXVIII should be considered separately and should not follow one after another in any particular order.

[6] Panel Report, *EC – Bananas III (Article 21.5-Ecuador II)*, para. 7.447.
[7] Ibid., para.7.451.
[8] The European Union's First Written Submission, para. 299.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THAILAND

I INTRODUCTION

1.1. This case raises issues of fundamental importance regarding the manner in which World Trade Organization ("WTO") Members modify their tariff concessions and provide compensation in the form of tariff rate quotas ("TRQs") to WTO Members affected by the modification.

1.2. China's argument, in essence, is that the European Union ("EU") should have identified China as a Member that had a principal supplying interest ("PSI") or substantial supplying interest ("SSI") in the products at issue in the EU's tariff modifications. In China's view, the EU did not do so because China's poultry imports were subject to an import ban for SPS reasons during the relevant reference period used by the EU to determine the Members that had a PSI or SSI, with which it had to negotiate appropriate compensation. China further argues that it should have received a share of the TRQs because it is the world's largest producer of poultry and it had growth potential in the affected products.

1.3. Thailand considers China's arguments to be unfounded. It fully supports the EU's request that the Panel reject all claims made by China. The EU complied fully with its obligations under the relevant provisions of the GATT 1994 and related instruments in modifying its tariff concessions and in allocating compensation to Thailand and Brazil following the tariff modifications. Thailand endorses the legal arguments set out in the EU's first written submission.

A. Article XXVIII and Article XIII contain related, but separate, obligations

1.4. In this case, the EU modified its tariff schedule pursuant to Article XXVIII of the GATT 1994 and allocated compensation in TRQs to Thailand and Brazil pursuant to Article XIII:2 of the GATT 1994. Article XXVIII:1 (and related instruments) address with which countries the EU had to negotiate or consult when it decided to modify its tariff concessions. Article XIII (and related instruments) refer to how the EU has to determine the allocation of compensation in the TRQs. In other words, Article XXVIII:1 deals with "with whom to negotiate/consult when modifying a tariff concession" and Article XIII:2 deals with "how to allocate compensation after modifying a tariff concession."

1.5. Article XXVIII of the GATT 1994 sets out the conditions that apply when a WTO Member seeks to modify its tariff schedule. The applicant Member, Members with initial negotiating rights, and Members with a principal supplying interest are referred to as the "contracting parties primarily concerned" and the fourth is a Member with a substantial interest. Article XXVIII:1 treats these categories of Members differently.

1.6. Paragraph 7 of Note *Ad* Article XXVIII[1] states that "the expression 'substantial interest' is not capable of precise definition and accordingly may present difficulties for [WTO Members]. 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 contracting party seeking to modify or withdraw the concession."

1.7. Paragraph 4 of the *1980 Procedures for the Negotiations under Article XXVII of the GATT 1994* ("1980 Procedures") provides that claims of interest by a PSI or SSI holder should be made within ninety days following the circulation of the import statistics by the applicant country, in this case, the EU. Paragraph 5 of the *Understanding on the Interpretation of Article XXVIII of the GATT 1994* ("Understanding on Article XXVIII") provides that where a Member considers that it has a PSI or SSI, it shall communicate its claim in writing to the [applicant Member and the Secretariat]. It further provides that paragraph 4 of the 1980 Procedures "shall apply in these

[1] This Note applies to Article XXVIII and not Article XIII. However, as the provisions contain identical terms, Thailand considers that the clarification provided for Article XXVIII could be used to interpret the term in Article XIII.

cases". The Understanding on Article XXVIII is part of the GATT 1994 and is, therefore, legally binding.

1.8. Article XXVIII:2 provides that the compensatory adjustment provided by the applicant Member "shall endeavour" to maintain a general level of reciprocal and mutually advantageous concessions. The obligation in Article XXVIII:2 is thus not 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" but rather to "*endeavour to* maintain" such a level. Paragraph 6 of the Understanding on Article XXVIII may be used to determine the compensation for WTO Members that have an SSI when a tariff concession is replaced by a TRQ.

1.9. Article XIII of the GATT 1994 is entitled "Non-discriminatory Administration of Quantitative Restrictions." Article XIII:1 provides that no import or export restriction may be applied to a single Member, unless imports or exports from all other countries are similarly restricted. The remaining provisions of Article XIII provide guidance as to how this non-discriminatory obligation is to be applied. The chapeau to Article XIII:2 provides that in "applying import restrictions to any product, [Members] shall aim at a distribution of trade in such product *approaching as closely as possible the shares which the various [Members] might be expected to obtain in the absence of such restrictions and to this end shall observe the following conditions*....". This provision therefore requires the EU, in this case, to provide different allocations in the TRQs based on historical trade patterns from countries with supplying interests.

1.10. Article XIII:2(d) provides for two different processes for determining the allocation of quotas among supplying countries. First, the applicant Member can seek agreement on the allocation of shares with those Members that had a SSI. Second, if there is no agreement on the allocation, the applicant Member can allot shares in the quota to Members that have a substantial interest on the basis of the criteria specified in Article XIII:2(d), second sentence, including taking account of special factors that may have affected the trade in the product.[2] Thus, the consideration of special factors is relevant only when there is no agreement on the allocation of the shares within a TRQ between the applicant Member and the Members that had an SSI.

1.11. China incorrectly suggests that the principles outlined in paragraph 4 of the Understanding on Article XXVIII to determine Members that had a PSI or SSI on new products (for which three years' trade statistics are not available) may also be used to determine such interests when an import ban has been applied. However, paragraph 4 addresses a completely different situation. When a tariff on a new product is being modified, it may be necessary to take into account "production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand in the importing Member" because three years' statistics are not available. Where three years' statistics are in fact readily available (even if a legitimate SPS measure was in place) there is no basis to examine production capacity and other criteria to determine whether a Member "could have had" a PSI or SSI.

1.12. In Thailand's view, China's attempt to mix up the applicable concepts is incorrect. The factors that are used to determine the amount of compensation to be provided should not be used to identify a Member with a PSI or SSI, and *vice versa*.

B. China's argument that the EU should have identified that China had a PSI or SSI based on a counterfactual reference period is incorrect

1.13. China argues that the reference periods used by the EU to identify that Thailand and Brazil had a PSI or SSI were "tainted" by the application of an import ban to China's imports during the reference periods used by the EU, namely 2003−2005 for the First Modification Package and 2006-2008 for the Second Modification Package. China further argues that the EU should have examined the share China "would have had in the absence of the import ban and whether such share constitutes a PSI or SSI". Lastly, China argues that, due to the extended nature of the negotiations for the Second Modification Package, the EU should have used a more recent reference period to correctly identify the WTO Members that had a PSI or SSI.

[2] Panel Report, *EC — Bananas III (Ecuador)*, paras. 7.71−7.72.

1.14. In order for an applicant Member to determine which Members have a PSI or SSI and therefore, with which Members it must negotiate or consult prior to modifying its tariff concessions, the applicant Member must analyse import data in an appropriate reference period.

1.15. Article XXVIII does not specify the appropriate time period for this reference period. However, paragraph 4 of Note *Ad* Article XXVIII provides that the determination of a Member that had a PSI should be made if the Member had "over a reasonable period of time *prior to the negotiations*, a larger share in the market [than a Member with INRs]". Logically, this temporal requirement should apply equally to the determination of a Member that had a SSI. Thus, the reference period must be "prior to the negotiations". The practice in the GATT and the WTO has been to rely upon the three-year period prior to the notification of the intention to modify the concession.

1.16. China incorrectly suggests that the principles outlined in paragraph 4 of the Understanding on Article XXVIII to determine Members that had a PSI or SSI on new products (for which three years' trade statistics are not available) may also be used to determine such interests when an import ban has been applied. However, paragraph 4 addresses a completely different situation. When a tariff on a new product is being modified, it may be necessary to take into account "production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand in the importing Member" because three years' statistics are not available. Where three years' statistics are in fact readily available (even if a legitimate SPS measure was in place), there is no basis to examine production capacity and other criteria to determine whether a Member "could have had" a PSI or SSI.

1.17. China also incorrectly argues that due to the extended nature of the negotiations for the Second Modification Package and the application of the import ban, the EU should have used a more recent reference period, such as from 2009-2011, to correctly identify the Members that had a PSI or SSI. There is no legal basis for this argument. As the EU explains, this argument has no basis in "any provision of Article XXVIII or the 1980 Procedures or on past practice, and would undermine the objective pursued by Article XXVIII:1. This was also acknowledged by the Arbitrator in *EC – The ACP-EC Partnership Agreement.* The Arbitrator further stated that "[t]he use of the most recent representative reference period minimizes the need for *ad hoc* adjustments to be made to the data and corresponds as closely as possible to the trade regime as applied".[3] Thus, it is important to use trade statistics for a period as close as possible to the trade regime in place prior to the notification of the modification.

1.18. The practice of using three years' trade statistics *prior to the negotiations* allows for predictability and certainty. It is not clear how the proper reference period could be chosen in the circumstances described by China. China does not propose any guidelines to determine which period should be used other than, apparently, to suggest a period that would "reflect the more natural export strength of the WTO Member(s) affected by the discriminatory quantitative restrictions" *in casu*, China. This is not a guideline that could be applied in a manner that promotes predictability and certainty in the multilateral trading system.

1.19. China also incorrectly argues that the "requirement in paragraph 6 of the Understanding on Article XXVIII that the three-year reference period for determining compensation must be representative or that trade in the most recent year be taken into account should equally apply for the determination of the supplying interests." It suggests that the determination of the existence of a PSI or SSI based on one period and the calculation of compensation based on a different period would seem illogical. In Thailand's view, China fundamentally misunderstands the different purpose of each of these provisions. The determination of which Members have a PSI or SSI must necessarily be based on import data from the past. The review of the import data in the trade actually affected over the relevant three-year reference period shows which Members have a special interest in the concessions to be modified, and therefore, with which Members the applicant Member must negotiate or consult. This backward-looking exercise must be conducted before the applicant Member can modify its tariff concessions. As the EU explains, as "those Members stand to lose the most from the intended modification, they can be trusted to negotiate compensation which is adequate for all Members". Paragraph 6 of the Understanding on Article XXVIII addresses a very specific situation, namely the compensation that should be provided when a Member replaces an unlimited tariff concession with a TRQ. As the EU notes, paragraph 6 is expressed in

[3] Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement*, para. 83.

"hortatory terms". As is clear from the terms of paragraph 6, "the amount of the compensation should exceed the amount of trade actually affected by the modification of the concession". The compensation must be calculated on "future trade prospects", which should be based on the greater of the average annual trade in the more recent three-year period or trade in the most recent year increased by 10 percent. This must be a forward-looking exercise as it seeks to compensate the affected Members for the changes brought about by the tariff modification. Therefore, contrary to China's assertions, it is not at all illogical that the determination of the existence of a PSI or SSI would be made based on a different period from that used to determine compensation.

1.20. China submits that the EU should have made allowances for the import ban imposed for SPS reasons and used a different reference period to determine the Members that had a PSI or SSI. To this end, China submits that its exports to the EU of products classified under CN 1602 32 19 in particular were "growing". The EU has explained that even if it had taken into account import data before the SPS measures were introduced in 2002, China did not have sufficient imports to qualify as a Member that had a SSI as its imports were well below the 10 per cent benchmark for a SSI Member. China has also submitted that where "significant time" has lapsed since the notification of the intention to modify a concession, the three-year reference period must be re-assessed and the latest available data must be used. To this end, China submits import data for 2009–2011. The EU has explained that there is no legal basis to require such a re-determination. Moreover, such a re-determination would adversely affect the due process rights of Thailand (and Brazil), which entered into good faith discussions with the EU on the basis of Article XXVIII and the 1980 Procedures.

1.21. China also submits detailed trade statistics to demonstrate its production capacity and export growth potential. It refers to its share of world imports for products classified under CN 1602 32 and CN 1602 39 in Japan, Singapore, Korea, Hong Kong, China, Mauritius and South Africa. As explained by the EU, the "data on China's share of imports in a handful of selected import country markets where China holds a 'major share' is manifestly unreliable and unrepresentative." There is no legal basis to look at import shares in other (selected) markets to determine whether Members have a PSI or SSI in the tariff lines being modified in the market of the applicant Member, in this case, the EU.

1.22. In any event, it is too late for China to now claim a PSI or SSI status for the First and Second Modification Packages. At the time of the First Modification Package, China did not claim a PSI. It made a claim of SSI only on 6 September 2006, without providing any evidence of its alleged substantial interest in the tariff lines at issue. At the time of the Second Modification Package, China did not make a timely claim of interest, but waited three years before submitting its claim of a PSI on 9 May 2012.

1.23. Thailand recalls that paragraph 4 of the 1980 Procedures provides that claims of interest of a PSI or SSI should be made within ninety days following the circulation of the import statistics by the applicant Member, in this case, the EU. Paragraph 5 of the Understanding on Article XXVIII provides that where a Member considers that it has a PSI or SSI, it shall communicate its claim in writing to the [applicant Member and the Secretariat]. It further provides that paragraph 4 of the 1980 Procedures "shall apply in these cases". The Understanding on Article XXVIII is part of the GATT 1994,[4] and is therefore legally binding.

C. China's argument that the EU's SPS measure "tainted" the identification of Members that had a PSI or SSI within the meaning of Article XXVIII of the GATT 1994 is incorrect

1.24. China claims that the three-year period preceding the EU's notification of its intention to modify its tariff concessions is "tainted" by the EU's import ban on poultry products. China argues that the reference period did not take into account the import ban that adversely affected its share of imports in the EU.

1.25. In particular, China contends that the import ban was a "discriminatory quantitative restriction" within the meaning of paragraph 7 of the Note *Ad* Article XXVIII that affected the exports that China could reasonably be expected to have made to the EU. In China's view, as the

[4] See paragraph 1(c) (vi) of the General Agreement on Tariffs and Trade 1994.

reference period was not representative, it could not have resulted in an accurate determination of the Members that had a SSI or PSI. China argues that the import ban, which had a limiting effect on importation by prohibiting imports of poultry products, was a "quantitative restriction" within the meaning of Article XI:1 of the GATT 1994. It further argues that the import ban was a "discriminatory" quantitative restriction within the meaning of paragraphs 4 and 7 of Note *Ad* Article XXVIII because it treated imports from one WTO Member differently than it treated imports from other WTO Members, "irrespective of the ground for such disparate treatment, and, in particular, whether such difference in treatment was justified or not".

1.26. Paragraphs 4 and 7 of *Ad* Note to Article XXVIII provide that the determination of whether a Member has a PSI or SSI, respectively, should take into account whether "discriminatory quantitative restrictions" affected the share of imports a Member would have had in the absence of those discriminatory restrictions.

1.27. First, Thailand notes that the EU rebutted China's claim that the import ban should be characterised as a "quantitative restriction" on "importation" by explaining that Article XI should be interpreted in the light of the *Ad* Note to Article III. Accordingly, a measure that prohibits the sale of like domestic and foreign products should be considered as an internal law or regulation regardless of whether enforcement of the measure takes place at the border.[5]

1.28. Second, Thailand agrees with the EU that the SPS measure is not a "discriminatory" measure. Measures that apply different treatment to Members that are in different situations may be seen as non-discriminatory. In the case at hand, the EU's regime applied the same or equivalent requirements to imported products as it did to domestic products. The only difference in treatment was to prohibit products that did not comply with the sanitary requirements and allow those that did comply. This difference in treatment is based on legitimate regulatory requirements and, therefore, does not constitute a "discriminatory" measure.

D. China's arguments that the allocation of most of the TRQs to Thailand and Brazil is inconsistent with Article XIII:1 and Article XIII:2 are incorrect

1.29. China argues that Article XIII:1 requires that exportation or importation of like products to or from all third countries must be "similarly prohibited or restricted". It therefore argues that there can be no discrimination in the level of access to the TRQs. China also argues that the EU's allocation of the TRQs is inconsistent with the chapeau of Article XIII:2, which requires WTO Members to "aim at a distribution of trade [...] approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions." It argues that Members that do not have a SSI "must still be afforded access to the TRQs (through the TRQs for all other countries) such that they obtain the share they might expect to have in the absence of the TRQs". To this end, the allocation of the TRQs must take into account the comparative advantages of the WTO Members participating in the TRQ and the import ban in the representative period. Lastly, China argues that the EU acted inconsistently with Article XIII:2(d), second sentence, which requires that the shares of TRQs must be based "upon the proportions, supplied by such [Members], during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product."

1.30. As the Appellate Body has explained, the principle of non-discriminatory application governed by Article XIII:1, as applied to tariff quotas, means that "if a tariff quota is applied to one Member, it must be applied to all...".[6] China argues that the allocation of the majority of the TRQs to Thailand and Brazil is inconsistent with Article XIII:1. As the EU explains, however, this provision governs *access* to the TRQ, not the *allocation* of shares in the TRQ to different suppliers. Therefore, Article XIII:1 cannot be used as a basis to claim that the allocation of shares in the TRQ was inconsistent with this provision. As the EU also explains, Article XIII:1 requires that a TRQ be applied by a Member on a product-wide basis without discrimination as to the origin of the product. The TRQs established by the EU following the First and Second Modification packages do not discriminate on the basis of the origin of the products.

[5] Panel Report, *EC – Asbestos*, paras. 8.88-8.93.

[6] Appellate Body Reports, *EC – Bananas III (Article 21.5 - Ecuador II); EC – Bananas III (Article 21.5 - US)*, para. 337.

1.31. The Appellate Body has explained in EC − Bananas III (Article 21.5 - Ecuador: II); EC - Bananas III (Article 21.5 - US)[7] that:

> ... 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. The provisions of Article XIII:2(a)-(d) are specific instances of authorized forms of allocation when a Member chooses to allocate shares of the tariff quota. Article XIII:2(d) allows for the case where a quota is allocated among supplying countries, either by way of agreement or, where this is not reasonably practicable, by allotment to Members having a substantial interest in supplying the product concerned, and in accordance with the proportions supplied by those Members during a previous representative period, taking due account of "special factors". In other words, *Article XIII:2(d) is a permissive "safe harbour"; compliance with the requirements of Article XIII:2(d) is presumed to lead to a distribution of trade as foreseen in the chapeau of Article XIII:2, as far as substantial suppliers are concerned*.[408] (emphasis added).
>
> Footnote 408: If a Member allocates quota shares to Members with a substantial interest in supplying the product, in accordance with Article XIII:2(d), it must also respect the requirement in the chapeau of Article XIII:2—that distribution of trade approach as closely as possible the shares that Members may be expected to obtain in the absence of the restriction. This is usually done by allocating a share to a general "others" category for all suppliers other than Members with a substantial interest in supplying the product.

1.32. In this case, the EU allocated specific TRQs as a means of compensation to two substantial suppliers (Thailand and Brazil) by agreement under Article XIII:2(d), first sentence, and in accordance with paragraph 6 of the Understanding on Article XXVIII. The EU did so based on the shares held by each of the Members that had a SSI in each relevant tariff line during the same reference period that was used to determine the "all others" share in the TRQs. Thus, the share in each TRQ for "all others" was determined as a reflection of the shares allocated to Members that had a SSI. The EU complied with Article XIII:2(d), first sentence, in allocating shares in the TRQ to the Members that had a SSI as well as to Members in the "all others" category. It follows that the EU respected the chapeau of Article XIII:2 both in terms of the Members that had a SSI and of Members in the "all others" category.

1.33. Thailand notes that there is a TRQ in CN 1602 39 21 (processed duck, geese, guinea fowl meat, uncooked containing 57% or more of weight of poultry meat or offal) was accorded 100% to Thailand. This allocation reflects the fact that during the relevant representative period, 100% of imports of these products in the EU came from Thailand. No other WTO Member had any share of the trade in these products even though there were no restrictions in place at the time. In this situation, even a 100% TRQ can be consistent with the chapeau of Article XIII:2. The Appellate Body itself recognised this possibility when it stated in footnote 408: [The distribution of trade approaching as closely as possible the trade that that Members may be expected to obtain in the absence of the restriction] ... is ***usually*** done by allocating a share to a general "others" category for all suppliers other than Members with a substantial interest in supplying the product. In situations where other Members are not expected to obtain a share of the trade, the importing Member, *in casu*, the EU is not required to allocate an "all others" category.

1.34. "Special factors" that may have affected trade in the product are only required to be taken into account in Article XIII:2(d), second sentence, which does not apply in this case. The term "special factors" does not appear in Article XIII:2(d), first sentence. It appears only in Article XIII:2(d), second sentence, to address situations where it is not possible to arrive at an agreement on the allocation of shares in a TRQ with Members that had a SSI. It is not necessary to conduct an analysis of what does (or does not) constitute a special factor as the conditions in Article XIII:2, second sentence, do not apply in this case.

[7] Appellate Body Reports, *EC − Bananas III (Article 21.5 - Ecuador II); EC − Bananas III (Article 21.5 - US)*, para. 338 and footnote 408.

E. China's claims under Article II:1 and Article I:1 of the GATT 1994 should be consequentially dismissed

1.35. China's claim that the EU acted inconsistently with its obligations under Article II:1 of the GATT 1994 because it implemented changes in its Schedule even though those changes had not been certified by the Director-General is without merit. Certification is an administrative procedure that allows for the incorporation of modifications in the applicant Member's Schedule. It is not a substantive requirement that must be completed before the modifications may enter into force.[8]

1.36. China's claim that the EU acted inconsistently with its obligations under Article I:1 of the GATT 1994 because the EU granted market access to Thailand and Brazil in the TRQs and not to other Members, including China, is also without merit. The EU's actions are consistent with its obligations to provide non-discriminatory treatment under Article XIII:1. Therefore, a harmonious interpretation of both non-discriminatory provisions requires that its actions also be considered as consistent with its obligations under Article I:1 of the GATT 1994.

[8] See EU's first written submission citing *Anwarul Hoda, Tariff negotiations and renegotiations under the GATT and the WTO*, Cambridge University Press; 2001, p.115.

ANNEX C-6

EXECUTIVE SUMMARY THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY ORAL STATEMENT

I. Introduction

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

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

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

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

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

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

6. This procedure, then, would appear to provide its own remedy for the withdrawal or modification of the concession by that proposing Member. That is, the first and second set of Members can rebalance their own concessions in light of the withdrawal or modification. It could be viewed as incongruous to both permit a self-judging rebalancing of concessions under the Article XXVIII procedures and a claim for breach of the Article XXVIII procedures. And it is not clear how an alleged failure to follow a procedure resulting in a change to a Member's WTO *Schedule* would constitute a "measure affecting the operation of any covered agreement taken within the territory of" the proposing Member. In substance, of course, a Member may potentially challenge the treatment accorded to imports, following a modification or withdrawal, pursuant to numerous Articles of GATT 1994, including Articles I, II, XI, and XIII.

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

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

9. As mentioned, Article XXVIII:1 establishes that a Member proposing to modify or withdraw a concession may do so "by negotiation and agreement" with any Member having an initial negotiating right "and with any other [Member] determined by the CONTRACTING PARTIES to have a principal supplying interest" and "subject to consultation with any other [Member] determined by the CONTRACTING PARTIES to have a substantial interest in such concession." Thus, by the very terms of Article XXVIII:1, a Member entitled to negotiate and agree is that "determined by the CONTRACTING PARTIES to have a principal supplying interest". Likewise, the Member entitled to "consultation" on the proposed modification or withdrawal is that "determined by the CONTRACTING PARTIES to have a substantial interest."

10. China has not established or even alleged that it was "determined by the CONTRACTING PARTIES" (to be understood as a reference to Ministerial Conference or General Council, or as delegated) to have a principal supplying interest or a substantial interest in any such concession. Nor does China allege that the EU accepted China's assertion of a substantial interest, which under the Procedures for Negotiations under Article XXVIII, could be deemed to constitute such a determination. Therefore, the United States does not understand the basis on which China considers that it could make a claim under Article XXVIII:1 in relation to a status that it does not even allege it had.

11. As noted above, China's claim under Article XXVIII:1 raises a novel legal issue, one which has been discussed by the GATT Contracting Parties and which, pragmatically, did not result in review by a GATT panel. As the United States understands the facts in this dispute, the Panel may similarly decline to make a finding on this legal issue. China has not asserted or established a fact that is a necessary element of its claim, even assuming, for the limited purposes of this analysis, that such a claim can be considered under the DSU.

II. The Relationship between Article XIII and Article XXVIII

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

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

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

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

16. Second, as the obligations in Article XIII apply to the application or administration of restrictions on imports, they apply whenever a Member seeks to apply or administer such a

restriction. That is, while the procedure in Article XXVIII comes to a close with the possible modification or withdrawal of concessions in the relevant Members' Schedules, the treatment of imports by a Member at any given time must comply with Article XIII, and other provisions that govern "treatment" of imports, such as Articles I, II, III, or XI.

17. Accordingly, the United States considers that the existence of a tariff concession in the form of a tariff-rate quota in a Schedule does not determine the WTO-consistency of the treatment of imports under a tariff-rate quota that is applied by a Member through a domestic tariff measure. As noted, a concession in a Member's GATT 1994 Schedule is not − at the level of the concession − subject to an ongoing WTO obligation. Rather, a failure to accord to imports the treatment set out in the Schedule − such as concession for a particular Member expressed as a tariff-rate quota − would give rise to a claim under GATT 1994 Article II:1(b). If a tariff-rate quota is imposed by a Member through a domestic tariff measure, the treatment given to imports through that import restriction must conform to the requirements of Article XIII.

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

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

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

2. As described above, Article XXVIII allows a Member to modify or withdraw a scheduled commitment as long as it negotiates and consults with the appropriate WTO Members. According to the text of Article XXVIII and the *Procedures for Negotiations under Article XXVIII*, the Members having a right to participate in these negotiations and consultations as determined by the Contracting Parties at the start of the negotiations. If the Contracting Parties did not make such a determination with respect to a Member, that Member does not have recourse to the remedy provided for in paragraph 3 of Article XXVIII.

3. Paragraph 7 to the Note Ad Article XXVIII establishes that the concept of "discriminatory quantitative restrictions" is one that the then-CONTRACTING PARTIES agreed for purposes of guiding *their own* "judgment" on whether a Member would merit the status of having a "principal supplying interest" or a "substantial interest". In this, the Ad Article corresponds to the language of Article XXVIII previously reviewed, which establishes that a Member's status for purposes of negotiations or consultations on proposed modifications of concessions is a matter reserved to the decision of the Ministerial Conference or General Council.

4. Again, as elaborated in the U.S. third-party oral statement, this is not an interpretive issue for the Panel to resolve. China has not established or even alleged that it was "determined by the CONTRACTING PARTIES" (to be understood as a reference to Ministerial Conference or General Council, or as delegated) to have a principal supplying interest or a substantial interest in any such concession. If China were dissatisfied with the EU's non-recognition of its status under Article XXVIII, its proper recourse was to the Ministerial Conference or the General Council. It would not be for the Panel to determine that those bodies had failed to make a determination, even aside from the fact that China has not even asked those bodies to make that determination.

WORLD TRADE ORGANIZATION

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EUROPEAN UNION – MEASURES AFFECTING TARIFF CONCESSIONS ON CERTAIN POULTRY MEAT PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS492/R.

LIST OF ANNEXES

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WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 16 December 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute ("party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU ("third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier)

following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the attached WTO Editorial Guide for Panel Submissions, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by China. If the European Union chooses not to avail itself of that right, the Panel shall invite China to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is

needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 5 paper copies of all documents it submits to the Panel. Exhibits may be filed in 4 copies on CD-ROM and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org, and ****.****@wto.org. If a CD-ROM is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

AMENDED WORKING PROCEDURES OF THE PANEL

Adopted on 16 December 2015
Amended on 3 February 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute ("party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU ("third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the attached WTO Editorial Guide for Panel Submissions, to the extent that it is practical to do so.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by China. If the European Union chooses not to avail itself of that right, the Panel shall invite China to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the

end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party may be present during the entirety of the substantive meetings with the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. These summaries may also include a summary of responses to questions. Each such executive summary shall not exceed 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

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c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org, and ****.****@wto.org. If a CD-ROM is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its first and second written submissions, written responses to questions and comments, and related exhibits. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. Introduction

1. In this dispute, China challenges the European Union's determination and allocation of tariff rate quotas (TRQs) which are the sole compensation for the withdrawal of its unlimited tariff concessions for poultry meat.

2. China is the second largest producer of poultry in the world and a significant exporter of poultry meat products, including to the European Union. Yet, in denying China's principal or substantial supplying interest, the European Union stated that China's share in the trade affected by the concessions was insufficient, while choosing to ignore the effect of the sanitary measures (SPS) measures that it had imposed on Chinese poultry meat products which had acted effectively as a ban on imports into the European Union of Chinese products.

3. China contends that the European Union's TRQs for poultry meat products (1) do not maintain the balance of tariff concessions existing prior to the withdrawal, (2) do not give due credit to China's future trade propects or its share of the European Union market absent the TRQs, and (3) do not offer to Chinese poultry meat products the share of imports into the European Union commensurate with their comparative advantages.

II. The European Union's SPS Measures Imposed On Imports Of Poultry Meat Products From China And Their Impact

4. China is not challenging the European Union's SPS measures *per se*. China nevertheless submits that the the impact of these SPS measures on the trade flows of the products in question should have been taken into account in the process of determining the TRQs, their level and their allocation.

5. Imports of Chinese poultry meat were completely banned in the European Union from 23 May 1996 through 8 February 2000 and from 14 March 2002 to 30 July 2008. Even when special heat treatment requirements allow certain types of cooked poultry meat products from China to be imported into the EU as exceptions to the import ban on all poultry meat products from China, between 8 February 2000 to 14 March 2002 and after 30 July 2008, uncooked poultry meat or cooked poultry that did not undergo the specific heat treatment could not be imported into the EU.

III. Legal Claims

A. China's Claims Under Article XXVIII

6. Pursuant to Article XXVIII:1, a WTO Member may withdraw or modify a concession *provided that* it negotiates with the WTO Members who have initial negotiating rights and a principal supplying interest (PSI) or consult with WTO Members who have a substantial supplying interest (SSI). Paragraphs 4 and 7 of Note *Ad* Article XXVIII:1 establish the rules on how to appropriately determine which Members have PSI or SSI, i.e. by the actual share of imports or the share of imports that should have been obtained in the absence of the discriminatory quantitative restrictions. Essentially, all products are equally expected to have access to the EU market based on the tariff concessions that were negotiated and extended to all on an MFN basis. Accordingly, any discriminatory quantitative restriction that has affected the shares of imports should be taken into account and allowance should be made for such restriction. To do otherwise would mean that the Article XXVIII:2 requirement to maintain a general level of reciprocal concessions would not be satisfied.

1. The European Union Violated Article XXVIII:1 By Failing To Recognise China's PSI or SSI Status

a. The European Union Import Bans Were Discriminatory Quantitative Restrictions

7. The fact that the European Union subjects Chinese poultry meat to import bans is not in question. What is at issue is whether the import bans are "discriminatory quantitative restrictions" within the meaning of paragraphs 4 and 7 of Note *Ad* Article XXVIII:1.

8. The term "restriction" has a broad scope which identifies not just a condition placed on importation but a condition that has a limiting effect. As a result of the EU's various SPS measures, from 2002 to 2008, there was an effective import ban on poultry meat products from China. An import ban, by its nature, is a "prohibition" that not only restricts but prevents imports of the product subject to the regulatory measure. Accordingly, the import ban resulting from the EU's SPS measures falls within the scope of "quantitative restrictions".

9. The concept of "discriminatory" quantitative restrictions covers not only those that are prohibited by the covered agreements but also others that are justifiable under relevant provisions of the covered agreements. China agrees with the Appellate Body that the determination of "discriminatory" should be based on the provision concerned, which in this case is Article XXVIII. The overall purpose, as provided in Article XXVIII:2, is to "endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided in this Agreement". By only taking actual import volumes into consideration but not import bans due to SPS measures when identifying WTO Members for Article XXVIII negotiations or consultations, this would mean that:

(i) WTO Members whose imports were affected by import bans due to SPS measures would be prevented from participation in the negotiations or consultations;

(ii) The condition of "in the absence of discriminatory restrictions" in paragraphs 4 and 7 of the Note *Ad* Article XXVIII:1 would be rendered meaningless; and

(iii) The TRQ or the TRQ plus compensation would not result in the maintenance of concessions at the general level of reciprocity and mutual advantages that had existed before the modification of concessions.

10. Negotiations under Article XXVIII aim to maintain a general level of reciprocal and mutually advantageous concessions not less favourable than what existed in the period preceding the withdrawal of concessions. What that level is should be a function of the tariff bindings for unlimited import volumes that existed prior to their withdrawal or modification, and not a function of imports that are affected by differential treatment. The import bans on all Chinese poultry meat products from 2002 to 2008, clearly show that a distinction was made between imports from China and those from other WTO Members, and have affected the shares of China's imports of poultry products in the European Union. In other words, the EU's SPS measures are "discriminatory quantitative restrictions" for the purpose of the application of Article XXVIII within the meaning of Notes 4 and 7 of *Ad* Article XXVIII:1.

b. The European Union Used Non-representative Periods To Determine PSI or SSI

11. The identification of the reference period for the determination of PSI or SSI must be compatible with the purpose of the determination of WTO Members with PSI or SSI, that is to identify which of the WTO Members have or would have had large enough exports of the subject products in the absence of discriminatory quantitative restrictions. In keeping with that purpose and in light of the rights and interests of other Members that will otherwise be excluded from negotiations or consultations, the period to be taken into account must be *representative* so as to permit an accurate determination of the Members with a PSI or SSI.

12. The adjustment of the reference period is necessary where the three-year period preceding the notification of the intention to withdraw or amend a concession was tainted by the existence of

discriminatory quantitative restrictions and/or data for a more recent period has become available before the end of the negotiations and consultations.

13. China has submitted sufficient factual evidence to support its claims of a substantial or a principal supplying interest. The evidence includes, *inter alia*, China's poultry meat production capacity, its poultry meat imports to the world in general and to specific other countries, as well as to the European Union following the partial lifting of the import bans.

14. In protracted negotiations such as those for part of the TRQs that lasted three years, China submits that at the very least, re-assessment should occur as soon as there is evidence of the developments materially affecting the determination of who holds a PSI or SSI, or affecting the determination of the future trade prospects. By failing to account for import developments since the relaxation of its import ban, the reference period used by the European Union is not "representative".

15. In the present case, China higlights three facts (1) the three-year period mentioned in the European Union's initial notification was affected by the import bans; (2) the negotiations and consultations by the European Union were so protracted as to render the trade data for the period used by the EU ancient history; and (3) the statistical data show resumption of imports into the European Union of China poultry meat after the partial relaxation of the import bans. China submits that, based on this data and the information generally available on China's production and competitiveness in the field of poultry meat, the European Union should have reconsidered whether it was negotiating or consulting with all WTO Members holding a PSI or SSI.

2. The European Union Violated Article XXVIII:2 and Paragraph 6 of the Understanding on the Interpretation of Article XXVIII of GATT 1994

16. Article XXVIII allows WTO Members to modify concessions bound under Article II but requires the balance in the general level of reciprocal concessions to be maintained. There is no discretion in this regard, especially since tariff liberalisation is one of the fundamental goals of the WTO.

17. Article XXVIII:2 directs the Members involved in negotiation and consultations to maintain a general level of reciprocal and mutually advantageous concessions not only *vis-à-vis* themselves but also *vis-à-vis* all other WTO Members. The use of the word "general" in Article XXVIII:2 supports that view. If Article XXVIII:2 only intended to maintain the level of concessions as between the withdrawing WTO Member and the WTO Members with which it negotiates or which it consults, the provision should have read that the aim was to maintain "the level of reciprocal and mutually advantageous concessions" or "the level of reciprocal and mutually advantageous concessions between them".

18. This also finds support in the findings by the Appellate Body who agreed with the panel in *EC – Poultry*, which stated that:

> If 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*. (emphasis added)

19. It is further supported by the negotiating history of Article XXVIII of the GATT 1994.

20. Thus, the outcome of a modification of concessions must:

(i) Achieve an overall balance of concessions assessed within the multilateral context, taking into consideration the interests of WTO Members without an initial negotiating right, PSI or SSI;

(ii) Maintain a general level of reciprocal and mutually advantageous concessions as provided in its Schedule of Concessions prior to the modification; and

(iii) Be extended to all other WTO Members on an MFN basis.

21. What that outcome should be is further guided by paragraph 6 of the Understanding on the Interpretation of Article XXVIII of GATT 1994, which specifically applies to the replacement of an unlimited tariff concession by a TRQ, as well as provides the basis for the calculation of compensation.

22. Where TRQs are allocated during the modification negotiations, compliance with Article XXVIII:2 necessitates a comparison at the level of the WTO Members to which the quota was allocated rather than at the global level only. It would not make any sense to fix a global TRQ taking into account overall future prospects without taking into account future trade prospects at the level of the separate TRQs in which the global TRQ is broken down. To do otherwise would result in over-compensation for some and under-compensation for others, thereby creating discrimination. Thus, in reading Article XXVIII:2 together with paragraph 6 of the Understanding and applied in the context of the current dispute, the assessment must be at the level of the allocated TRQ as well as at the level of the global TRQ.

23. In order for the TRQs to be compensation, they should be set at the level allowing China to import such quantities of poultry meat products into the European Union within the TRQ as are in line with its future trade prospects. Pursuant to paragraph 6 of the Understanding, the WTO Member replacing an unlimited tariff concession by a TRQ must accord compensation based on the greater of (i) trade "in the most recent representative three-year period increased by the average annual growth rate or 10 percent or (ii) trade in the most recent year increased by 10 percent". In other words, the volume of the TRQ should reflect the natural growth level of exports of Chinese poultry meat products to the European Union.

24. In the case of protracted negotiations, the period for determination of compensation should be adjusted in light of latest available trade data. Adjustments should also be made to account for the existence of the import bans. Being kept out of a market due to import bans as a result of sanitary requirements is different from being shut out due to modified concessions. Chinese poultry meat producers understood that they would have access to the European Union's market based on the European Union's tariff commitments, as soon as they/their products meet the European Union's sanitary controls. But now, because of the European Union's modified concessions in the form of TRQs, most Chinese poultry meat products would be subject to the higher out-of-quota tariff rates (because the compensatory TRQs for "Others" are small), even though their improved sanitary controls and practices meet the European Union's sanitary requirements.

25. By using a period tainted by a ban on imports of Chinese poultry meat products into the European Union, the TRQs determined by the European Union are not at a level reflecting future growth prospects. The European Union's modifications of concessions have disturbed its balance of concessions *vis-a-vis* China. It also means that the European Union has in effect extended the effect of the SPS measures it imposed on China permanently.

B. China's Claims Under Article XIII

1. The European Union's Administration of TRQs Is Discriminatory And Violates Article XIII:1

26. China contends that the general application of the provisions of Article XIII are necessarily applicable to all TRQs. As explicitly acknowledged by the Appellate Body in *EC – Poultry*, irrespective of the status of the TRQs instituted under the provisions of Article XXVIII, they must equally respect Article XIII of the GATT 1994. Otherwise, the object and purpose of the non-discrimination provision of Article XIII would be defeated.

27. First, the requirement of Article XIII:1 is that imports from all third countries must be similarly restricted. As the Appellate Body in *EC – Bananas II (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)* established, there can be *no* discrimination in the level of access

that is given to the import market. The mere fact the the European Union allocated a share of the TRQs for poultry meat to "others" does not mean that products from such other Members are similarly restricted to those from Thailand and/or Brazil. In the present case, for those poultry meat products where the European Union has allocated TRQ shares to WTO Members other than Brazil and/or Thailand, it did so in volumes and portions that are so small as to allow no meaningful access to or participation in the TRQs. Thus, the benefit afforded by the TRQ is reserved nearly exclusively to two WTO Members and other WTO Members, especially China which had and has substantial supplying interests, are precluded *de facto* from having access to (and participating in) the TRQs in violation of Article XIII:1 of the GATT 1994.

28. Second, if all countries must be similarly restricted, then all Members with a substantial supplying interest must be similarly restricted. In the present case, the European Union negotiated with and allocated country-specific shares to Brazil and Thailand which it recognised as having principal or substantial supplying interests. China submits and has demonstrated that it held a substantial supplying interest and thus accordingly, should have been (but was not) allocated a country-specific share of the TRQ, similar to those allocated to Brazil and Thailand.

29. Third, where there is an allocation of a TRQ, "[m]embers not having a substantial supplying interst will be able, if sufficiently competitive, to gain market share in the "others" category and possibly achieve "substantial supplying interest" status which, in turn, would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4", as noted by the panel in *EC – Bananas III (Ecuador)*. In the present dispute, the European Union has allocated very small "others" shares in the TRQs (and for certain tariff lines, none) and the new out-of-quota tariff rates are much higher than the in-quota rates. The only conclusion here is that all WTO Members are not given "access and an opportunity of participation", and are not "similarly restricted".

30. Finally, where import bans due to SPS measures are applied to a WTO Member but not to others, the determination of TRQs without taking into account the existence and impact of such import bans would lead to a long-term freezing of those SPS measures, hardly a situation where all third countries are "similarly restricted".

2. The European Union's Failure To Establish TRQs Based On A Representative Period And Take Into Account The Import Bans And Comparative Advantages Violates Article XIII:2

31. The chapeau of Article XIII:2 of the GATT 1994 sets forth a general non-discriminatory obligation with respect to the allocation of tariff quota among Members, whether they hold an SSI or not. The Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* confirmed that the standard for compliance with the chapeau of Article XIII:2 is high; the TRQs must be set at levels such as to be the *least* trade-distortive possible. The TRQs must afford:

(i) all WTO Members access to the TRQs; and

(ii) all WTO Members competitive opportunities under the TRQs that mimics "their comparative advantage" *vis-à-vis* other WTO Members participating in the TRQs.

32. TRQs must be allocated such that WTO Members are in a position to exploit their comparative advantages -- be that in terms of their cost of production, the nature and properties of their products or other factors -- and, thus, to make use of competitive opportunities to increase their trade with the WTO Member imposing the TRQs. They will then achieve the share they would have obtained in the absence of the TRQs.

33. In line with the panel reports in *US – Line Pipe* and in *EEC – Chilean Apples*, the historical trade patterns used for the determination of the share that WTO Members might be expected to obtain in the absence of TRQs must be the trade patterns during a period *preceding the imposition or allocation* of the TRQs. By using 2006-2008, a period remote from the allocation of the TRQs in the Second Modification Package, as the reference period, the EU violated the chapeau of Article XIII:2.

34. In addition, Article XIII:2(d) provides that the representative period must be selected with due account being taken of special factors, such as import bans due to SPS measures which curb the natural comparative advantages of a WTO Member. They are not themselves an element of competition. The facts in this case demonstrate that China could satisfy the sanitary requirements and that its exports of poultry meat to the European Union increased significantly after the lifting of the import bans. As such, the natural comparative advantages of the WTO Member once the SPS measures are lifted or relaxed must be the basis for the determination of the TRQs.

35. Accordingly, determining TRQs based on a reference period that is affected by import bans due to SPS measures violates the requirements of the chapeau of Article XIII:2. As stipulated by Article XIII:2(d), the reference period must also take into account special factors. Import bans clearly affect trade in the product; trade flows in a period where import bans are in place can not be said to be representative. Thus, the reference period affected by import bans must be adjusted. Otherwise, the country-specific TRQs and the "other" shares would not reflect the comparative advantages nor accord competitive opportunities that WTO Members might have expected to obtain in the absence of the TRQs.

36. China has shown that the import bans due to the European Union's SPS measures have affected Chinese poultry meat imports into the European Union for all periods taken into account by the EU. Older periods were also not representative because they too were affected by import bans. As a result, adjustments should have been made to neutralize the impact of the import bans. In light of the Havana Reports and the GATT panel findings in *EEC – Chilean Apples*, such adjustments could have been made by considering China's comparative advantages in terms of its cost of production, the nature and properties of its products, export capacity, the position of China's exports of poultry meat products to non-EU markets.

37. Finally, the TRQs that are allocated to "all others" must be at a sufficient level in order to allow the relevant WTO Members going forward to make use of their comparative advantages so as to obtain an SSI. What that level is will depend on the circumstances of each case, and as the panel in *EC – Banana III* noted, the level might vary based on the structure of the market.

38. Relying on Article XIII:4, the Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* established that a country-specific TRQ may not lead to long-term freezing of the shares of imported products and cannot be applied in such a way as to create an artificial hurdle preventing the natural evolution of the import market structure. A stifling of the trade flows that could be anticipated without the imposition of the TRQ is especially likely to happen when the out-of-quota tariff rate is set at a very high level in both absolute and relative terms.

39. In this dispute, the "all others" shares of the TRQs for poultry meat for one tariff heading is non-existent while those for four tariff headings fall below five percent. In contrast, China's poultry meat imports to the European Union had reached very significant levels in the years preceding the imposition of the TRQs in 2012. Thus, based on the evidence provided by China, China had a substantial supplying interest that should have been recognized by the EU and should have led to the attribution of a commensurate country-specific share in the TRQs. Absent such attribution, the "all others" share should have been established at a much higher level than is currently the case, to allow China to reach SSI.

3. The European Union's Failure To Enter Into Meaningful Consultations Violates Article XIII:4

40. Article XIII:4 provides for consultations. However, mere consultations followed by no adjustment of a TRQ when the conditions for an adjustment are met, would mean that the consultations under Article XIII:4 are a dead letter. That cannot be the purpose and objective of the mandatory consultations provided for in Article XIII:4. It would also be inconsistent with the findings of the Appellate Body in *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)* that a country-specific TRQ may not lead to long-term freezing of the shares of imported products and cannot be applied in such a ways as to create an articifical hurdle preventing the natural evolution of the import market structure. As such, consultations under Article XIII:4 must consider issues of substance, i.e. they must relate as mentioned in Article XIII:4 to "the need for an adjustment of the proportion determined or of the base period

selected, or for the appraisal of the special factors involved, or for the elimination of conditions, formalities or any other provisions established unilaterally relating to the allocation of an adequate quota or its unrestricted utilisation".

C. China's Claims Under Article II

41. According to Article II:7 of the GATT 1994, the schedules of concessions are an integral part of the GATT 1994. In line with the Decision of 26 March 1080 on the Procedures for Modification and Rectification of Schedules of Tariff Concessions and pursuant to paragraph 8 of the Procedures for Negotiations under Article XXVIII, the modification of schedules is subject to certification. Thus, in the context of modification of schedules of concessions, certification of modified schedules is a requirement that a WTO Member *must* undertake before the application *erga omnes* of any revised concession; otherwise, implementation of the modification will be in violation of the Schedule annexed to the GATT 1994.

42. Nothing in paragraph 7 of the Procedures for Negotiations under Article XXVIII explicitly waives the obligations in Article II. If paragraph 7 of the Article XXVIII Procedures were to be read as waiving the obligation in Article II for the results of Article XXVIII negotiations, the certification process to which it refers would be reduced to inutility, contrary to the principle of effective interpretation. It would also run contrary to the object and purpose of all the WTO rules regarding certification, which is to allow the entire Membership to acquiesce in modifications to Schedules, since Schedules contain obligations that are an integral part of the WTO Agreement and give rise to rights enjoyed by all Members.

43. The tariffs and TRQs implemented by the EU have not been certified nor been given legal effect. And by applying tariffs well in excess of the tariff rates that are certified in its Schedule of Concessions, the European Union violated Article II:1.

D. China's Claims Under Article I

44. Article I:1 of the GATT 1994 prohibits discriminatory measures in connection with importation that confer an "advantage, favour, privilege or immunity" to products from certain countries and not to like products from other countries.

45. The preparatory work of Article XXVIII of the GATT supports the view that Article I of the GATT 1994 is applicable to any action taken and outcome resulting from modification of concessions under Article XXVIII of the GATT 1994. The Appellate Body in *EC − Bananas III (Article 21.5-Ecuador II)* also found that it is possible for a more favourable TRQ allocation to violate Article I of the GATT 1994.

46. The majority of the TRQs for the products at issue are allocated to only two WTO Members -- Brazil and Thailand. Imports of the products at issue from China are subject to the higher out-of-quota rates under the 2007 and 2012 Modification Packages − that is, they face vastly different and more adverse market access conditions in the EU market as compared to like products from Brazil and Thailand.

47. As such, the tariffs and TRQs negotiated by the European Union and implemented under the First and Second Modification Packages are *per s*e violations of Article I:1.

IV. Conclusion

48. The legal possibility of withdrawing tariff concessions is not at dispute here. However, such a withdrawal must occur in the strictest respect of the legal requirements so as to maintain the balance of concessions and the predictability and security that tariff commitments are supposed to achieve. Moreover, where TRQs are imposed and allocated, these TRQs should respect the share of imports that each WTO Member would have had in the absence of the TRQs based on its own comparative advantages. All China is seeking here is for the European Union to honor its obligations under the WTO.

ANNEX B-2

SECOND EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. Introduction

1. In this Second Executive Summary China focuses on the key issues in this dispute that were discussed during the Panel's second substantive meeting with the Parties and the responses to the Panel's questions.

II. China's Claims Under Article XXVIII

A. China's Claims Under Article XXVIII:1

1. The European Union's SPS Measures Are Discriminatory Quantitative Restrictions

2. China submits, with support from various panels and the Appellate Body, that prohibitions or restrictions on importation under Article XI:1 may be taken in the form of sanitary and phytosanitary ("SPS") measures. Even the European Union ("EU") itself admits that "[f]ailure to comply with such requirements may entail the imposition of import restrictions, including the prohibition of the imports concerned". China has clearly demonstrated that the EU's SPS measures had a material impact on imports of poultry meat products from China. They in fact resulted in an import ban. Even when special exceptions were given to (1) fresh poultry meat from certain production areas in China; and (2) poultry meat products subject to special heat treatment requirements, these only had the effect of narrowing the scope of the import bans (i.e. the limitation on production areas and the heat treatment requirements had a limiting effect on China's imports of the products in question into the EU). Thus, the volume of imports under each of the tariff lines in question would not fully reflect nor would it be truly representative of China's full import potential.

3. There are several instances where the impact of the EU's SPS measures during the relevant reference periods were different as between China and Thailand.. These instances clearly show that the effect of adopting the import bans is straightforward: products from certain countries may be imported while products from other countries may not. Therefore, a distinction − a differentiation − is made between poultry originating in one country and poultry originating in another. Whether such disparate treatment is justifiable is not relevant in assessing whether a measure constitutes a "discriminatory quantitative restriction" in the sense of *Ad* Note Article XXVIII:1. Article XXVIII and paragraphs 4 and 7 of *Ad* Note Article XXVIII:1 are concerned with the impact that such restrictions had on the imports from supplying World Trade Organization ("WTO") Members. That being the case, import bans, whether WTO-consistent or not, must be taken into account to determine whether the WTO Members affected should have had a principal or substantial supplying interest in the absence of the import bans.

4. Contrary to the EU's flawed assertions, China is not suggesting that the EU must abolish or replace its SPS regime, nor is it requesting compensation for measures that are presumably WTO consistent. First, China is not advocating for the *replacement* of WTO consistent measures in the form of import bans based on SPS measures. China and Chinese poultry meat producers have every reasonable expectation that their products would have access to the EU market upon meeting the EU's SPS requirements in accordance with the EU's commitments under its Schedule of Concessions. What is being replaced is the withdrawn concession. Before the re-binding exercise, China was entitled to un-limited access for its poultry meat at the bound rate set forth in the EU's Schedule of Concessions. And following the re-binding, the balance of concessions and future prospects must be maintained in order to have full effect for the time when compliance with the EU's SPS measures is achieved. Second, compensation under Article XXVIII is for the modification of concessions, it is not to address other WTO obligations. Just because an SPS measure is WTO compliant − which is not at issue here − does not mean that it can serve as a basis for the determination of compensatory tariff-rate quotas ("TRQs") in case of withdrawn tariff

bindings. In order to achieve the purpose of maintaining a general level of reciprocal and mutually advantageous concessions not less favourable than what existed in the period preceding the withdrawal of concessions pursuant to Article XXVIII:2, the determination of the total quantity of each TRQ and its allocation among supplying countries should be based on the future trade prospects of China's poultry meat exports to the EU taking into account the impact of import bans imposed by the EU.

2. The European Union Used Non-representative Periods To Determine Which WTO Members Held Principal Or Substantial Supplying Interests

5. The identification of the reference period for the determination of principal supplying interest ("PSI") or substantial supplying interest ("SSI") must be compatible with the purpose of a reference period, which is to identify the WTO Members having sufficiently large exports of the subject products (or who would have had such exports in the absence of discriminatory quantitative restrictions). In keeping with that purpose and in light of the rights and interests of other Members that will otherwise be excluded from negotiations or consultations, the period to be taken into account must be *representative* so as to permit an accurate determination of the Members with a PSI or SSI.

6. The adjustment of the reference period or at least an adjustment to the data for the reference period is necessary where the three-year period preceding the notification of the intention to withdraw or amend a concession was tainted by the existence of discriminatory quantitative restrictions and/or data for a more recent period has become available before the end of the negotiations and consultations. Brazil supports China's view, stating that "there is no reason to consider that adjustments cannot happen if the circumstances require. In many cases they may actually be necessary in light of the very purpose of Article XXVIII".

7. Furthermore, in the case of protracted negotiations (such as those in connection with the so-called "Second Modification Package"), China submits that at the very least, re-assessment should occur as soon as there is evidence of the developments materially affecting the determination of who holds a PSI or SSI, or affecting the determination of the future trade prospects. Both Brazil and Argentina lends support to China's position on re-assessment. By failing to account for import developments since the relaxation of its import ban, the reference period used by the European Union was not "representative".

8. In the present case, China highlights three facts. First, the three-year period mentioned in the EU's initial notification was affected by the import bans. Second, the negotiations and consultations by the EU were so protracted as to render the trade data for the period used by the EU "ancient history". Third, the statistical data show resumption of imports into the EU of China poultry meat after the partial relaxation of the import bans. China submits that, based on this data and the information generally available on China's production and competitiveness in the field of poultry meat, the EU should have reconsidered whether it was negotiating or consulting with all WTO Members holding a PSI or SSI. An inappropriate determination of Members with a PSI or an SSI would not yield negotiations consistent with Article XXVIII.

3. There Is No Bright Line Rule On Using A 10% Import Share Threshold To Determine SSI

9. While now stating that it did not "apply a rigid 10 percent test", the EU then strangely questions that "China has nowhere identified the specific characteristics of the poultry market that would make inappropriate the use of the customary 10% threshold". As provided in paragraph 7 of the *Ad* Note to Article XXVIII:1, China consistently argues against a bright line rule for determining who is or is not an SSI; there is nothing "customary" about the 10% threshold. China is of the opinion that one needs to take into account the circumstances of each case, such as the structure of the market, and special factors or discriminatory quantitative restrictions affecting the Member's import share.

10. The EU's insistence on the 10% threshold is not supported by its own trade statistics. For example, the EU imported zero volume of tariff heading 1602 39 21 from Thailand in the three years prior to the conclusion of the negotiations for the Second Modification Package in 2012,

namely 2009, 2010 and 2011. Moreover, total Thai imports over the period 1996-2015 accounted for less than 2% of the total imports by the EU28. Yet, the EU allocated 100% of the TRQ for tariff heading 1602 39 21 to Thailand based on the import statistics for the period 2006-2008.

11. In this case, the EU (a) failed to establish 10% as the appropriate threshold that reflected a "significant share" as regards the market concerned, and (b) applied a 10% test to actual import columes without taking into account the quantitative restrictions and special factors affecting China's market share in the EU.

B. China's Claims Under Article XXVIII:2

1. Article XXVIII:2 And Paragraph 6 Of The Understanding Address The Allocation Of Compensation In The Form Of TRQs

12. Article II of the GATT 1994 specifically requires Members to be bound by their schedule of concessions. Contrary to the EU's assertion, China submits that Article XXVIII does not leave a wide margin of discretion when allowing WTO Members to modify Article II concessions lest the fundamental goals of the WTO are undermined. Furthermore, TRQs are inherently more trade restrictive than unlimited tariff concessions. China notes that this is the reason why paragraph 6 of the Understanding provides that compensation must exceed the amount of trade affected. Otherwise, the compensation would not reflect future trade prospects.

13. The EU argues that Article XXVIII:2 and paragraph 6 of the Understanding do not address the allocation of TRQs among supplying countries. China is not suggesting that these provisions require Members to allocate compensation in the form of TRQs among supplying countries. However, where a Member chooses to allocate (or break down) the total compensation among supplying countries and records the shares of the compensation as part of its modification of concessions, as the EU did in this case, China contends that the sufficiency of the compensation under Article XXVIII:2 and paragraph 6 of the Understanding must be examined not only at the level of total compensation, but also at the level of the compensation received by each supplying country or group of countries. Brazil supports China's views, stating that "in negotiations under Article XXVIII, the provision of the total amount of compensation in the form of TRQs is intrinsically tied to the specific amount given to each participating Member".

2. Compensation Must Reflect Future Trade Prospects Exempt From The Impact Of Import Bans And Calculated Based On The Formula In Paragraph 6 Of The Understanding

14. To the EU, the wording of paragraph 6 of the Understanding, read with paragraph 6 of *Ad* Note Article XXVIII:1, means that the most recent three-year period preceding the notification of the intention to withdraw concessions should always be used as the reference period. China disagrees.

15. Paragraph 6 of *Ad* Note Article XXVIII:1 provides that compensation should be judged "in the light of the conditions of trade at the time of the proposed withdrawal or modification". The moment of the "proposed withdrawal or modification" is not the moment of the notification of the mere intention to withdraw or modify concessions. It is the moment at which the details of the withdrawal or modification are agreed immediately preceding their implementation. And the reference to "future" in paragraph 6 of the Understanding confirms the intention to make sure that the compensation is as close as possible to economic reality at the time of the implementation of the withdrawal of the concession.

16. Furthermore, for the general balance of concessions to be restored pursuant to Article XXVIII:2, the future trade prospects under paragraph 6 of the Understanding should take into account *the future trade prospects of all WTO Members exempt from the impact of import bans*. In other words, where warranted in light of the circumstances of a particular case, another period which is more representative should be used, or alternatively, the trade data during the most recent period should be duly adjusted. In fact, the EU itself has modified the reference period from that initially notified for two tariff headings covered by the First Modification Package.

17. The EU claims that compensation in the form of the global volume of the TRQs is at least equal to, but most often in excess of, the formula set out in paragraph 6 of the Understanding. However, a quick calculation by China shows that not only do the global volumes of several TRQs fall short of the requirements of paragraph 6 of the Understanding, the allocation to 'all others' is extremely small and falls short of what is required under paragraph 6 of the Understanding. Indeed, for some tariff lines, even if the periods selected by the EU are used as the basis for calculation, the allocation falls short as well. That said, certain Chinese poultry meat under the tariff lines in question could not be imported into the EU due to the import bans in place during the periods selected by the EU. The EU did not take these bans into account in determination of the global volume of the TRQs, nor in their allocation.

18. The EU further claims that allocation of unusable shares to China "would have reduced the size of the shares allocated to imports from other sources which do comply with the EU's SPS requirements and, consequently, limited the total volume of imports under the TRQs for as long as China remains unable to comply with the EU's SPS requirments". First, to be clear, the EU is not under an obligation to allocate its TRQs on a country-specific basis. However, having decided to do so, the EU was under an obligation pursuant to Article XXVIII to, among other things, ensure that the modified concessions 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". Assuming the SPS measures are in place and the EU allocates a TRQ to China, Chinese poultry products will not be imported into the EU, a situation similar to that prior to modification. If China subsequently complies with the SPS measures, Chinese products should be able to access the EU market, as it was able to under concessions prior to modification. As for imports from other sources that comply with the EU's SPS requirements, they would still have the same access, as the global volume of the TRQs would be adjusted accordingly to account for China's share.

III. China's Claims Under Article XIII

19. China submits that Article XIII imposes an *ongoing* obligation to ensure that the actual allocation of shares in the TRQs throughout their entire period of validity is not discriminatory. Not only did the EU act inconsistently with Article XIII in its disciminatory *initial* allocation of shares in the TRQs in the First and Second Modification Packages, the EU continues to act inconsistently with Article XIII because of the *continuous* application of this discriminatory allocation from one quota year to another without adjustment, notwithstanding subsequent trade developments. In the present dispute, China argues that (a) the allocated shares in the TRQs as applied by the EU (since 2007 and 2012, respectively) and going forward during their period of validity must be updated from time to time to reflect the share that each WTO Member could have had without the TRQs, and (b) such updating must be based on trade flows during a representative period preceding the continued application of the allocated shares. The EU should not rely on outdated trade data to allocate TRQs concerned among supplying Members.

A. China's Claims Under Article XIII:1

20. The EU partially concedes that Article XIII:1 applies to the allocation of TRQs "for aspects of the allocation of TRQs that are not covered by Article XIII:2 ... to the extent that its [Article XIII:1] application does not lead to results that would conflict with the outcome resulting from the application of Article XIII:2". The EU's new position is built upon the *EC-Banana III (Ecuador)* panel's statement that "[Article XIII:2(d)] may be regarded, to the extent that its practical application is inconsistent with [Article XIII:1], as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned". However, China notes that the panel in that dispute referred to substantial suppliers only and only to the extent that the practical application of Article XIII:2(d) is inconsistent with Article XIII:1. The panel was not (and certainly not China) suggesting that Article XIII:2(d) overrides Article XIII:1.

21. China submits that the "similarly restricted" provision in Article XIII:1 requires, *inter alia*, that:

(i) If all countries must be similarly restricted, then, all Members with an SSI must be similarly restricted. This means that the process for determining the TRQs should be the same for all WTO Members holding an SSI (i.e. negotiations must be held

with all Members holding an SSI; if negotiations are held with some and not with others, that means that all Members holding an SSI are not similarly restricted).

(ii) If a country-specific share is allocated to some Members with an SSI, a country-specific share must be allocated to all Members with an SSI. If not, these Members are not similarly restricted.

(iii) Where there is an allocation of the TRQs, not only the WTO Members with an SSI must be granted a share of the quota that is proportionate to the share they would have had absent the TRQs, but all other countries as well. In the absence thereof, all countries are not similarly restricted.

22. And, as mentioned above, these requirements must be complied with on an ongoing basis throughout the period of validity of the allocated shares in the TRQs.

23. In the present case, the EU failed to negotiate with or similarly allocate a country-specific share of the TRQs to China, which was a Member holding an SSI, unlike what it did with Brazil and Thailand.

24. China further notes that the EU omitted to take into account a very important statement by the panel in *EC – Bananas III (Ecuador)*. Specifically, the panel noted that in the case of an "others" category for all Members not having a substantial interest in supplying the product, the allocation must comport with the object and purpose of Article XIII, which includes Article XIII:1, to have a significant share of a tariff quota assigned to "others" such that the import market will evolve with the minimum amount of distortion and "[m]embers not having a substantial supplying interest will be able, if sufficiently competitive, to gain market share in the "others" category and possibly achieve "substantial supplying interest" status which, in turn, would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4". In the instant case, China argues, with support from Argentina, that when a very small TRQ share is allocated to "others" and the new out-of-quota tariff rates are much higher than the in-quota rate, every Member is not given "access and an opportunity of participation" in each TRQ similarly and the importation of the products concerned from all third countries is not similarly restricted under Article XIII:1.

B. China's Claims Under Article XIII:2

1. The TRQs Established By The European Union Violate The Chapeau of Article XIII:2 And Lead To A Permanent Allocation of TRQ Shares

25. The EU argues that its TRQ allocation was conducted under Article XIII:2(d), which provides a safe harbour such that the allocation was not required to be based on a different reference period for all others, nor make adjustments for special factors. It states that this safe harbour extends to the allocation or non-allocation of TRQs to all other Members.

26. However, the Appellate Body has clarified that Article XIII:2(d) provides a safe harbour "as far as substantial suppliers are concerned". It does not exempt the importing Member from its obligations, such as those under the chapeau of Article XIII:2 as regards non-substantial suppliers. China argues that the chapeau of Article XIII:2 of the GATT 1994 sets forth a general non-discriminatory obligation with respect to the allocation of TRQs among Members, separate from the provisions of Article XIII:2(a) to (d) and thus requires a separate analysis.

27. China addresses the EU's violation of Article XIII:2(d) when it failed to negotiate with China as a WTO Member with an SSI in supplying the poultry meat concerned, as it did with Brazil and Thailand, in the section below. But even if assuming that China is not a WTO Member with an SSI, the EU would still need to comply with the requirements of the chapeau of Article XIII:2 in setting the TRQs for all other countries (i.e. the TRQs for all others should reflect the shares of imports that these other Members could have been expected to obtain in the absence of the TRQs). And that share will not be achieved if the allocation does not take into account the special factors that affect the share of imports of the other WTO Members. The mere use of objective and pertinent criteria is not enough. The special factors that affect imports of the other WTO Members must be taken into account and must be reflected in the allocation of the TRQs. Moreover, to measure the

shares Members might be expected to obtain in the absence of allocation, the trade during the most recent period preceding the *allocation* provides an objective basis, provided that trade is representative and there are no special factors. This is confirmed by the findings of the WTO panel in *US – Line Pipe* and the GATT panel in *EEC – Chilean Apples*. Trade data for an outdated period, even if it is "objective" and somehow "pertinent", cannot be representative of the shares that various Members could be expected to obtain in the absence of the TRQs or in the absence of the allocation of the TRQs among supplying Members.

28. The EU states there is no freezing of trade flows, even if a small or no share is allocated to "Other" suppliers, when a TRQ is allocated pursuant to Article XIII:2; after all says the EU, these "Other" suppliers can always import outside the TRQ. As Argentina points out, in this present dispute, the "Other" suppliers wishing to increase their market share would face high tariff rates, while domestic suppliers and Members with country-specific TRQs enjoy a competitive advantage simply due to the existence of the TRQs. Even if there are still imports at the higher out-of-quota tariff rate, the much higher tariff rate must have a stifling effect; normal trade flows are thus distorted, leading to a permanent allocation of TRQ shares. Such a result would not be consistent with the reasoning of the panel in *EC – Bananas III*, which states that an "all others" share of TRQ is required in all circumstances to allow new entrants to compete in the market and to avoid the long-term freezing of market shares.

2. The European Union Acted Inconsistently With Article XIII:2(d) By Denying SSI Status To China

29. China now turns to the EU's reiteration of its argument that: (a) the terms "substantial supplying interests" in Article XIII and Article XXVIII have the same meaning; (b) the import bans are not "special factors"; and (c) the evidence available at the time that the EU notified its intention to negotiate the modification of the concession did not demonstrate China's SSI status.

30. As to the EU's first argument, China has previously noted the differences between the notion of SSI in Article XIII and that in Article XXVIII. One key difference is the reference period. Assuming that there is no "discriminatory quantitative restrictions" nor "special factors", the reference period to be used under Article XXVIII:1 should be the most recent representative period preceding the initiation of a modification negotiation or preceding the conclusion of the negotiations if they are prolonged, while the reference period to be used under Article XIII shall be the most recent representative period preceding the allocation of the TRQs for any given period. To put it another way, allocation under Article XXVIII if undertaken is done once during a modification of concessions; while allocation under Article XIII needs to be re-examined as warranted in order to ensure that the allocation for a given quota year is based on the most recent trade data with special factors being taken into account. Second, China contends, and Brazil, Canada and the United States agree, that the concept of "special factors" is broader than that of "discriminatory quantitative restrictions". Paragraph 7 of *Ad* Note Article XXVIII:1 provides that the expression "substantial interest" is "intended to be construed to cover only those contracting parties which have, or in the absence of discriminatory quantitative restrictions affecting their exports could reasonable by expected to have, a significant share in the market of the contracting party seeking to modify or withdraw the concession". On the other hand, Article XIII:2 does not refer to "discriminatory quantitative restrictions", but to "special factors" that must be taken into account for the determination of the WTO Members holding a substantial interest as well as for the allocation of the shares in the tariff rate quotas. In this dispute, the import bans that affected Chinese poultry meat were both discriminatory quantitative restrictions and special factors that should be taken into account in affording to China its supplier status under Article XXVIII and under Article XIII:2. However, if ever the import bans were not considered to be discriminatory quantitative restrictions, they should at least be considered as special factors and be taken into account both for the determination of the supplier status and the allocation of TRQ shares under Article XIII:2.

31. Regarding its second argument that the import bans are not special factors, the EU maintains that the ability of a WTO Member to comply with a set of SPS requirements is an element of competition and, where this led to the imposition of an import ban, it would allow the exclusion of this WTO Member from the TRQs. The EU is wrong. First, compliance with sanitary requirements is not a factor of competition; the EU's views to the contrary are unfounded and without support in WTO law and practice. Second, the EU's views are based on the unfounded assumption that a WTO Member may never be able to comply with the sanitary requirements.

Third, the facts in this case demonstrate that China could satisfy the sanitary requirements and that its exports of poultry meat to the EU increased significantly after the lifting of the import ban. This demonstrates that Chinese poultry meat has comparative advantages that are precisely the conditions of competition that must be taken into account when determining and allocating the TRQs. Thus, in this dispute, by failing to account for the import bans (special factors), the EU has failed to properly identify China as a Member having substantial supplying interests.

32. Without repeating China's rebuttal of the EU's third argument, China stresses two key points:

(i) The reference period to determine SSI status under XIII is not a period preceding the EU's notification of its intention to modify its concessions. Therefore, whether sufficient evidence is available at the time of the EU's notification is irrelevant.

(ii) China has already presented evidence supporting its SSI status, such as its production capacity, in view of the existing import bans which are "special factors". Instead, it is the EU that has failed to disclose the historical trade data, the base period, the basis for the allocating the shares and the presence or absence of special factors. Without such data, WTO Members will be in the dark and will not be in a position to determine SSI and request the Member allocating the TRQs among supplying countries to enter into consultation regarding "the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved" pursuant to Article XIII:4. Argentina agrees with China on the disclosure requirements. Argentina points out that the information submitted by the EU in G/SECRET/25/Add.1 and G/SECRET/32/Add.1 did not explain the procedure used to determine the TRQs, or whether a single methodology was used for the TRQ distribution among the supplying Members, or the calculation of the growth rate under paragraph 6 of the Understanding, or the methodology used to determine the representative reference period and whether they have taken into account special factors.

IV. China's Claims Under Article II

33. Certification is the act, at the international level, that modifies the terms of a Member's Schedule, which is an integral part of the multilateral WTO Agreements. Even though there are instances where a modification entered into force before a certification was officially issued, Members do submit requests for a certification prior to the planned implementation date, and leave time for the certification process. In any event, China submits that a practice cannot supersede the law.

34. The applicant Member must certify to the WTO's Director General the proposed changes to its concessions pursuant to paragraph 1 of the Procedures for Modification and Rectification of Schedules of Tariff Concessions, within three months after the action has been completed. This paragraph is couched in mandatory terms but this three-month period has in fact not been respected by the EU either for the First or for the Second Modification Package. The EU itself concedes that very significant delays have occurred and the fact is that the changes in the EU's bound tariffs as a result of the First and Second Modification Packages have not been the subject of certifications and thus do not have formal legal effect. Thus, in applying the out-of-quota tariff rates for poultry meat originating in China, which are substantially higher than the bound rates currently still provided for in the EU's Schedule of Concessions, the EU is in violation of Article II.

ANNEX B-3

FIRST EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. CLAIMS UNDER ARTICLE XXVIII:1 OF THE GATT 1994

1.1. CHINA DID NOT CLAIM ANY PSI IN THE FIRST MODIFICATION PACKAGE AND FAILED TO MAKE A TIMELY CLAIM OF INTEREST IN RESPECT OF THE SECOND MODIFICATION PACKAGE

1. The European Union was not required to take into account either China's claims of PSI in the First package of modifications, which China has put forward for the first time in these panel proceedings, or China's claims of interest in the Second package of modifications, which were not raised by China until nearly three years after the deadline provided for in the Procedures, when agreements had already been negotiated with both Brazil and Thailand.

2. The Procedures for Negotiations under Article XXVIII provide that "claims of interest should be made within ninety days following the circulation of the import statistics". This provision underlines the importance of submitting the claims of interest in a timely manner. Members are not free to submit a claim of interest at any point in time during the Article XXVIII procedures. It would be manifestly unreasonable to force a Member seeking to modify a concession to take into account late claims of interest where doing so would cause undue delay in ongoing negotiations or, as in the present case, require the re-opening of negotiations already concluded.

1.2. THE SPS MEASURES CITED BY CHINA ARE NEITHER "QUANTITATIVE RESTRICTIONS" NOR "DISCRIMINATORY"

3. The EU's sanitary regime for animal products (including poultry products) is based on the fundamental principle that imported products must comply with the same or equivalent sanitary requirements as the EU domestic products. The SPS measures at issue are part of a comprehensive system of regulations put in place by the EU authorities in order to enforce at the border those sanitary requirements with regard to imported products. Therefore, in accordance with the Note *Ad* Article III, those measures are not "quantitative restrictions" within the meaning of either Article XI:1 or, consequently, of the Note *Ad* Article XXVIII:1.

4. Furthermore, the SPS measures at issue are not "discriminatory". The principle that imported products must comply with the same or equivalent sanitary requirements as the domestic products applies equally to all imports of poultry products, irrespective of the country of origin. Whether or not imports from a given country are restricted will depend on whether they comply with those sanitary requirements. In turn, this will depend on the sanitary situation in each country of origin. Where the sanitary situation in any two countries is the same or equivalent the European Union will treat imports from those two countries in the same manner.

5. China contends that the term "discriminatory" covers any situation "where imports from a WTO Member are treated differently from other WTO Members, irrespective of the ground of such disparate treatment". The European Union disagrees: treating differently two different situations is not discriminatory. Quite to the contrary, it would be discriminatory to treat in identical manner the imports from a Member which comply with the EU sanitary requirements and the imports from another Member which do not comply with the same or equivalent requirements.

6. The Appellate Body Report in *Canada – Wheat* does not support China's position. The findings of the Appellate Body in *EC – Tariff Preferences* confirm that, contrary to China's assertions, when used in the WTO Agreement, the term "non-discriminatory" can be interpreted as covering different treatment of Members which are in different situations. Further confirmation of this is provided by the respective preambles to the WTO Agreement and the GATT, which both cite among the objects and purposes of those agreements "the elimination of *discriminatory* treatment in international commerce". Clearly, in this context the term "discriminatory" cannot be read as referring to any situation "where imports from a WTO Member are treated differently from other WTO Members, irrespective of the ground of such disparate treatment", as it is beyond doubt that the WTO Agreement does not seek to "eliminate" all such differences of treatment.

7. It is necessary, therefore, to examine the term "discriminatory" in the context of Article XXVIII:1 and having regard to the objective pursued by that provision, as well as the

objects and purposes of the GATT and the WTO Agreement. Article XXVIII:1 seeks to facilitate the negotiation of the modification of tariff concessions, so as to limit the uncertainty which is inherent in such negotiations. This is achieved by providing that those modifications are to be negotiated, or consulted, with a few Members having a special interest, rather than with the entire WTO membership; and by laying down a straightforward, easy-to-apply rule for identifying those Members, namely the share of imports over a previous representative period. This objective, in turn, contributes to one of the objects and purposes of both the GATT and the WTO Agreement: to increase the predictability and security of tariff concessions. The overbroad reading of the term "discriminatory" invoked by China would undermine the described objective. Sanitary requirements, such as those at issue in this dispute, and many other legitimate regulatory requirements often have the effect, in law or in fact, of restricting imports from certain countries which fail to comply with such requirements (for example, by reason of deficiencies in their own regulatory systems). Making adjustments to the import shares for all such restrictions would be an extremely complex task involving the use of highly speculative estimates. The results would be necessarily inaccurate and likely to be a source of disputes. Furthermore, since those regulatory requirements are often a necessary and permanent feature of the markets for the products concerned, the import shares estimated by making allowance for those requirements would fail to capture the genuine relative importance of each Member's supplying interest. As a result, China's interpretation could have the anomalous result that negotiations would have to be undertaken with Members whose supplying interest is largely theoretical, at least in the short or medium term, instead of other Members with a far more immediate supplying interest. This would be detrimental to all WTO Members since a Member with a genuine supplying interest is more likely to commit the necessary efforts to ensure adequate compensation for the benefit of all WTO Members.

8. China's interpretation of the term " discriminatory" would have required the European Union to make allowance not only for the specific SPS measures applied to China, but also for the SPS measures applied to many other WTO Members and, more generally, for the entire sanitary regime applied to imports of poultry products. Indeed, that regime rests on the fundamental principle that the SPS measures applied to the imports from any given country must address the specific sanitary situation in that country, a principle which China regards as being inherently "discriminatory". Therefore, on China's interpretation of the term "discriminatory", the European Union would have been required to estimate what would have been the import shares of all potential suppliers of poultry products in the absence of the EU's sanitary regime for imports of those products. In practice, that estimate would have been extremely complicated and grossly inaccurate.

9. Even more important, that estimate would not reflect the import shares which each Member could have reasonably expected to achieve either during the period of reference or in the foreseeable future. China does not contest that, even if the EU's sanitary regime for imports of poultry products was "discriminatory" (as contended by China), it would be compatible with the WTO Agreement. In view of this, there is no reason to expect that the European Union will replace that regime with another regime which China would regard as "non-discriminatory" (i.e. a regime where imports from all sources are treated in identical way, irrespective of the sanitary situation in each country of origin). Since there can be no reasonable expectation that the European Union will replace the current sanitary regime with a "non-discriminatory" regime (according to China's interpretation), making allowance for the existing EU's sanitary regime would have gone against the rationale behind the requirement in Note *Ad* Article XXVIII:1 to make allowance for the "discriminatory quantitative restrictions". This confirms that China's reading of the term "discriminatory" cannot be correct in the context of that provision.

1.3. In the alternative, if the European Union had been required to make allowance for the SPS measures, the evidence available at the time when the EU notified its intention to negotiate the modification of the concessions did not warrant China's present claims of PSI or SSI

10. Most of the evidence relied upon by China was not provided to the European Union in support of China's claims of interest pursuant to paragraph 4 of the Procedures for Negotiations under Article XXVIII. China cannot rely on evidence that was not made available to the European Union in a timely manner in the course of the Article XXVIII procedures, in particular given that most of such evidence does not concern the EU market.

11. Paragraph 4 of the Note *Ad* Article XXVIII:1 makes it clear that the existence of a PSI must be determined on the basis of the import share which a Member had, or would have had in the

absence of discriminatory quantitative restrictions "over a reasonable period of time *prior to the negotiations*". Moreover, the determination of a PSI must, by definition, be made before the opening of the negotiations. Accordingly, in assessing whether the European Union fulfilled its obligations under Article XXVIII:1, only the evidence that was available to the European Union prior to the opening of the negotiations can be taken into consideration. Therefore, the import data for the period 2009-2015 provided by China is not pertinent for assessing this claim and must be disregarded.

12. Having regard to the above considerations, the European Union submits that the import data concerning the period immediately preceding the entry into force of Decision 2002/69/EC, of 30 January 2002, is both the most pertinent and the most reliable source of evidence in order to estimate the import share that China would have had in the absence of the SPS measures..

13. China has argued that prior to the entry into force of Decision 2002/69/EC in 2002, its imports into the European Union were "growing". However, during the years preceding 2002 China's import shares for all the tariff lines concerned were negligible. The fact that China was the second largest world producer of poultry meat products during the two reference periods is only to be expected given the very large size of China's own domestic market. Similarly, China's share of the world exports of poultry meat is not a reliable indicator of its export prospects to the EU market. China's import share may vary considerably from one country market to another. Moreover, China's share of world exports varies considerably among the various categories of poultry products concerned by this dispute. In any event, the European Union observes that China's share of world export trade fell from 5 % in 2003 to just 3 % in 2009. These percentages are well below the 10 % benchmark for recognising a SSI. China provides data on China's share of world imports only for tariff items 1062 32 and 1602 39. This suggests that the shares for the remaining tariff items covered by this dispute are not regarded as "significant" even by China. As regards item 1602 39, according to China's own data, China's share was on average 5.16 % during the first reference period and 5.71 % during the second reference period. Both percentages are well below the 10 % benchmark. China's share of world imports was above 10 % during both reference periods only for item 1602 32 (on average, 19.87 % during the first reference period; and 18.20 % during the second reference period). Nevertheless, these are global figures. Given these broad variations among geographically close countries where China is a major supplier, China's share of global imports of 1602 32 cannot be reliably used to estimate what would have been China's share of the EU imports of the item 1602 32. The data on China's share of imports in a handful of selected import country markets where China holds a "major share" is manifestly unrepresentative and unreliable. China has not explained why the markets of the selected countries are analogous to the EU market and can be considered as sufficiently representative.

1.4. As regards the Second modification package, the European Union was not required to re-determine the Members having a PSI or SSI on the basis of import data subsequent to the initial determination

14. Neither Article XXVIII:1 nor the Procedures provide for a re-determination of the Members having a PSI or SSI after the initiation of the negotiations. China suggests that the obligation to make such a re-determination would arise when negotiations are not completed within the time limits provided for in Article XXVIII:1. However, those time limits do not apply to 'reserved' negotiations pursuant to Article XXVIII:5. The European Union is not aware of any single instance where the Member seeking to modify a concession has, during the course of the negotiations, proceeded to re-determine the Member having a PSI on the basis of more recent import data and resumed the negotiations with a different Member.

15. Article XXVIII:1 seeks to facilitate the negotiation of modification of tariff concessions with a view to putting an end as quickly as possible to the uncertainty created by such negotiations. Reading into Article XXVIII:1 an obligation to "re-assess" on a continuous basis the reference period on the basis of the most recent import data at each point in time during the negotiations and to re-determine as many times as necessary the Members having a PSI or a SSI would undermine that objective.

2. CLAIMS UNDER ARTICLE XXVIII:2 OF THE GATT 1994

2.1. THE UNDERSTANDING DO NOT ADDRESS THE ALLOCATION OF TRQS AMONG SUPPLYING COUNTRIES

16. The objections raised by China as part of its claims under Article XXVIII:2 relate to the country allocation of the TRQs, rather than the total amount of compensation provided by the European Union in the form of TRQs. Since, Article XXVIII:2 and paragraph 6 of the Understanding do not address the allocation of TRQs, the Panel should reject the claims brought by China under those two provisions.

17. China's position has no basis on the wording of either Article XXVIII:2 or paragraph 6 of the Understanding. China contends that paragraph 6 of the Understanding is equally applicable in respect of each of the country-specific shares of an allocated TRQ because that provision refers to "a tariff rate quota" in the singular. Yet a "tariff quota" is not the same as a "share" of an allocated tariff quota. Moreover, reading additional rules on the allocation of TRQs into the provisions of Article XXVIII:2 and paragraph 6 of the Understanding would result in the application of two different and potentially conflicting sets of requirements.

2.2. THE AMOUNT OF COMPENSATION PROVIDED BY THE EUROPEAN UNION IN THE FORM OF TRQS IS FULLY CONSISTENT WITH ARTICLE XXVIII:2, READ IN CONJUNCTION WITH PARAGRAPH 6 OF THE UNDERSTANDING

18. The amount of trade covered by each of the three TRQs included in the First modification package equals or exceeds the greatest of the amounts that would result from applying each of the three formulae set out in paragraph 6 of the Understanding. Likewise, the amount of trade covered by each of the TRQs included in the Second modification package exceeds largely the greatest of the amounts that would result from applying each of the three formulae included in paragraph 6 of the Understanding.

19. The European Union was not required to use import data for the period following the initiation of the negotiations, including data for the period 2009-2011. Paragraph 6 of the Note *Ad* Article XVIII:1 makes it clear that the adequacy of compensation must be judged in the light of the conditions prevailing at the moment where the modification of the schedule is proposed, rather than at the time where the modification is eventually agreed. In view of this, the terms of paragraph 6 of the Understanding terms must be read as referring to the most recent year or three-year period preceding the moment where the Member concerned formally initiates the modification process. The guidelines set out in paragraph 6 of the Understanding seek to facilitate the negotiations by providing a benchmark that the negotiators can use as a "basis" for the calculation of compensation. In order to achieve that purpose, the benchmark must be known in advance of the negotiations and fixed. The use of import data pre-dating the initiation of the negotiations as a benchmark for negotiating the amount of compensation offers certainty and predictability to both negotiating sides and is not inherently biased in favour of either of them. Rather, the opposite is true: the uncertainty created by the opening of negotiations can have a chilling effect on imports. In contrast, the use of a 'moving' benchmark based on the most recent post-initiation data available at any point in the course of the negotiations would create an incentive for the parties to delay the conclusion of negotiations while waiting for more favourable trade data to emerge.

3. CLAIMS UNDER ARTICLE XIII OF THE GATT 1994

3.1. ARTICLE XIII:1 DEALS NEITHER WITH THE ALLOCATION OF SHARES WITHIN A TRQ NOR WITH LEVEL OF ACCESS TO BE GRANTED TO EACH MEMBER

20. Article XIII:1 establishes a principle of non-discriminatory access to, and participation in, a TRQ. It requires that a TRQ is applied by a Member on a product-wide basis without discrimination as to the origin of the product. On the other hand, it deals neither with the allocation of shares within a TRQ nor with the level of access to be granted to that each Member.

21. The TRQs at issue in this dispute are defined only by reference to the tariff line and there is manifestly no discrimination between products based on the origin. Hence, imports of every Member are given access and an opportunity of participation in each TRQ within the meaning of Article XIII:1.

22. The access to the TRQs and their allocation to different suppliers are two conceptually distinct questions. The share allocated to each Member within each TRQ results from the application of the rules contained in Article XIII:2. Since, Article XIII:2 is *lex specialis* with respect to Article XIII:1, the arguments of China concerning the allocation of the TRQ are to be examined in the light of that provision.

3.2. THE EU WAS REQUIRED NEITHER TO BASE THE ALLOCATION OF THE TRQS ON A DIFFERENT REFERENCE PERIOD NOR TO MAKE ADJUSTMENTS FOR SPECIAL FACTORS

23. The European Union agreed with the substantial suppliers (i.e. Brazil and/or Thailand) the method for the allocation of the TRQs. This allocation was based on the share of EU imports held by Brazil and/or Thailand and "all others" over the same period used to calculate the total amount of each individual TRQ.

24. It is manifest that the European Union followed the first allocation method set out in Article XIII:2(d), which provides a "safe harbour" to the Member applying the TRQ. In turn, the European Union was not required to comply with the requirements of the second allocation method provided for by Article XIII:2(d), including the use of a "representative period" or making adjustment for "special factors".

25. By providing that a TRQ can be allocated by agreement with the substantial suppliers, Article XIII:2(d) admits implicitly that the Member allocating the TRQ and its negotiating partners have a certain margin of discretion in choosing the allocation key. Panels should not interfere with the discretion accorded to the negotiating Members under Article XIII:2, notably in a case as the present one where the method selected by the European Union and its partners is based on objective factors (i.e. import shares over a past reference period), it is not inherently biased in favour of any supplier, it is in line with past practice and, furthermore, it reflects the method used for calculating the total amount of the TRQs, which in turn is based on paragraph 6 of the Understanding.

26. In summary, even though the European Union negotiated only with substantial suppliers, as explicitly provided for by Article XIII:2(d)), the resulting agreements treat substantial suppliers and non-substantial suppliers in the same way by applying an impartial allocation method based on objective factors.

27. Moreover, neither Article XIII nor the WTO jurisprudence concerning that Article imposes a rule whereby a Member allocating a TRQ must always set aside a minimum share for Members that are not substantial suppliers, regardless of the level of imports from those suppliers in the past.

28. Finally, the SPS sanitary measures mentioned by China are not special factors as their objective is to ensure equal treatment between domestic and foreign suppliers and among foreign suppliers, from the point of view of the EU sanitary requirements. Moreover, the willingness and ability of one country to produce poultry products in compliance with a given set of SPS requirements at any point in time is part of the elements that contribute to determine the comparative advantage of that country in the production and export of poultry products. Therefore, no Member should be required to allocate a TRQ by making abstraction of the sanitary situation prevalent in any other country over the period used for the allocation of the TRQ, because that would not describe the real supplying interest of that country and ultimately it would lead to highly speculative results, to the detriment of those suppliers that complied with those sanitary requirements over the same period.

3.3. THE CHAPEAU OF ARTICLE XIII:(2) DOES NOT REQUIRE THE EUROPEAN UNION TO ALLOCATE A SHARE FOR "ALL OTHER" COUNTRIES IN EACH TRQ AT LEVELS THAT ALLOW THEM TO ACHIEVE AN SSI

29. The European Union submits that this is a new legal claim developed for the first time in China's first written submission, which was neither mentioned nor implied in China's Panel request. It is therefore a new claim that falls outside the scope of the Panel request and thus also outside the terms of reference of the Panel pursuant to Article 7(1) of the DSU.

30. In any event, the EU submits that neither Article XIII nor the WTO jurisprudence concerning that Article imposes a rule whereby a Member allocating a TRQ must always set aside a minimum

share for Members that are not substantial suppliers, regardless of the level of imports from those suppliers in the past, let alone a share allowing suppliers going forward to claim a substantial interest.

31. The Appellate Body Report in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* does not support that claim. In any event that Report contains some *obiter dicta* concerning Article XIII:2 and Article XIII:4, which were made by the Appellate Body *ad abundantiam*. As a consequence the Panel is not legally obliged to follow those *obiter dicta*.

32. Finally, China's claim cannot be justified by the objective to avoid a freezing the TRQ allocation. Indeed, China' idea would not prevent a freezing of the TRQ allocation, but just postponing that effect. Moreover, China's reasoning does not take into account that TRQs do not prevent imports outside the quota and indeed China has been able to export to the EU market also outside the TRQs.

3.4. THE EUROPEAN UNION DID NOT VIOLATE THE CHAPEAU OF ARTICLE XIII:2 AND ARTICLE XIII:4 BY NOT EXPLICITLY IDENTIFYING THE DATA THAT IT TOOK INTO ACCOUNT TO DETERMINE THE TRQS

33. China's first written submission develops these two legal claims for the first time. They are neither mentioned, nor implied in China's Panel request. They are therefore new claims that fall outside of the scope of the Panel request and thus also outside the terms of reference of the Panel pursuant to Article 7(1) of the DSU.

34. In any event, these claims are groundless, because nothing in Article XIII:2 or in Article XIII:4 refers, even implicitly, to an obligation to disclose proactively the trade data on the basis of which the allocation is done (or has been done).

35. Moreover, the EU considers that such an obligation is not implicit in Article XIII:4 as any Member can assess for itself if it holds a substantial supplying interest in exporting a given product to another Member, on the basis of available export statistics or during consultations with the Member imposing the TRQ. In any event China argues that it had a substantial supplying interest in supplying the products concerned for the purpose of Article XIII:4, and not that it could not appreciate whether or not it had such interest.

36. Finally, the disclosure invoked by China is not foreseen in Article XIII:3, which sets out the disclosure obligations that a Member applying a restriction should respect.

3.5. THE EUROPEAN UNION DID NOT VIOLATE ARTICLE XIII:2(D) OF THE GATT 1994 BY DENYING SSI STATUS TO CHINA

37. There is no reason to interpret the notion of SSI in a different way in Article XXVIII and Article XIII. That notion is only defined in the context of Article XXVIII by Ad Article XXVIII(1), paragraph 7, and the negotiation of a TRQ pursuant to Article XXVIII and the subsequent allocation of the shares within that TRQ in accordance with Article XIII, are closely related issues. In the present case, moreover, the Article XXVIII negotiations on the opening of the TRQs and the negotiations on the allocation of the TRQs took place concomitantly. It would be both illogical and unpractical to have negotiations under Article XXVIII with some Members considered to have a substantial supplying interest in respect of the overall amount of the TRQ and, in parallel, to hold negotiations with other Members considered to have a different substantial supplier interest in respect of the allocation of the same TRQ in compliance with Article XIII:2(d).

38. Second, China has not demonstrated that the specific context or object/purpose of each of those two Articles requires giving to the terms "substantial supplying interest" a different meaning in each of them.

39. Third, WTO jurisprudence confirms that it is reasonable to give to the notion of SSI the same meaning in Article XXVIII and Article XIII.

40. Therefore, since China did not have a substantial supplying interest in the tariff items covered by the TRQs at issue in the present case under Article XXVIII, the European Union

complied with Article XIII:2(d), first sentence by negotiating and agreeing the allocation of the TRQ with all substantial suppliers (i.e. Brazil and Thailand).

3.6. THE EUROPEAN UNION DID NOT VIOLATE ARTICLE XIII:(4) BY REFUSING TO ENTER INTO MEANINGFUL CONSULTATIONS WITH CHINA

41. China and the EU held consultations at the request of China on 19 May 2014, which explicitly invoked Article XIII:4. The EU clarified that it was accepting to hold the consultations without prejudice to its interpretation of Article XIII.

42. During the consultations, it emerged that the EU was not convinced that Article XIII:4 applied in the present case. Nevertheless, the European Union agreed to look into China's arguments in that respect and showed its openness to look at additional information that China had undertaken to send following the 19 May meeting, but then did not send. During the 19 May meeting, China requested the EU to adjust the shares allocated to other partners, specifically in relation to two tariff lines based on a different reference period, and in the light of special factors (the SPS measures).

43. China's assertion that the European Union refused to enter into consultations under Article XIII:4 is, therefore, unfounded as a matter of facts.

3.7. CLAIMS UNDER ARTICLE II:1 OF THE GATT 1994

44. The certification of the changes to the schedule has the sole purpose of formally incorporating into a Member's schedule the modifications made in accordance with Article XXVIII or other relevant provisions, but it is not a prerequisite for implementing such changes. This is made clear by the Procedures for Negotiations under Article XXVIII, which state that:

> 7. Contracting parties will be free to give effect to the changes agreed upon in the negotiations as from the first day of the period referred to in Article XXVIII:1, or, in the case of negotiations under paragraph 4 or 5 of Article XXVIII, as from the date on which the conclusion of all the negotiations have been notified as set out in paragraph 6 above. A notification shall be submitted to the secretariat, for circulation to contracting parties, of the date on which these changes will come into force.

45. The European Union notified the conclusion of the negotiations in accordance with paragraph 6 of the Procedures on Negotiations under Article XXVIII on 27 May 2009, as regards the First modification package, and on 20 December 2012, as regards the Second modification package. Hence, in accordance with paragraph 7 of the same Procedures, the European Union was free to give effect to the agreed changes as of the date of the relevant notification. Therefore, by implementing those changes before the certification of the changes to its schedule, the European Union has not acted in violation of its tariff bindings pursuant to Article II:1 of the GATT 1994.

3.8. CLAIMS UNDER ARTICLE I:1 OF THE GATT 1994

46. According to the Appellate Body Report in *EC – Bananas III (Article 21.5 – Ecuador II) /* EC – Bananas III (Article 21.5 – US), Article I:1 is violated when a Member imposes differential in-quota duties on imports of like products from different supplier countries within a TRQ. In the present case, it is plain that the in-quotas duties are the same for all suppliers. It is also uncontested that the TRQs are defined on a product-wide basis and taking into account only the custom classification of the products concerned.

47. It follows that China's claim is groundless.

4. CONCLUSION

48. For the reasons set out in this submission, the European Union requests the Panel to reject all the claims submitted by China.

ANNEX B-4

SECOND EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. CLAIMS UNDER ARTICLE XXVIII:1 OF THE GATT 1994

1.1. CHINA DID NOT CLAIM ANY PSI IN THE FIRST MODIFICATION PACKAGE AND FAILED TO MAKE A TIMELY CLAIM OF INTEREST IN RESPECT OF THE SECOND MODIFICATION PACKAGE

1. In response to a question from the Panel, most Third Parties have agreed that the Member seeking the modification of a concession is entitled to disregard claims of interest which have not been submitted in a timely manner and that the 90-day period mentioned in Paragraph 4 of the Procedures for Negotiations under Article XXVIII provides guidance for assessing whether a claim has been timely submitted. China itself concedes that it may be possible to depart from the 90-day time limit provided for in Paragraph 4 of the Procedures only with "due cause".

2. As regards the First modification package, China has confirmed that it never made a claim of PSI until the present proceedings. China has not invoked any circumstance in order to justify its failure to submit its claims of PSI within the 90-day time limit. As regards the Second modification package, none of circumstances cited by China may justify China's delay of more than three years in submitting the claims of interest.

1.2. THE EUROPEAN UNION WAS NOT REQUIRED TO MAKE ALLOWANCE FOR THE SPS MEASURES APPLIED TO CHINA, AS THEY ARE NEITHER QUANTITATIVE RESTRICTIONS NOR DISCRIMINATORY

3. China appears to agree that the European Union is not required to make allowance for measures that have the effect of limiting imports but are not "discriminatory quantitative restrictions" within the meaning of *Ad* Article XXVIII:1. China also appears to agree that the notion of "discriminatory quantitative restriction" must be interpreted in the light of Article XI of the GATT 1994 and, therefore, of the note *Ad* Article III of the GATT 1994. Nevertheless, China contends that the SPS measures which it has identified in this dispute are "discriminatory quantitative restrictions". China has failed to substantiate this allegation.

1.2.1. The SPS measures are not "quantitative restrictions"

4. China has not contested that the SPS measures at issue are applied in order to enforce at the border sanitary requirements which apply also to the domestic EU products. Instead, China limits itself to argue, in the abstract, that "different aspects" of a measure may fall under Article III or under Article XI of the GATT 1994. But China has not shown that, in the case at hand, the SPS measures which it has identified include any restrictive "aspect" without equivalent in the sanitary requirements applied to the EU's domestic products.

5. China misrepresents the panel's findings in *EC – Seal Products*. The measure at issue in that case prohibited the placing on the market of seal products. In the case of imports this prohibition was enforced at the border. The finding cited by China was not reached under Article XI of the GATT 1994, but instead under Article 2.2 of the TBT Agreement. Moreover, the panel did not find that the measure at issue was "a restriction on importation", but rather that it was "trade restrictive" within the meaning of Article 2.2 TBT.

6. The panel report in *US – Shrimp (Article 21.5)* does not support China's position. The United States did not argue in that case that the measure fell within the scope of Article III of the GATT 1994. Indeed, the import prohibition at issue in *US – Shrimp* had no domestic equivalent.

1.2.1.1 The SPS measures are not "discriminatory"

7. China has not alleged, let alone proven, that imports from other countries posing similar sanitary risks as the imports from China are not similarly restricted. Instead, China limits itself to argue that the term "discriminatory" covers any situation "where imports from a WTO Member are

treated differently from other WTO Members, irrespective of the ground of such disparate treatment".

8. In its first oral statement China has conceded that "whether a restriction is discriminatory must be determined based on the text as well as the object and purpose of the provision in which the word is used". Nevertheless, China goes on to argue that its reading of the term "discriminatory" is necessary in order to achieve the objective pursued by Article XXVIII, which China describes as "reinstating the general level of concessions that had existed before the increase of the bound rates".

9. The specific objects and purposes of Article XXVIII are not limited to the single objective mentioned by China. They may be described as follows:

1) encouraging Members to make tariff concessions by providing them with flexibility to withdraw or modify those concessions subsequently, if necessary;

2) ensuring that the modified or withdrawn concessions are replaced with equivalent concessions, so as to maintain the "general level of reciprocal and mutually advantageous concessions"; and

3) facilitating the negotiation of the modification or withdrawal of tariff concessions, so as to limit the uncertainty which is inherent in such negotiations.

10. The reading of the term "discriminatory" invoked by China would undermine the first and the third of the objects and purposes of Article XXVIII described above by rendering unduly complicated the negotiation of the modification of concessions. Sanitary requirements, such as those at issue in this dispute, and many other legitimate regulatory requirements often have the effect, in law or in fact, of restricting imports from certain countries which fail to comply with such requirements (for example, by reason of deficiencies in their own regulatory systems). Making adjustments to the import shares for all such restrictions would be an extremely complex task involving the use of highly speculative estimates.

11. In the present case, China's interpretation of the term " discriminatory" would have required the European Union to make allowance not only for the specific SPS measures applied to imports from China, but also for the SPS measures applied to many other WTO Members and, more generally, for the entire sanitary regime applied to imports of poultry products. Indeed, it must be emphasised that that regime (like the sanitary regimes applied by most, if not all, countries) rests on the fundamental principle that the SPS measures applied to the imports from any given country must address the specific sanitary risks posed by the imports from that country, a principle which China regards as being inherently "discriminatory". Therefore, on China's interpretation of the term "discriminatory", the European Union would have been required to estimate what would have been the import shares of all potential suppliers of poultry products in the absence of the EU's sanitary regime for imports of those products.

12. For example, if China's interpretation were upheld, the European Union would have had to make allowance also for *inter alia*:

- the restrictions applied pursuant to Regulation 798/2008and its predecessors, which lay down the list of countries from which imports of fresh poultry meat are authorized;
- the restrictions adopted by the Commission in order to address specific sanitary risks, such as the decisions restricting imports from China, Thailand and other countries on grounds of avian influenza; or
- the restrictions applied pursuant to Directive 96/23/EC.

13. Moreover, contrary to China's allegations, its reading of the term "discriminatory" is not required in order achieve the second objective described above i.e. the objective of maintaining the general level of concessions. To the contrary, China's interpretation would have the consequence that, in order to modify a concession, a Member could be required to provide compensation which is well in excess of the value of the modified concession. The value of any tariff concessions made by a Member is implicitly limited by the regulatory restrictions, such as

sanitary restrictions, which a Member is entitled to impose or maintain in accordance with the relevant provisions of the WTO Agreement. China has not argued that the SPS measures at issue are WTO inconsistent. Nor has China argued that those SPS would otherwise impair or nullify the concessions within the meaning of Article XXIII:1 of the GATT 1994. Since those SPS measures do not diminish the original value of the concessions granted by the European Union, there is no reason why the European Union should make allowance for such measures in order to maintain the general level of concessions.

14. Moreover, China's interpretation could have the anomalous result that negotiations would have to be undertaken with Members whose supplying interest is largely theoretical, instead of other Members with a far more immediate supplying interest. This would be detrimental to all WTO Members, since a Member with a genuine supplying interest is more likely to commit the necessary efforts to ensure adequate compensation for the benefit of all WTO Members.

1.2.2. In the alternative, if the European Union had been required to make allowance for the SPS measures, the evidence in China's first written submission does not substantiate China's claims of PSI or SSI

15. In its opening oral statement, China claimed that the issue before this Panel is whether the European Union should have taken into account the SPS measures identified by China and that it is irrelevant whether or not China has adduced evidence that it should have had a PSI or SSI in the absence of those measures. The European Union disagrees. The only obligation imposed by Article XXVIII is to negotiate or consult, respectively, with the Members holding a PSI or SSI. The note *Ad* Article XXVIII provides guidance in order to identify those Members, but it does not create self-standing process obligations. Therefore, if the Panel finds that China did not hold a PSI or SSI, there can be no violation of Article XXVIII. Moreover, China's position raises an issue of terms of reference as this claim was not included in the panel request.

1.2.2.1 China cannot rely on evidence that was not made available to the European Union during the Article XXVIII procedures

16. China concedes that it was required to submit evidence in support of its claims of PSI, but not in support of its claims of SSI. China invokes the fact that paragraph 2 of the Understanding on the Interpretation of Article XXVIII, unlike its paragraph 5, only refers to the provision of supporting evidence by the Members claiming a PSI. However, the provisions cited by China provide no basis for making that distinction.

17. China further contends that its claims of PSI in respect of the Second modification package were supported by evidence. However, as explained by the European Union, such evidence consisted exclusively of import statistics for the period 2010-2012. All the other evidence included in China's first written submission (including detailed data on China's share of world production and world trade and China's exports to third countries) was not provided in support of China's claims of PSI during the Article XXVIII procedures and, therefore, cannot be relied upon by China in this dispute.

1.2.2.2 China cannot rely on import data for a period subsequent to the opening of opening of the negotiations

18. China argues that, in view of the duration of the negotiations, the European Union was required to make a re-determination of the Members holding a PSI or SSI based on the import data available at that point in time. For the reasons explained below, the European Union submits that it was not required to make such a re-determination. At any rate, the European Union submits in the alternative that, even if it had been required to make a re-determination of the Members holding a PSI or SSI during the negotiations, the import data for the period following the conclusion of the negotiations (i.e. period 2012-2015) would still not be pertinent for assessing this claim.

19. China also invokes paragraph 3 of the Understanding in support of its position that it may be necessary to take into account import data for a period following the initiation of the negotiations. However, paragraph 3 of the Understanding does not provide for the use of such post-initiation

import data. The determination of whether trade in the affected product "has ceased" to benefit from preferences or "will do so" by the conclusion of the negotiations is to be done when the negotiations are opened. If that is the case, the trade to be taken into account is the trade "which has taken place" under the preferences prior to the initiation of the negotiations, rather than the subsequent non-preferential trade. Thus, far from supporting China's position, paragraph 3 of the Understanding comforts the EU's view that only import data pre-dating the initiation of the negotiations is to be taken into account.

1.2.2.3 The evidence in China's first written submission does not warrant China's claims of PSI or SSI

20. The European Union is providing as Exhibit EU − 40 a table showing China's import share in the top largest third-country import markets for the tariff items 0210 99, 1602 32 and 1602 39 (i.e. the same items for which China has provided import share data in its first written submission) during the period 2002-2012. The table evidences that China's share only exceeded 10 % in a few of the top largest import markets: 1 out of the 18 largest import markets in the case of 0210 99; 3 out 11 in the case of 1602 32; and 3 out of 14 in the case of 1602 39. This confirms that, in practice, China's import shares may vary considerably from one import market to another and, consequently, that neither global data nor data for a handful of unrepresentative import markets, such as the data included in China's first written submission, can be considered as a reliable indicator of China's future trade prospects in the EU market.

1.2.2.4 As regards the Second modification package, the European Union was not required to re-determine the Members having a PSI or SSI on the basis of import data subsequent to the initial determination

21. China contends that there is an obligation to make a re-determination when negotiations do not comply with the time limits provided for in Article XXVIII:1. But, as explained by the European Union, those time limits do not apply to so-called 'reserved' negotiations under Article XXVIII:5. The time limits provided for in Article XXVIII:1 are linked to the requirement to make the modifications on the first day of each three year period, the first of which began on 1 January 1958. The defining feature of the negotiations 'reserved' under Article XXVIII:5 is precisely that they are not subject to that requirement. Consequently, the time limits linked to that requirement are not applicable to 'reserved' negotiations.

22. In practice, and since the 1960s, most negotiations have been conducted as 'reserved' negotiations under Article XXVIII:5. The reason for this is that, in many cases, Article XXVIII:1 does not afford the necessary flexibility due to its tight deadlines. Applying the deadlines provided for in Article XXVIII:1 to 'reserved' negotiations under Article XXVIII:5 would eviscerate the latter provision of its *effet utile* and deprive Members of much needed flexibility in negotiating the modification of concessions. In turn, this would undermine the objective of encouraging Members to make further concessions. China insists that applying the time limits provided for in Article XXVIII:1 also to negotiations 'reserved' under Article XXVIII:5 is essential in order to ensure the objective of ending the negotiations as quickly as possible. Yet, on China's own interpretation, the Member seeking the modification of a concession would have to re-determine the Members having a PSI or SSI every six months. It is difficult to see how such a constant re-determination of the negotiating and consulting partners could have contributed to the objective of speeding up the negotiations.

2. CLAIMS UNDER ARTICLE XXVIII:2 OF THE GATT 1994

2.1. GATT ARTICLE XXVIII AND PARAGRAPH 6 OF THE UNDERSTANDING DO NOT ADDRESS THE ALLOCATION OF TRQS AMONG SUPPLYING COUNTRIES − PARAGRAPH 6 OF THE UNDERSTANDING DOES NOT APPLY AT THE LEVEL OF EACH OF THE COUNTRY SHARES OF A TRQ

23. Paragraph 6 only refers to "tariff quotas". It makes no reference whatsoever to the shares of a tariff quota allocated to certain supplying countries or groups of countries.

24. The European Union does agree with China that paragraph 6 provides guidelines for calculating the amount of compensation to be provided to all Members. But from this it does not follow that paragraph 6 must be applied separately at the level of each country share of an

allocated TRQ. Rather, the opposite is true. China further argues that, unless paragraph 6 is applied at the level of each share of the TRQ, it would "create discrimination". However, if the total amount of compensation resulting from the application of paragraph 6 of the Understanding is allocated consistently with Article XIII:2, such allocation cannot be considered as "discriminatory". Moreover, reading additional rules on the allocation of TRQs into the provisions of Article XXVIII:2 and paragraph 6 of the Understanding would result in the application of two different and potentially conflicting sets of requirements. TRQs negotiated pursuant to Article XXVIII would have to comply with the rules of Article XIII and, at the same time, with the additional requirements read by China into Article XXVIII:2 and paragraph 6 of the Understanding.

25. China argues that Article XXVIII:2 "governs the allocation of tariff quotas in the Schedule of concessions", while "what Article XIII governs is the allocation of tariff quotas in reality, i.e. in a WTO Member's domestic regulations or in the implementation of these regulations". This distinction is specious. It is beyond dispute that, "in reality", one and the same TRQ cannot be allocated simultaneously in two different ways. If a Member allocates "in reality" a TRQ in order to comply with Article XIII:2 in a manner which departs from the allocation bound in its schedule, it would violate its obligations under Article II of the GATT. Therefore, it is plain that China's position would lead to a genuine conflict between, on the one hand, Article XIII and, on the other hand, Article XXVIII:2 and paragraph 6 of the Understanding. China cannot but recognise this conflict, but seeks a way out by arguing that the Member concerned could always avoid a violation of its obligations by opening a larger TRQ than that bound in that Member's Schedule. However, a 'solution' to a conflict between two obligations which involves the imposition on the Member concerned of an additional obligation going beyond either of those two obligations is not a proper solution. Article XIII:2 of the GATT governs exclusively the allocation of TRQs. It cannot be interpreted and applied in such a way as to impose upon a Member an obligation to open a TRQ which exceeds the compensation previously agreed and bound by that Member in its Schedule consistently with Article XXVIII.

2.1.1. The appropriate reference period for the application of paragraph 6 of the Understanding is the period preceding the opening of the negotiations

26. China argues that the EU's position is contradicted by the fact that the compensation for one of the tariff items included in the First modification package (0210 99 39) was calculated on the basis of the imports for the period 2000-2002 instead of the imports for the reference period 2003-2005, whereas the compensation for another item in the same package (1602 3219) was calculated on the basis of the imports for the period July 2005-June 2006, rather than for the last calendar year of the reference period (i.e. 2005). China's criticism is misguided. The European Union has never contested that the negotiating Members *may* agree to depart from the guidelines provided in paragraph 6 of the Understanding, provided that, as in the present case, the amount of compensation exceeds that which would result from such guidelines. Indeed, if the negotiating Members could not depart from the benchmark provided for in paragraph 6 of the Understanding, it would be pointless to engage in negotiations. In particular, the negotiating Members *may* agree to use a different reference period from that provided for in paragraph 6 if that results in a larger amount of compensation. But this is not the same as saying that the negotiating Member are always required to do so. Contrary to what appears to be China's view, neither Article XXVIII:2 nor paragraph 6 of the Understanding impose any obligation to use always the reference period which is most favourable to the supplying Members, let alone to one supplying Member.

27. Moreover, in the two instances mentioned by China, the compensation agreed by the European Union was based on import data pre-dating the initiation of the negotiations, which data was, therefore, fixed and known in advance to the negotiating parties.

28. As further explained by in the EU's first written submission, there is no reason why the post-initiation import volumes should necessarily be higher than the pre-initiation volumes. The present case illustrates this. According to China's own data and calculations, the amount of the TRQs for two of the tariff items included in the second modification package (1602 39 21 and 1602 39 80) is lower if the formulae of paragraph 6 of the Understanding are applied on basis of import data for the period 2009-2011, instead of import data for the reference period 2006-2008.

2.1.2. The compensation provided by the European Union in the form of TRQs is fully consistent with paragraph 6 of the Understanding

29. China concedes that the size of the TRQs agreed by the European Union exceed the amount that would result from the application of the formulae in paragraph 6 of the Understanding, on the basis of data for the reference periods 2003-2005 and 2006-2008, in all cases but one: the TRQ for tariff item 1602 31. The difference, however, is minimal. The TRQ agreed by the European Union covers 103.896 tonnes whereas, according to China's calculations in Exhibit CHN - 49, the compensation required pursuant to paragraph 6 of the Understanding would amount to 103.953 tonnes, i.e. a difference of just 57 tonnes.

30. Moreover, the difference appears to be due to the use of a different set of import data. For the purposes of the negotiations, the European Union relied on the import data contained in the notification made by the European Union to the WTO in June 2006, which covers the imports into "EU 25" in 2006 and the imports into "EU 27" in 2007 and 2008.. In contrast, the data set used by China appears to cover all imports into "EU 28", i.e. including the imports into Romania, Bulgaria and Croatia made into those countries before they joined the European Union.

31. The data on imports into Romania, Bulgaria or Croatia before those countries joined the European Union is not representative because they may be affected by import conditions which are different from those prevailing in the European Union. Moreover, to the extent that the accession of those countries to the European Union resulted in an increase of the applicable duty rates, the European Union would have been required to provide compensation in accordance with Article XXIV:6 of the GATT 1994.

32. China also concedes that the "all others" share determined by the European Union is larger than the share calculated by China by applying the formulae of paragraph 6 of the Understanding on the basis of import data for the reference periods 2003-2005 and 2006-2008, with only two exceptions: the tariff items 1602 39 21 and 1602 39 80. In fact, however, China's calculations in Exhibit CHN 49 show that, in the case of item 1602 39 21, the share for "all others" would be nil, as there were no imports from "all others" during the reference period 2006-2008. China's calculation of the "all others" share in tariff item 1602 39 80 also appears to be incorrect. The European Union notes that, in particular, according to Exhibit CHN − 49, imports from China would have reached 201 tonnes in 2006. Yet, according to the data notified by the European Union to the WTO in 2006 (Exhibit CHN − 25) and to the 2016 Eurostat figures provided as Exhibit EU − 30, there were no imports at all from China during the reference period 2006-2008. Again, this discrepancy appears to be due to the fact that China has used import data into EU 28.

3. CLAIMS UNDER ARTICLE XIII OF THE GATT 1994

3.1. ARTICLE XIII:1 DEALS NEITHER WITH THE ALLOCATION OF SHARES WITHIN A TRQ NOR WITH LEVEL OF ACCESS TO BE GRANTED TO EACH MEMBER

33. The European Union recalls that Article XIII:1 establishes a principle of non-discriminatory access to, and participation in, a TRQ. It requires that a TRQ is applied by a Member on a product-wide basis without discrimination as to the origin of the product. The Appellate Body has stressed that access to a TRQ and its allocation to different suppliers are two conceptually distinct questions. They must therefore be appreciated separately.

34. Moreover, it results from the structure of Article XIII and from the finding of the Panel in *EC-Bananas III (Ecuador)*, that Article XIII:2 is *lex specialis* with respect to Article XIII:1. Hence, China's arguments concerning the allocation of the TRQ are to be examined in the first place in the light of the first provision. Article XIII:1 cannot be relied upon to overrule the provisions of Article XIII:2. That means that for TRQs allocation's aspects that are not covered by Article XIII:2, Article XIII:1 still applies, to the extent that its application does not lead to results that would conflict with the outcome of the application of Article XIII:2. This does not read out of Article XIII:1 the provision that imports from all WTO Members must be "*similarly* restricted".

35. In paragraph 7.76 of the panel report in *EC − Bananas III (Ecuador)*, the Panel simply made some comments on the fact that, in its view, it would be preferable not to allocate the 'all others' share among non-substantial suppliers (even if specific shares are allocated to the substantial

suppliers). Hence, that Panel statement does not support the view that Article XIII requires that an 'all others' share must be allocated to non-substantial suppliers so that, going forward, they can obtain a substantial supplying interest.

36. China's contention that Article XIII:1 requires to allocate a share to 'all others' at a level that permits the non-substantial suppliers to increase their exports so as to obtain an SSI would require either to reduce the share allocated to the substantial suppliers (possibly also to zero) or would transform the TRQ in an unlimited tariff concession.

37. Paragraph 476 of the Appellate Body report in *EC- Bananas III (Article 21.5 – USA)* does not confirm China's argument to the effect that the EU should have reserved a "significant" share for all others. That paragraph relates essentially to the interpretation of Article 3.8 of the DSU and not to Article XIII.

3.2. THE EUROPEAN UNION WAS REQUIRED NEITHER TO BASE THE ALLOCATION OF THE TRQS ON A DIFFERENT REFERENCE PERIOD NOR TO MAKE ADJUSTMENTS FOR SPECIAL FACTORS

38. In allocating the TRQs at issue the European Union followed the first allocation method set out in Article XIII:2(d), which provides a "safe harbour" to the Member applying the TRQ, and does not impose any specific obligation as to the reference period or special factors. China therefore cannot pretend that the European Union was required to comply with the same legal criteria set in the second allocation method provided for by Article XIII:2(d).

39. In any event, the agreement with the substantial suppliers on the allocation of the TRQs treats substantial suppliers and non-substantial suppliers in the same way by applying an impartial allocation method based on objective factors. It is quite obvious that a method that disregards special factors affecting any of the suppliers of a given product would not be objective and unbiased.

40. China's argument that chapeau of Article XIII:2 requires to set aside a minimum share for non-substantial suppliers, regardless of the trade data considered, would be discriminatory vis-à-vis substantial suppliers. The Appellate Body Report in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US*), is of no avail to China. That Report did not require setting aside a minimum share for Members that are non-substantial suppliers, regardless of the level of imports from those suppliers in the past.

41. Finally, the European Union demonstrated that the SPS measures mentioned by China are not "special factors", but measures that define the relevant product market and the nature of the competitive relationship between products. China, on the other hand, explains that compliance with sanitary requirements is not a factor of competition. The European Union fails to see how product's properties, which are dealt with by the SPS requirements (such as the presence in the product of pathogenic agents or substances harmful for human and animal health) can be ignored when apprehending the comparative advantage of one country and the relevant product market. Since *EC – Asbestos* the Appellate Body has clarified that properties of a product that make it dangerous for human health are relevant to determine the competitive relationship between that product and other allegedly like products.

42. China argues that when it allocates a TRQ, a Member should make abstraction of the SPS measures, even if those measures are perfectly legal, otherwise the effect of the TRQ will be to perpetuate the SPS measures. In reality, what China calls a perpetuation of the SPS measures is the effect of any allocation of a TRQ in line with Article XIII:2(d). In any event, the expected import growth in the European Union of poultry meat products that do not comply with the EU's SPS requirements was and remains zero, regardless of China's production capacity, its investments, its position in other selected export markets or its ability at a given point in time to partially meet those requirements for certain tariff lines.

43. In summary, the European Union reiterates that since the SPS measures are not special factors, the European Union was not required to adjust the 'all others' share or set aside a specific share for China or base the allocation of the TRQ on a different reference period not affected by those measures.

3.3. THE CHAPEAU OF ARTICLE XIII:(2) DOES NOT REQUIRE THE EUROPEAN UNION TO ALLOCATE A SHARE FOR "ALL OTHER" COUNTRIES IN EACH TRQ AT LEVELS THAT ALLOW THEM TO ACHIEVE AN SSI

44. According to China, the European Union violated the chapeau of Article XIII:2 because it did not establish the shares of the TRQs for 'all others' at levels that allow these countries "going forward" to achieve a substantial interest. China explained in its oral statement that it did not mean that, if a non-substantial supplier captures the entire 'all others' share, there would be no share left in the TRQ for others. However, unless the dimension of the 'all others' share and also the amount of the TRQ is a moving target (which would transform a TRQ in an open ended tariff concession), China's reasoning implies necessarily that a non-substantial supplier may at a certain point capture the whole 'all others' share. That is confirmed by China's assertion that the 'all others' share must be sufficient to allow at least one non-substantial supplier to gain an SSI. Hence, China's line of argument on top of being contradictory, it would only postpone the freezing of the TRQs allocation.

45. China is also incapable to indicate what is the minimum share that the EU should have allocated to "all others" to comply with the chapeau of Article XIII:2 when allocating the TRQs at issue, but it suggests that it should be established at a level allowing all non-substantial supplier to gain an SSI. But China's argument lead to a paradoxical situation where either the 'all others' share would overrun the shares allocated to the substantial suppliers or the TRQs would need to be transformed in unlimited tariff concessions.

46. Finally, China's claims are not confirmed by the practice of the Member. The European Union provided examples of other TRQs included in the schedule of other Members that do not contemplate an 'all others' share or contemplate only a symbolic share for 'all others'.

3.4. THE EUROPEAN UNION DID NOT VIOLATE THE CHAPEAU OF ARTICLE XIII:2 AND ARTICLE XIII:4 BY NOT EXPLICITLY IDENTIFYING THE DATA THAT IT TOOK INTO ACCOUNT TO DETERMINE THE TRQS

47. China argued that, unless the historical trade data, the base period, the basis for allocating the shares and the presence or absence of special factors are disclosed, WTO Members will be in the dark and will not be in a position to determine whether or not they hold an SSI and can ask for consultations under Article XIII:4.

48. The European Union wonders how this reasoning accords with China's claims according to which, even in the absence of that information disclosure, China has demonstrated to the Panel that it holds an SSI on the basis of its poultry meat production and its export to some other Members? Moreover, the European Union wonders why China did not ask for all the clarifications that it considered appropriate on those matters during the meeting of 19 May 2014?

3.5. THE EUROPEAN UNION DID NOT VIOLATE ARTICLE XIII:2(D) OF THE GATT 1994 BY DENYING SSI STATUS TO CHINA

49. China reiterates its arguments that the notion of SSI is different in Article XXVIII and in Article XIII and that the European Union should have assessed China's supplying interest by taking into account the SPS measures as a special factor. However, China is incapable to come up with any alternative definition of substantial supplier for the purpose of Article XIII:4. If the European Union should have recognised China's SSI because China is one of the biggest world producers of poultry meat products and it holds a leading supplying position in certain other Members, that would imply that China should be recognised as a substantial supplier of poultry meat products by all Members, regardless of their actual imports from China.

50. Moreover, by making an example China itself demonstrated that the notion of substantial supplier under Article XXVIII and Article XIII should be interpreted in a harmonious way. Indeed, if the SSI status of a Member was excluded because it was subject to a WTO incompatible import ban, that means in all likelihood that the party imposing the TRQ did not take into account the discriminatory quantitative restrictions affecting that Member. In other words, the notion of substantial interest was applied in violation of paragraph 7 of *Ad* Note Article XXVIII:1. That, in turn, would mean that the agreement reached with the other substantial suppliers for the allocation of the TRQ would not comply with Article XIII:2(d), because the agreement would not include all substantial suppliers.

3.6. THE EUROPEAN UNION DID NOT VIOLATE ARTICLE XIII:(4) BY REFUSING TO ENTER INTO MEANINGFUL CONSULTATIONS WITH CHINA

51. China's assertion that the European Union refused to enter into consultations under Article XIII:4 is unfounded as a matter of facts, given that the European Union and China met and discussed China's request to adjust the allocation of two tariff lines based on a different reference period, and in the light of special factors (the SPS measures). And indeed, consultations between the parties on those matters are still ongoing.

52. The proposition that the obligation to enter into consultations with a substantial supplier should be construed as an obligation to agree with that substantial supplier is simply untenable as Article XIII:4 only sets out a procedural obligation.

53. Finally, Article XIII:4 does not apply when the allocation among substantial suppliers is based on the first sentence of Article XIII:2(d), but only when it has been decided "unilaterally". In any event China did not make a duly justified claim of SSI when requesting consultations pursuant to Article XIII:4.

3.7. CHINA'S NEW CLAIMS UNDER ARTICLE XIII OF PERIODIC REVIEW AND ADJUSTMENT OF THE TRQ ALLOCATION

54. In its second written submission China raised new claims, according to which Article XIII would require a Member applying a TRQ to review and adjust its allocation an a periodic basis in the light of market developments.

55. Besides not being based on the text or the case law concerning Article XIII, these claims are clearly not covered by the Panel's request and therefore they fall outside the Panel's terms of reference.

4. CLAIMS UNDER ARTICLE I:1 OF THE GATT 1994

56. China response to Panel's Question No. 58, confirms that China's claims under Article I:1 are consequential to China's claims concerning Article XIII:2. In any event they are also outside the scope of Article I:1.

5. CONCLUSION

57. For the reasons set out in this submission, the European Union reiterates its request that the Panel reject all the claims submitted by China.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA[*]

1. The Argentine Republic is participating and setting out its views in this case due to its systemic and trade interest in the correct interpretation of certain obligations contained in the legal provisions invoked in this dispute.

Article XXVIII of the GATT: The definition of "substantial interest" in Article XXVIII of the GATT.

2. Argentina considers it important to reach an interpretation of the phrase "substantial interest" in accordance with the text, object and purpose of Articles XIII and XXVIII, and the GATT 1994 in general, since there is no definition in the covered agreements. Argentina notes that Note 7 to Article XXVIII:1 of the GATT 1994 states that "substantial interest" covers only those contracting parties which have or could be expected to have a "significant" share in the market of the Member seeking to modify or withdraw the concession.

3. In Argentina's view, the word "significant" must be interpreted as a share in the market of the importing Member that is *perceptible* or, in statistical terms, *measureable*, whether or not less than 10%. For Argentina, the alleged minimum threshold of 10% participation in the market of the country modifying the concession as a basis for the right to claim the existence of a "substantial interest" has no textual basis in the GATT 1994.

4. Argentina also believes that the 10% criterion cannot be considered one of the "other decisions of the CONTRACTING PARTIES" within the meaning of paragraph 1(b)(iv) of the GATT 1994. Similarly, it is Argentina's understanding that this criterion is not a "decision[…], procedure[…] [or] customary practice[…] followed by the CONTRACTING PARTIES", within the meaning of Article XVI:1 of the Marrakesh Agreement Establishing the World Trade Organization. Nor is the 10% criterion a "subsequent agreement" or a "subsequent practice" within the meaning of Article 31.3(a) and (b) of the Vienna Convention on the Law of Treaties.

Discriminatory quantitative restrictions and the determination of substantial interest

5. Furthermore, Argentina considers that when determining which Members have a substantial interest in the concession the modification of which is being sought, consideration must be given to all the circumstances that might have affected the trade that had existed on the basis of most-favoured-nation (MFN) treatment conditions, in particular, "discriminatory quantitative restrictions". Argentina takes the view that an import ban is a "quantitative restriction" within the meaning of Note 7 to Article XXVIII:1 of the GATT, given that its effect is to reduce imports to "zero".

Trade restrictions and the maintenance of a "general level of … concessions" under Article XXVIII:2

6. Argentina also points out that the determination of the general level of reciprocal and mutually advantageous concessions under Article XXVIII:2 must be made on the basis of the "concessions" that existed prior to the initiation of the negotiations, irrespective of the circumstantial trade restrictions.

7. Likewise, Argentina notes that the determination of Members with a principal supplying interest or substantial interest must take into account the share in the market they would have had "in the absence of discriminatory quantitative restrictions". Since Notes 4 and 7 to Article XXVIII:1 of the GATT do not establish how that share in the market is to be determined, paragraph 4 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994 may be relevant, as this clause applies in the absence of statistical data.

[*] Original Spanish.

8. Argentina wishes to highlight that the period used for the determination of Members with a principal supplying interest or substantial interest must be "representative" and "recent". It is not representative if there are import bans or other discriminatory quantitative restrictions. And it is not recent if, in the context of Article XXVIII, there is a significant lapse of time between notification of the intention to withdraw or modify a concession and the point in time at which it is planned to bring the modification into effect.

9. Paragraph 1 of the Understanding on the Interpretation of Article XXVIII of the GATT sheds light on the notions of "representative" and "recent". The verb "has" in the present tense in this paragraph implies that the principal supplying interest is not frozen in the period that ends when a Member notifies its intention to modify or withdraw a concession; on the contrary, its status as a principal supplier lasts for as long as it continues to have the highest ratio of exports. Therefore, if a Member did not have a principal supplying interest in the period preceding the negotiations, it could acquire that interest if the period following the notification referred to in paragraph 2 of the Procedures for Negotiations under Article XXVIII is taken into consideration when determining its status.

10. Furthermore, it is Argentina's understanding that the compensatory agreements reached by a Member modifying the concession in the context of a procedure under Article XXVIII of the GATT must ensure the maintenance of a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that obtained before the negotiations pursuant to Article XXVIII:2 of the GATT 1994, in particular for trade with those Members which had not participated in the compensatory negotiations on account of not being considered to have a principal supplying interest or a substantial interest.

Article XIII:1 of the GATT and non-discriminatory tariff quota access

11. Argentina considers that the allocation of tariff rate quotas almost exclusively to two WTO Members (and on some tariff lines an almost exclusive allocation to a single Member) may be considered inconsistent with Article XIII:1 of the GATT. Argentina also considers the term "similarly restricted" to mean, in the case of tariff quotas, that imports of like products of third countries must have access to, and be given an opportunity of, participation.

12. In addition, Argentina takes the view that the allocation of a practically insignificant segment to "other countries" implies a *de facto* impossibility for third countries to have access to, and effectively participate in, the tariff quota, and consequently establishes an allocation inconsistent with the principle of non-discrimination captured by Article XIII:1, owing to discriminatory administration of the restriction.

The chapeau of Article XIII:2 and the non-distortive distribution of the tariff quota

13. Argentina highlights the existence of the obligation to share the tariff quota among all Members supplying the product in the least distortive manner possible, on the basis of the competitive opportunities of each supplying country, so that their access to and share in the tariff quota mimics their comparative advantages.

14. Argentina considers that the allocation of an insignificant quota to "other countries", together with the establishment of out-of-quota tariffs at very high levels, places Members which only have access to the quota allocated to "other countries" at a disadvantage *vis-à-vis* other supplying Members which have a specific quota. Consequently, the distribution of the tariff quota becomes *de facto* a permanent allocation of the quota share and a long-term freeze which constitutes an impediment or obstacle to the normal development of trade, inconsistent with the chapeau of Article XIII:2.

15. Furthermore, pursuant to Article XIII:2 of the GATT, the determination of tariff quotas must be based on statistical data that discount the impact of import restrictions.

16. Argentina considers that the period used as a basis for allocation of the tariff quota must be the period immediately preceding the modification of the tariff concession, provided that the period is representative in terms of Article XIII:2(d). If a reference period were permitted that did not approach as closely as possible what the various Members might have expected in the absence of

the tariff quotas, a Member introducing a tariff quota could arbitrarily select a period of time and distribute the quota in a trade-distorting manner inconsistent with the chapeau of Article XIII:2.

17. In Argentina's view, the logic of Article XIII:2(d), especially as regards the weighing of special factors, should be applied in the interpretation of the chapeau of Article XIII:2, both to the allocation of specific quotas and to the establishment of quotas for "other countries". A Member, in determining a tariff quota for "other countries", must weigh the special factors that may be affecting or may have affected trade in the product, so as to ensure a distribution of trade that approaches as closely as possible the shares which the different Members might be expected to obtain in the absence of the tariff quota.

18. Argentina considers that the Note to Article XI of the GATT, and the interpretative note to Article 22 of the Havana Charter, could help in the interpretation of the term "special factors" under Article XIII:2(d). Evidence of the existence of a new or greater export capacity, among others, constitutes a "special factor" that must be taken into account by the Member establishing a tariff quota.

19. In short, Argentina maintains that even when acting consistently with Article XIII:2(d) in the allocation of tariff quotas, there are various instances in which the Member establishing a quota may violate the chapeau of Article XIII:2.

Articles XIII:2 and XIII:4 of the GATT and the availability of information on the method used in the establishment of a tariff quota

20. Argentina agrees with China's argument concerning the chapeau of Article XIII:2 and Article XIII:4 of the GATT 1994, to the effect that a Member that establishes a tariff rate quota must make clear the statistical methodology used to determine the representative reference period and the manner in which the special factors which may have affected or may be affecting the trade in that product are taken into account and weighed.

21. Argentina argues that it is necessary to have access to the statistical data used in the allocation of the tariff rate quotas in order for WTO Members to be able to determine whether there was a distribution of trade approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of restrictions.

22. Failure to disclose the methodology used in the establishment of a tariff rate quota violates the chapeau of Article XIII:2 and the provisions of Articles XIII:2 and XIII:4, as it encourages the exercise of discretion in the distribution of trade under a tariff rate quota.

23. Furthermore, in Argentina's view there is no legal basis for having to determine the substantial interest provided for in XXVIII:1 and XIII:2(d) on the basis of different statistical data.

Article XIII:4 of the GATT and the obligation to enter into consultations on the allocation of a quota

24. Argentina believes that the Panel should analyse whether the obligation to enter into consultations on the allocation of a quota is exhausted through the holding of such consultations, for example through the consent of the Member establishing a tariff quota to hold a meeting, or whether, on the contrary, it implies the obligation to hold a deeper discussion with the Member claiming to have a substantial interest regarding the need for an adjustment of the proportion determined or of the base period selected, or for the reappraisal of the special factors involved in the allocation of a quota, as provided in Article XIII:4 of the GATT 1994.

China's claims regarding the procedures for modification and rectification of schedules of tariff concessions

25. Argentina considers that the certification provided for in the Procedures for Modification and Rectification of Schedules of Tariff Concessions is mandatory under paragraph 8 of the Procedures for Negotiations under Article XXVIII.

26. Given the significance of certification, Argentina considers that the Panel should analyse the legal nature of the normative provisions relating to the procedures for modification and rectification of tariff schedules, especially if non-compliance by a Member with those rules impairs the legal validity of the modified or withdrawn concessions.

27. Argentina considers both the Procedures for Negotiations under Article XXVIII and the Procedures for Modification and Rectification of Schedules of Tariff Concessions to fall under "other decisions of the CONTRACTING PARTIES to GATT 1947" provided for in Article 1(b)(iv), as well as under "decisions, procedures [or] customary practices" referred to in Article XVI:1 of the WTO Agreement. Argentina, for its part, does not view either set of procedures as "subsequent agreement[s]" or "subsequent practice[s]" within the meaning of Article 31.3(a) or (b) of the Vienna Convention on the Law of Treaties.

28. Regarding paragraph 4 of the Procedures for Negotiations under Article XXVIII, Argentina takes the view that Members cannot dismiss claims of interest simply because they are made outside the 90-day time-frame. Paragraph 4 of the Procedures grants a degree of flexibility for both the modifying Member and the Member claiming an interest.

Request by the European Union for a preliminary Panel ruling

29. First, at various points in the panel request China claimed a violation of the chapeau of Article XIII:2. Argentina considers that this was sufficient for the European Union to have been aware that it would be required to prepare its defence on the basis of an alleged violation of that provision.

30. Similarly, Argentina believes that China's claim that "diminishing for the other WTO Members the market access commitments that the EU undertook to maintain on a non-discriminatory basis" may be seen as a claim of violation of the chapeau of Article XIII:2, as from there stems the claim that it was prevented from achieving "… a distribution of trade … approaching as closely as possible the shares which [China] might be expected to obtain in the absence of such restrictions ..." in the terms of the chapeau of Article XIII:2.

31. Argentina considers the provision of statistical data to constitute a fundamental element for the correct allocation of tariff rate quotas, and it should therefore be concluded that China's claim falls within the Panel's terms of reference. For this reason, in Argentina's view, these claims concerning both the chapeau of Article XIII:2 and Article XIII:4 are included in the request for the establishment of a panel.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. INTRODUCTION

1. Brazil has a clear and legitimate interest in the outcome of this dispute: annual poultry exports of around 1.2 billion USD rely on the Tariff-Rate Quotas (TRQ) presently challenged, and such sales have a significant impact on Brazil's poultry sector, including investment decisions and numerous jobs. Brazil would, therefore, like to summarize its views on some key issues before the Panel, in particular the scope and the dynamics of renegotiations under Article XXVIII of GATT 1994.

2. Brazil stresses the importance of safeguarding the legitimate rights acquired through such renegotiations. The outcome of the present dispute should fully comply with Article 3.5 of the DSU, pursuant to which decisions within the WTO dispute settlement system "shall not nullify or impair benefits accruing to any Member under the covered agreements, nor impede the attainment of any objective of those agreements".

3. Schedules are an integral part to the covered Agreements and, thus, the outcomes of the renegotiations with the EU under Article XXVIII (including the shared administration of quotas and its distribution among exporters), are also part of the covered Agreements within the meaning of the DSU, and should not be invalidated by the present dispute.

4. This dispute raises complex legal issues regarding the interactions of Article XXVIII of GATT 1994 with Article XIII, and also on the applicable rules and procedures for negotiations under Article XXVIII. Because a definite interpretation on such interplay has not yet been provided by the dispute settlement system, it is essential that the Panel bear in mind the potential systemic repercussions of this case and the need to safeguard the stability of existing commitments and the legitimate interests of third parties.

II. The scope of negotiations under Article XXVIII of GATT 1994 and the balance between flexibility and predictability

5. It is not uncommon that negotiations under Article XXVIII result in the establishment of country-specific quotas. Yet, the establishment of such quotas certainly poses challenges to the functioning of the multilateral trade system. In essence, they amount to a quantitative restriction within the meaning of Article XIII of GATT and as such can be trade-distortive. As a matter of fact, when combined, for instance, with prohibitively high extra-quota tariffs, TRQs may result in a virtual freeze of trade flows, contrary to WTO's long-standing purpose of progressively improving market access. In this sense, the consistency of the application of this instrument with the obligations inscribed in Article XIII is in the interest of the whole WTO Membership.

6. While Article XXVIII allows for significant flexibility to introduce modifications to commitments, Article XXVIII:2 provides that renegotiations must maintain "a general level of reciprocal and mutually advantageous concessions not less favorable to trade than that provided for in this Agreement prior to such negotiations".

7. At the same time, Article XXVIII relies on certain objective criteria and procedures established over time to facilitate negotiations and minimize uncertainty. These criteria and procedures are not mandatory, but provide a useful guidance that should help indicate whether a XXVIII negotiation is consistent with WTO rules. Predictability also being an essential goal of the proceedings, those criteria and procedures seek to facilitate the process for modification of concessions with a view to promptly ending the uncertainty created by renegotiations.

8. Criteria and procedures under Article XXVIII, thus, offer Members a significant margin of discretion in reaching a mutually beneficial agreement, encompassing new rights and obligations which should be considered legitimate. With regard to the TRQs at issue in the present dispute, it was only after long exchanges with the EU that it was possible to agree on the TRQs and their

shared administration (which, in Brazil's view, constitutes an integral part of the renegotiations).

9. A key question under the present dispute is whether the procedures and practices of Article XXVIII of GATT 1994 related to the renegotiations leading to the 2007 and 2012 modifications of the EU Schedule were consistent with EU's obligations, specifically with regard to China's claims that its export interests have not been taken into account.

10 Brazil reiterates that it acted in good faith and in full observance of the rules and related practices of Article XXVIII of GATT 1994 and of the Covered Agreements in the negotiations which resulted in the TRQs under dispute. Brazil has no reason to believe that the criteria for renegotiations under Article XXVIII were not followed. Regarding specifically the criteria adopted to establish who were the Members with "substantial interest" at the beginning of each negotiation, Brazil recalls that, based on the relevant data, even if the SPS measure applied to Chinese exports at the time were not in place, China would not have met the 10% market-share criterion usually adopted in Article XXVIII processes to define the Members with a substantial interest.

11. Another important matter before this Panel is whether adjustments in the reference periods and the definition of negotiating Members, among other criteria, can take place in the course of negotiations. There is no reason to believe that the procedures of Article XXVIII do not allow for such adjustments. How these adjustments would apply in practice can, however, only be defined on a case-by-case basis, provided that the rights of the other parties involved in the negotiation are not affected.

12. Brazil submits that the findings stemming from this dispute cannot affect the integrity of the bona fide renegotiations leading to the two packages of reconsolidation (and the resulting shared administration of quotas and allocation between importers), legally and legitimately obtained through Article XXVIII proceedings. In our view, this would reflect the balance sought between flexibility and predictability under Article XXVIII.

13. In this context, Brazil emphasizes, once again, that EU's argument that "the objections raised by China as part of its claims under Article XXVIII:2 relate to the country allocation of the TRQs, rather than the total amount of compensation provided by the European Union in the form of TRQs" has no legal ground. A similar total TRQ, but with a smaller share for Brazil due to a hypothetical participation of another Member in the process, would not have appropriately reflected the balance of mutually agreed commitments and the trade to be preserved, pursuant to Article XXVIII.

III. The relationship between Articles XIII and XXVIII

14. Concerning claims of violation of Article XIII, Brazil understands that there is no definitive precedent on whether and how Members not holding a substantial interest could be taken into account in the distribution of a TRQ in light of Article XIII. Brazil, however, agrees with Canada's contention in its Third Party Submission that Article XIII contains its own procedures that not necessarily replicate those under Article XXVIII, and considers that, depending on the specific circumstances of each situation, initial allocations made under Article XIII:2(d) may evolve due to relevant factors affecting the trade of the relevant product, as acknowledged in the panel in EC-Bananas III (Ecuador)[1]. Brazil holds that the consistency of the application of both provisions and should be assessed on a case-by-case basis.

15. In Brazil's view, Article XIII:2(d) defines a specific methodology to apply import restrictions to a product among supplying countries. That does not necessarily mean that such methodology ensures, in every case, full compliance with the obligation set in the caput of Article XIII:2, which is of a more general nature, encompassing an obligation to achieve an approximate result: "distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions."

16. Brazil insists that, should the Panel understand that, in light of Article XIII, China's interests must be taken into account in the application of the TRQs under dispute, any modification in the allocation of these quotas could only come from an increase of the total volume of the current

[1] Panel Report, *EC – Bananas III (Ecuador)*, paras. 7.91-7.92.

quotas, rather than a mere reallocation, which would otherwise disrupt the balance achieved under both negotiations under Article XXVIII.

17. In light of the above, Brazil believes that the elements underlying the dispute (namely, the agreements reached in the 2007 and 2012 modification packages and the shared administration system contained therein) are a crucial part of the balance of the general level of reciprocal and mutually advantageous concessions achieved under WTO-compliant negotiations, and as such, should not be affected by the present dispute.

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. Canada has intervened in this dispute because of its systemic interest in the interpretation of the WTO Agreements and in ensuring that the Article XXVIII process remains functional and practical.

II. AD ARTICLE XXVIII AND THE MEANING OF "DISCRIMINATORY QUANTITATIVE RESTRICTIONS"

A. The Article XXVIII Process

2. The Article XXVIII process for the modification or withdrawal of tariff concessions consists of the following related provisions and procedures: Article XXVIII, Interpretative Note Ad Article XXVIII from Annex I, Understanding on the Interpretation of Article XXVIII of GATT 1994, and Procedures for Negotiations Under Article XXVIII (Procedures)[1].

3. The Procedures were adopted by Council on 10 November 1980 on the recommendation of the Committee on Tariff Concessions but, as they are non-binding in nature[2], Canada's view is that they fall within the meaning of Article XVI:1 of the WTO Agreement under all three elements of "decisions, procedures and customary practices". As noted by the panel in *US – FSC*, this means the Procedures would serve as guidance[3]. Canada submits that the Procedures also satisfy the test set out in *US – Clove Cigarettes*[4] to be considered a subsequent agreement in the context of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (Vienna Convention)[5]. As Members have followed the Procedures they have created a significant body of subsequent acts that Canada submits constitute subsequent practice under Article 31(3)(b) of the Vienna Convention.

4. An element of the Article XXVIII process has been the use of a ten per cent market share rule to identify the existence of a Member with a substantial supplying interest. Canada submits that the use of this rule has been "concordant, common and consistent"[6] and thus qualifies as "subsequent practice" within the meaning of Article 31(3)(b) of the Vienna Convention. It would also be logical for the rule to qualify as "customary practice" pursuant to Article XVI:1 of the WTO Agreement.

5. The Article XXVIII process has the following attributes:

i) to provide an opportunity for Members potentially most affected by the modification or withdrawal to protect rights under existing concessions by engagement with the modifying Member regarding the level of compensation[7];

ii) to provide adequate compensation to Members for the modification or withdrawal of tariff concessions[8];

iii) to be capable of timely completion, i.e. not be unduly complex or difficult and not be vulnerable to delays from claims of interest[9]; and

[1] Procedures for Negotiations Under Article XXVIII, adopted by the Council on 10 November 1980, C/113 and C/113 Corr. 1, 6 November 1980.
[2] Committee on Tariff Concessions, Minutes of the Meeting held in the Centre William Rappard on 3 November 1980, TAR/M/3, 10 March 1981, para. 4.7.
[3] Panel Report, *US – FSC*, para. 7.78.
[4] Appellate Body Report, *US – Clove Cigarettes*, paras. 262 and 265.
[5] The Vienna Convention on the Law of Treaties (Vienna Convention), done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.
[6] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13.
[7] Article XXVIII:4 of GATT 1994.
[8] Ibid.

iv) to provide for retaliation in the event that concurrence on compensation is not attained[10].

B. Meaning of "Quantitative Restriction"

6. Whether a particular measure amounts to a "quantitative restriction" in the sense of paragraphs 4, 6 and 7 of Article XXVIII must be determined on case-by-case basis, taking into consideration all relevant factors. In this regard, Article XI (General Elimination of Quantitative Restrictions) is relevant as interpretative context, but the introductory paragraph of Ad Article III must be taken into account in the interpretation of Article XI:1 and, by extension, the reference to the term "quantitative restriction" in paragraphs 4, 6 and 7 of Ad Article XXVIII:1. Whether a measure is a quantitative restriction barred by Article XI:1 or an internal regulation and thus subject to the requirements of Article III:4 calls for a detailed analysis of the measure in question.

C. Meaning of "Discriminatory"

7. The phrase "discriminatory quantitative restriction" has not been interpreted in WTO jurisprudence nor has the word "discriminatory" in the context of the Article XXVIII process been interpreted in WTO jurisprudence. The Appellate Body has noted that the plain language meaning of "discrimination" can encompass both a "neutral meaning of making a distinction" and "a negative meaning carrying the connotation of a distinction that is unjust or prejudicial" and that a full and proper interpretation of the provision is necessary to determine which meaning was intended[11].

8. It is Canada's view that the word "discriminatory" in Ad Article XXVIII bears the meaning of a distinction that is drawn on an improper basis, not a distinction drawn *per se*. Further, it is Canada's view that a measure that is otherwise consistent with WTO obligations would not be a distinction drawn on an improper basis and thus would not be "discriminatory" within the context of Ad Article XXVIII.

9. Canada's views in this regard are supported by the following:

i) it realizes the object and purpose of the Article XXVIII process to afford Members with a principal or substantial supplying interest with an opportunity to protect the contractual rights they enjoy under the Agreement while balancing the interest of Members utilizing Article XXVIII to achieve modifications or withdrawals of concessions within a reasonable period of time and thereby minimize uncertainty or disruption to trade;

ii) it maintains a functional and practical Article XXVIII process, which has been a preoccupation of Members since GATT 1947[12]; and

iii) it is consistent with the overall aims of the WTO Agreement to achieve the "substantial reduction of tariffs and other barriers to trade and [...] the elimination of discriminatory treatment in international trade relations"[13] while recognizing that Members have the right to take measures to protect a variety of interests, for example under Articles XX and XXI.

10. Were the word "discriminatory" to be interpreted as meaning a distinction regardless of reason, it becomes difficult to maintain the attributes of the Article XXVIII process. For example, a Member modifying or withdrawing its concessions cannot be expected, as a matter of course, to speculate on the market share of any number of possible suppliers that might exist in a world that is devoid of distinctions, essentially the absence of its laws, regulations and other measures, including those that are consistent with its WTO obligations. Doing so would render the

[9] Ad Article XXVIII:4 of GATT 1994 and timeframes expressed throughout Article XXVIII, Ad Article XXVIII of GATT 1994 and the Procedures.

[10] Article XXVIII:4(d) of GATT 1994.

[11] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 87.

[12] See, for example, Verbatim Report, Fourteenth Meeting of the Tariff Agreement Committee Held on Tuesday, 9 September 1947 at 2:30 PM in the Palais Des Nations, EP/CT/T/TAC/PV/14, pp. 14-15.

[13] Marrakesh Agreement Establishing the World Trade Organization, preamble.

Article XXVIII process unduly complicated and raise issues of procedural fairness *vis-à-vis* Members able to demonstrate an interest through a record of past imports. Such a process would likely result in a tariff rate quota (TRQ) not fit for its purpose as it would not be representative of genuine interests capable of supplying the market of the modifying Member. This would lead to further difficulties at the allocation stage under Article XIII and the administration and utilization of the TRQ. It is also neither logical nor just to require a modifying Member to provide compensation for the effect of measures that respect the overall requirements of the WTO agreements, especially when the Article has the limited purpose of providing compensation for lost access due to the withdrawal or modification of tariff concessions pursuant to Article XXVIII.

D. Flexibility in the Article XXVIII Process

11. It should be remembered that the Article XXVIII process provides for its own remedies and that the process also has some flexibility: it is a floor, not a ceiling in terms of the interests of suppliers to be protected and the compensation (e.g. size of TRQ) to be determined. By providing for negotiations and consultations, the Article inherently contains a degree of flexibility to permit arrival at a mutually agreed result. This includes flexibility to adjust a reference period to ensure that it is representative. However, balancing this with need to preserve the workability of the process, adjusting a reference period to something other than the usual three years immediately prior to notification would normally involve looking back further in time than three years, not employing hypothetical considerations. There is a systemic interest in quickly and clearly identifying Members holding a principal or substantial supplying interest so that negotiations can begin and the TRQ can be set. If a Member could insist that the reference period be continually adjusted forward in time to a period that it considers to be more "representative", it would impede the identification of those Members holding principal or supplying interests and the conclusion of negotiations with those Members.

12. Timely expressions of interest from Members believing they have a principal or substantial supplying interest are essential for the workability of the process. However, there may be instances (to be determined on a case-by-case basis) where it would be appropriate for a Member to accept an untimely claim of interest so long as issues of procedural fairness towards Members who have provided a timely claim of interest are taken into account.

III. THE OPERATION OF ARTICLE XIII

A. Interaction of Article XIII and Article XXVIII

13. Article XXVIII provides for the establishment of the level of compensation (e.g. a TRQ); Article XIII relates to the administration and allocation of a TRQ and may occur at times when Article XXVIII is not being used. However, if Article XXVIII is being used, it is very likely that allocation under Article XXIII will occur coincident with the establishment of a TRQ under Article XXVIII. In this instance, it is virtually certain that the Members determined to have initial negotiating rights, a principal supplying interest or a substantial interest will be the main recipients of the allocations. As the compensation (TRQ) determined under Article XXVIII might not be large enough to accommodate the introduction of another Member with a substantial interest in supplying the product into the allocation process at this stage using a different set of criteria, this could raise issues of procedural fairness *vis-à-vis* the Members involved in the determination of compensation under Article XXVIII. However, the plain language of Article XIII:2(d) would not preclude the allocating party from doing so, so long as the rights of the Members whose initial negotiating rights, or principal or substantial supplying interests were protected through negotiations or consultation (as applicable) under Article XXVIII continue to be protected at this point in time.

14. Article XIII contains its own procedures; those related to Article XXVIII are not imported into Article XIII. There are attractions of methodological ease and consistency in using a ten per cent share of imports as the means of determining "substantial interest" in Article XIII as is the practice for Article XXVIII. However, the ten per cent threshold is not a bright line and some flexibility may be desirable given the range of market situations to which Article XIII can apply[14] and that

[14] Panel Report, *EC – Bananas III (Ecuador)*, paras. 7.83-7.84. The panel did not take issue with the ten per cent threshold applied by the European Community in the context of Article XIII:2(d) but did not find it necessary to set a precise import share to determine the existence of a substantial interest in supplying a

supplying interests can evolve with time[15]. The determination of "substantial interest" in Article XIII:2(d) could vary with time or round of allocation so long as, in a particular round, the same parameters for determining substantial interest in a particular product are used *vis-à-vis* each potential supplier and allocation does not discriminate between similar situations. Consistent with the explanation of the Appellate Body[16], Canada's view is that following either method of allocation in Article XIII:2(d) satisfies the aim expressed in the chapeau of that paragraph.

B. Meaning of "Special Factors"

15. Further acknowledgement that supplying interests can evolve with time is found in the possibility of taking into account, when using the second method of allocation under Article XIII:2(d) (unilateral imposition), "special factors which may have affected or may be affecting the trade in the product". Ad Article XIII suggests that "special factors" is broader in scope than the term "discriminatory quantitative restrictions". However, Ad Article XIII also suggests that there is a desire to keep the determination of a substantial interest grounded in genuine and demonstrated market access and to ensure that the process of allocation remains practicable.

C. Establishment of an Allocation for "Others"

16. The text of Article XIII does not require a Member to establish an allocation for others: whether this is done will depend on the interests to supply a product that exist and the outcome of the process in Article XIII:2(d). In this respect, an allocating Member must have regard to the admonition in *EC – Bananas III* that it cannot discriminate by providing country specific allocations to some with a non-substantial interest in supplying the product but not to others with a non-substantial interest[17]. Should an allocation for others be established, there is also no general obligation in the text of Article XIII to set it at a particular size. This will also be an outcome of a particular fact situation and the application of Article XIII:2 taken as a whole and read in conjunction with Article XIII:4.

product, noting: "A determination of substantial interest might well vary somewhat based on the structure of the market."

[15] Panel Report, *EC – Bananas III (Ecuador)*, paras. 7.91-7.92.

[16] Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 338.

[17] Appellate Body Report, *EC – Bananas III*, para. 161.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1. The Russian Federation would like to present, as a third party in this dispute, the summary of its arguments that mostly relate to the issues concerning Article II of the General Agreement on Tariffs and Trade (GATT) and the Procedures for Modification and Rectification of Schedules of Tariff Concessions adopted by the Council on 26 March 1980.

2. In its First Written Submission China claims that without certification the first and the second modifications have no legal effect and, therefore, the European Union's implementation of these modifications violate Article II of the GATT 1994.[1]

3. Article II of the GATT 1994 imposes an obligation on an importing Member to accord to the commerce of other Members treatment no less favorable than that provided for in the relevant part of its Schedule.

4. In the view of the Russian Federation all modifications of tariff concessions should be certified under the Procedures for Modification and Rectification of Schedules of Tariff Concessions adopted by the Council on 26 March 1980.

5. According to the Panel in *US – FSC* for a decision to be classified as "other decisions of the CONTRACTING PARTIES to the GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994 "it must be a legal instrument within the meaning of the chapeau to paragraph 1, *i.e.*, it must be a formal legal text which represented a legally binding determination in respect of the rights and/or obligations generally applicable to all contracting parties to GATT 1947"[2].

6. Modifications of Member's tariff commitments could be the outcome of action under various provisions of the WTO Agreement, including Articles II, XVIII, XXIV, XXVII and XXVIII of the GATT 1994, and, as the results, will probably affect the existing rights and obligations of WTO Members. Thereby, the Procedures for Modification and Rectification of Schedules of Tariff Concessions may constitute "other decisions of the CONTRACTING PARTIES to the GATT 1947" within the meaning of paragraph 1(b)(iv) of the GATT 1994. Thus, all WTO Members should follow these Procedures as they contain a legally binding determination in respect of the rights and/or obligations generally applicable to all contracting parties to GATT 1947.

7. The Russian Federation disagrees with the EU's arguments that "*[t]he certification of the changes to the schedule has the sole purpose of formally incorporating into a Member's schedule the modifications made in accordance with Article XXVIII or other relevant provisions, but it is not a prerequisite for implementing such changes*"[3] and that "*the certifications do not have any effect on the entry into force of the proposed modification or rectification. The idea is to formally incorporate in the schedules of members modifications and rectifications which, in most cases, have already entered into force*".[4]

8. The Appellate Body in *EC – Computer Equipment* noted: "*[a] Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are general rules of treaty interpretation set out in the Vienna Convention*".[5]

9. Article 26 of the Vienna Convention requires that "*[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith*". The chapeau of the Procedures for Modification and Rectification of Schedule of Tariff Concessions requires that "*[…] changes in the authentic texts of Schedules which record […] modifications resulting from action taken under Article II, Article XVIII, Article XXIV, Article XXVII and Article XXVIII shall be certified without delay*". Furthermore, paragraph 4 of the same Procedures provides that "*[w]henever practicable*

[1] The China's First Written Submission, para. 270.
[2] Panel Report, *US – FSC*, para. 7.63.
[3] The European Union's First Written Submission, para.300. (emphasis added)
[4] Ibid., para. 301. (emphasis added)
[5] Appellate Body Report, *EC – Computer Equipment*, para. 84. (emphasis added)

Certifications shall record the date of entry into force of each modification". Taking into account that the European Union failed to obtain certification from the WTO Members, the EU's Modification Packages have no legal effect. Thus, it would appear that the European Union is obliged to comply with its current Schedule, including for the purposes of Articles II:1(a) and II:1(b) of the GATT 1994.

10. The significance of following procedural rules was noted by the Panel in *EC – Bananas III (Article 21.5-Ecuador II)*:

> There is no provision in the WTO Agreement that would allow a Member to unilaterally modify the concessions contained its Schedule, unless procedures for renegotiation of such Schedule are formally concluded.[6]
>
> Accordingly, the appropriate procedures must be finalized, before the concession can be legitimately modified or withdrawn and replaced with a new one.[7]

11. The European Union also states that the certification process of changes to the Schedule is going to start only after the conclusion of certification process started in March 2014 for changes made pursuant to Article XXIV:6 (2004 Enlargement).[8] According to the Procedures for Modification and Rectification of Schedules of Tariff Concessions, a Member should communicate a draft within three months after the negotiation has been completed. There is nothing in the Procedures that can be interpreted to suggest that certification process for modifications made pursuant to Article XXVIII should be initiated only after certification process for modifications made pursuant to Article XXIV has been completed. On the contrary, the word "or" in paragraph 1 of the Procedures for Modification and Rectification of Schedule of Tariff Concessions means that Articles XXIV and XXVIII should be considered separately and should not follow one after another in any particular order.

[6] Panel Report, *EC – Bananas III (Article 21.5-Ecuador II)*, para. 7.447.
[7] Ibid., para.7.451.
[8] The European Union's First Written Submission, para. 299.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THAILAND

I INTRODUCTION

1.1. This case raises issues of fundamental importance regarding the manner in which World Trade Organization ("WTO") Members modify their tariff concessions and provide compensation in the form of tariff rate quotas ("TRQs") to WTO Members affected by the modification.

1.2. China's argument, in essence, is that the European Union ("EU") should have identified China as a Member that had a principal supplying interest ("PSI") or substantial supplying interest ("SSI") in the products at issue in the EU's tariff modifications. In China's view, the EU did not do so because China's poultry imports were subject to an import ban for SPS reasons during the relevant reference period used by the EU to determine the Members that had a PSI or SSI, with which it had to negotiate appropriate compensation. China further argues that it should have received a share of the TRQs because it is the world's largest producer of poultry and it had growth potential in the affected products.

1.3. Thailand considers China's arguments to be unfounded. It fully supports the EU's request that the Panel reject all claims made by China. The EU complied fully with its obligations under the relevant provisions of the GATT 1994 and related instruments in modifying its tariff concessions and in allocating compensation to Thailand and Brazil following the tariff modifications. Thailand endorses the legal arguments set out in the EU's first written submission.

A. Article XXVIII and Article XIII contain related, but separate, obligations

1.4. In this case, the EU modified its tariff schedule pursuant to Article XXVIII of the GATT 1994 and allocated compensation in TRQs to Thailand and Brazil pursuant to Article XIII:2 of the GATT 1994. Article XXVIII:1 (and related instruments) address with which countries the EU had to negotiate or consult when it decided to modify its tariff concessions. Article XIII (and related instruments) refer to how the EU has to determine the allocation of compensation in the TRQs. In other words, Article XXVIII:1 deals with "with whom to negotiate/consult when modifying a tariff concession" and Article XIII:2 deals with "how to allocate compensation after modifying a tariff concession."

1.5. Article XXVIII of the GATT 1994 sets out the conditions that apply when a WTO Member seeks to modify its tariff schedule. The applicant Member, Members with initial negotiating rights, and Members with a principal supplying interest are referred to as the "contracting parties primarily concerned" and the fourth is a Member with a substantial interest. Article XXVIII:1 treats these categories of Members differently.

1.6. Paragraph 7 of Note *Ad* Article XXVIII[1] states that "the expression 'substantial interest' is not capable of precise definition and accordingly may present difficulties for [WTO Members]. 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 contracting party seeking to modify or withdraw the concession."

1.7. Paragraph 4 of the *1980 Procedures for the Negotiations under Article XXVII of the GATT 1994* ("1980 Procedures") provides that claims of interest by a PSI or SSI holder should be made within ninety days following the circulation of the import statistics by the applicant country, in this case, the EU. Paragraph 5 of the *Understanding on the Interpretation of Article XXVIII of the GATT 1994* ("Understanding on Article XXVIII") provides that where a Member considers that it has a PSI or SSI, it shall communicate its claim in writing to the [applicant Member and the Secretariat]. It further provides that paragraph 4 of the 1980 Procedures "shall apply in these

[1] This Note applies to Article XXVIII and not Article XIII. However, as the provisions contain identical terms, Thailand considers that the clarification provided for Article XXVIII could be used to interpret the term in Article XIII.

cases". The Understanding on Article XXVIII is part of the GATT 1994 and is, therefore, legally binding.

1.8. Article XXVIII:2 provides that the compensatory adjustment provided by the applicant Member "shall endeavour" to maintain a general level of reciprocal and mutually advantageous concessions. The obligation in Article XXVIII:2 is thus not 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" but rather to "*endeavour to* maintain" such a level. Paragraph 6 of the Understanding on Article XXVIII may be used to determine the compensation for WTO Members that have an SSI when a tariff concession is replaced by a TRQ.

1.9. Article XIII of the GATT 1994 is entitled "Non-discriminatory Administration of Quantitative Restrictions." Article XIII:1 provides that no import or export restriction may be applied to a single Member, unless imports or exports from all other countries are similarly restricted. The remaining provisions of Article XIII provide guidance as to how this non-discriminatory obligation is to be applied. The chapeau to Article XIII:2 provides that in "applying import restrictions to any product, [Members] shall aim at a distribution of trade in such product *approaching as closely as possible the shares which the various [Members] might be expected to obtain in the absence of such restrictions and to this end shall observe the following conditions*....". This provision therefore requires the EU, in this case, to provide different allocations in the TRQs based on historical trade patterns from countries with supplying interests.

1.10. Article XIII:2(d) provides for two different processes for determining the allocation of quotas among supplying countries. First, the applicant Member can seek agreement on the allocation of shares with those Members that had a SSI. Second, if there is no agreement on the allocation, the applicant Member can allot shares in the quota to Members that have a substantial interest on the basis of the criteria specified in Article XIII:2(d), second sentence, including taking account of special factors that may have affected the trade in the product.[2] Thus, the consideration of special factors is relevant only when there is no agreement on the allocation of the shares within a TRQ between the applicant Member and the Members that had an SSI.

1.11. China incorrectly suggests that the principles outlined in paragraph 4 of the Understanding on Article XXVIII to determine Members that had a PSI or SSI on new products (for which three years' trade statistics are not available) may also be used to determine such interests when an import ban has been applied. However, paragraph 4 addresses a completely different situation. When a tariff on a new product is being modified, it may be necessary to take into account "production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand in the importing Member" because three years' statistics are not available. Where three years' statistics are in fact readily available (even if a legitimate SPS measure was in place) there is no basis to examine production capacity and other criteria to determine whether a Member "could have had" a PSI or SSI.

1.12. In Thailand's view, China's attempt to mix up the applicable concepts is incorrect. The factors that are used to determine the amount of compensation to be provided should not be used to identify a Member with a PSI or SSI, and *vice versa*.

B. China's argument that the EU should have identified that China had a PSI or SSI based on a counterfactual reference period is incorrect

1.13. China argues that the reference periods used by the EU to identify that Thailand and Brazil had a PSI or SSI were "tainted" by the application of an import ban to China's imports during the reference periods used by the EU, namely 2003−2005 for the First Modification Package and 2006-2008 for the Second Modification Package. China further argues that the EU should have examined the share China "would have had in the absence of the import ban and whether such share constitutes a PSI or SSI". Lastly, China argues that, due to the extended nature of the negotiations for the Second Modification Package, the EU should have used a more recent reference period to correctly identify the WTO Members that had a PSI or SSI.

[2] Panel Report, *EC — Bananas III (Ecuador)*, paras. 7.71−7.72.

1.14. In order for an applicant Member to determine which Members have a PSI or SSI and therefore, with which Members it must negotiate or consult prior to modifying its tariff concessions, the applicant Member must analyse import data in an appropriate reference period.

1.15. Article XXVIII does not specify the appropriate time period for this reference period. However, paragraph 4 of Note *Ad* Article XXVIII provides that the determination of a Member that had a PSI should be made if the Member had "over a reasonable period of time *prior to the negotiations*, a larger share in the market [than a Member with INRs]". Logically, this temporal requirement should apply equally to the determination of a Member that had a SSI. Thus, the reference period must be "prior to the negotiations". The practice in the GATT and the WTO has been to rely upon the three-year period prior to the notification of the intention to modify the concession.

1.16. China incorrectly suggests that the principles outlined in paragraph 4 of the Understanding on Article XXVIII to determine Members that had a PSI or SSI on new products (for which three years' trade statistics are not available) may also be used to determine such interests when an import ban has been applied. However, paragraph 4 addresses a completely different situation. When a tariff on a new product is being modified, it may be necessary to take into account "production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand in the importing Member" because three years' statistics are not available. Where three years' statistics are in fact readily available (even if a legitimate SPS measure was in place), there is no basis to examine production capacity and other criteria to determine whether a Member "could have had" a PSI or SSI.

1.17. China also incorrectly argues that due to the extended nature of the negotiations for the Second Modification Package and the application of the import ban, the EU should have used a more recent reference period, such as from 2009-2011, to correctly identify the Members that had a PSI or SSI. There is no legal basis for this argument. As the EU explains, this argument has no basis in "any provision of Article XXVIII or the 1980 Procedures or on past practice, and would undermine the objective pursued by Article XXVIII:1. This was also acknowledged by the Arbitrator in *EC – The ACP-EC Partnership Agreement.* The Arbitrator further stated that "[t]he use of the most recent representative reference period minimizes the need for *ad hoc* adjustments to be made to the data and corresponds as closely as possible to the trade regime as applied".[3] Thus, it is important to use trade statistics for a period as close as possible to the trade regime in place prior to the notification of the modification.

1.18. The practice of using three years' trade statistics *prior to the negotiations* allows for predictability and certainty. It is not clear how the proper reference period could be chosen in the circumstances described by China. China does not propose any guidelines to determine which period should be used other than, apparently, to suggest a period that would "reflect the more natural export strength of the WTO Member(s) affected by the discriminatory quantitative restrictions" *in casu*, China. This is not a guideline that could be applied in a manner that promotes predictability and certainty in the multilateral trading system.

1.19. China also incorrectly argues that the "requirement in paragraph 6 of the Understanding on Article XXVIII that the three-year reference period for determining compensation must be representative or that trade in the most recent year be taken into account should equally apply for the determination of the supplying interests." It suggests that the determination of the existence of a PSI or SSI based on one period and the calculation of compensation based on a different period would seem illogical. In Thailand's view, China fundamentally misunderstands the different purpose of each of these provisions. The determination of which Members have a PSI or SSI must necessarily be based on import data from the past. The review of the import data in the trade actually affected over the relevant three-year reference period shows which Members have a special interest in the concessions to be modified, and therefore, with which Members the applicant Member must negotiate or consult. This backward-looking exercise must be conducted before the applicant Member can modify its tariff concessions. As the EU explains, as "those Members stand to lose the most from the intended modification, they can be trusted to negotiate compensation which is adequate for all Members". Paragraph 6 of the Understanding on Article XXVIII addresses a very specific situation, namely the compensation that should be provided when a Member replaces an unlimited tariff concession with a TRQ. As the EU notes, paragraph 6 is expressed in

[3] Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement*, para. 83.

"hortatory terms". As is clear from the terms of paragraph 6, "the amount of the compensation should exceed the amount of trade actually affected by the modification of the concession". The compensation must be calculated on "future trade prospects", which should be based on the greater of the average annual trade in the more recent three-year period or trade in the most recent year increased by 10 percent. This must be a forward-looking exercise as it seeks to compensate the affected Members for the changes brought about by the tariff modification. Therefore, contrary to China's assertions, it is not at all illogical that the determination of the existence of a PSI or SSI would be made based on a different period from that used to determine compensation.

1.20. China submits that the EU should have made allowances for the import ban imposed for SPS reasons and used a different reference period to determine the Members that had a PSI or SSI. To this end, China submits that its exports to the EU of products classified under CN 1602 32 19 in particular were "growing". The EU has explained that even if it had taken into account import data before the SPS measures were introduced in 2002, China did not have sufficient imports to qualify as a Member that had a SSI as its imports were well below the 10 per cent benchmark for a SSI Member. China has also submitted that where "significant time" has lapsed since the notification of the intention to modify a concession, the three-year reference period must be re-assessed and the latest available data must be used. To this end, China submits import data for 2009–2011. The EU has explained that there is no legal basis to require such a re-determination. Moreover, such a re-determination would adversely affect the due process rights of Thailand (and Brazil), which entered into good faith discussions with the EU on the basis of Article XXVIII and the 1980 Procedures.

1.21. China also submits detailed trade statistics to demonstrate its production capacity and export growth potential. It refers to its share of world imports for products classified under CN 1602 32 and CN 1602 39 in Japan, Singapore, Korea, Hong Kong, China, Mauritius and South Africa. As explained by the EU, the "data on China's share of imports in a handful of selected import country markets where China holds a 'major share' is manifestly unreliable and unrepresentative." There is no legal basis to look at import shares in other (selected) markets to determine whether Members have a PSI or SSI in the tariff lines being modified in the market of the applicant Member, in this case, the EU.

1.22. In any event, it is too late for China to now claim a PSI or SSI status for the First and Second Modification Packages. At the time of the First Modification Package, China did not claim a PSI. It made a claim of SSI only on 6 September 2006, without providing any evidence of its alleged substantial interest in the tariff lines at issue. At the time of the Second Modification Package, China did not make a timely claim of interest, but waited three years before submitting its claim of a PSI on 9 May 2012.

1.23. Thailand recalls that paragraph 4 of the 1980 Procedures provides that claims of interest of a PSI or SSI should be made within ninety days following the circulation of the import statistics by the applicant Member, in this case, the EU. Paragraph 5 of the Understanding on Article XXVIII provides that where a Member considers that it has a PSI or SSI, it shall communicate its claim in writing to the [applicant Member and the Secretariat]. It further provides that paragraph 4 of the 1980 Procedures "shall apply in these cases". The Understanding on Article XXVIII is part of the GATT 1994,[4] and is therefore legally binding.

C. China's argument that the EU's SPS measure "tainted" the identification of Members that had a PSI or SSI within the meaning of Article XXVIII of the GATT 1994 is incorrect

1.24. China claims that the three-year period preceding the EU's notification of its intention to modify its tariff concessions is "tainted" by the EU's import ban on poultry products. China argues that the reference period did not take into account the import ban that adversely affected its share of imports in the EU.

1.25. In particular, China contends that the import ban was a "discriminatory quantitative restriction" within the meaning of paragraph 7 of the Note *Ad* Article XXVIII that affected the exports that China could reasonably be expected to have made to the EU. In China's view, as the

[4] See paragraph 1(c) (vi) of the General Agreement on Tariffs and Trade 1994.

reference period was not representative, it could not have resulted in an accurate determination of the Members that had a SSI or PSI. China argues that the import ban, which had a limiting effect on importation by prohibiting imports of poultry products, was a "quantitative restriction" within the meaning of Article XI:1 of the GATT 1994. It further argues that the import ban was a "discriminatory" quantitative restriction within the meaning of paragraphs 4 and 7 of Note *Ad* Article XXVIII because it treated imports from one WTO Member differently than it treated imports from other WTO Members, "irrespective of the ground for such disparate treatment, and, in particular, whether such difference in treatment was justified or not".

1.26. Paragraphs 4 and 7 of *Ad* Note to Article XXVIII provide that the determination of whether a Member has a PSI or SSI, respectively, should take into account whether "discriminatory quantitative restrictions" affected the share of imports a Member would have had in the absence of those discriminatory restrictions.

1.27. First, Thailand notes that the EU rebutted China's claim that the import ban should be characterised as a "quantitative restriction" on "importation" by explaining that Article XI should be interpreted in the light of the *Ad* Note to Article III. Accordingly, a measure that prohibits the sale of like domestic and foreign products should be considered as an internal law or regulation regardless of whether enforcement of the measure takes place at the border.[5]

1.28. Second, Thailand agrees with the EU that the SPS measure is not a "discriminatory" measure. Measures that apply different treatment to Members that are in different situations may be seen as non-discriminatory. In the case at hand, the EU's regime applied the same or equivalent requirements to imported products as it did to domestic products. The only difference in treatment was to prohibit products that did not comply with the sanitary requirements and allow those that did comply. This difference in treatment is based on legitimate regulatory requirements and, therefore, does not constitute a "discriminatory" measure.

D. China's arguments that the allocation of most of the TRQs to Thailand and Brazil is inconsistent with Article XIII:1 and Article XIII:2 are incorrect

1.29. China argues that Article XIII:1 requires that exportation or importation of like products to or from all third countries must be "similarly prohibited or restricted". It therefore argues that there can be no discrimination in the level of access to the TRQs. China also argues that the EU's allocation of the TRQs is inconsistent with the chapeau of Article XIII:2, which requires WTO Members to "aim at a distribution of trade [...] approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions." It argues that Members that do not have a SSI "must still be afforded access to the TRQs (through the TRQs for all other countries) such that they obtain the share they might expect to have in the absence of the TRQs". To this end, the allocation of the TRQs must take into account the comparative advantages of the WTO Members participating in the TRQ and the import ban in the representative period. Lastly, China argues that the EU acted inconsistently with Article XIII:2(d), second sentence, which requires that the shares of TRQs must be based "upon the proportions, supplied by such [Members], during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product."

1.30. As the Appellate Body has explained, the principle of non-discriminatory application governed by Article XIII:1, as applied to tariff quotas, means that "if a tariff quota is applied to one Member, it must be applied to all...".[6] China argues that the allocation of the majority of the TRQs to Thailand and Brazil is inconsistent with Article XIII:1. As the EU explains, however, this provision governs *access* to the TRQ, not the *allocation* of shares in the TRQ to different suppliers. Therefore, Article XIII:1 cannot be used as a basis to claim that the allocation of shares in the TRQ was inconsistent with this provision. As the EU also explains, Article XIII:1 requires that a TRQ be applied by a Member on a product-wide basis without discrimination as to the origin of the product. The TRQs established by the EU following the First and Second Modification packages do not discriminate on the basis of the origin of the products.

[5] Panel Report, *EC – Asbestos*, paras. 8.88-8.93.

[6] Appellate Body Reports, *EC – Bananas III (Article 21.5 - Ecuador II); EC – Bananas III (Article 21.5 - US)*, para. 337.

1.31. The Appellate Body has explained in EC − Bananas III (Article 21.5 - Ecuador: II); EC - Bananas III (Article 21.5 - US)[7] that:

> ... 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. The provisions of Article XIII:2(a)-(d) are specific instances of authorized forms of allocation when a Member chooses to allocate shares of the tariff quota. Article XIII:2(d) allows for the case where a quota is allocated among supplying countries, either by way of agreement or, where this is not reasonably practicable, by allotment to Members having a substantial interest in supplying the product concerned, and in accordance with the proportions supplied by those Members during a previous representative period, taking due account of "special factors". In other words, *Article XIII:2(d) is a permissive "safe harbour"; compliance with the requirements of Article XIII:2(d) is presumed to lead to a distribution of trade as foreseen in the chapeau of Article XIII:2, as far as substantial suppliers are concerned*.[408] (emphasis added).
>
> Footnote 408: If a Member allocates quota shares to Members with a substantial interest in supplying the product, in accordance with Article XIII:2(d), it must also respect the requirement in the chapeau of Article XIII:2—that distribution of trade approach as closely as possible the shares that Members may be expected to obtain in the absence of the restriction. This is usually done by allocating a share to a general "others" category for all suppliers other than Members with a substantial interest in supplying the product.

1.32. In this case, the EU allocated specific TRQs as a means of compensation to two substantial suppliers (Thailand and Brazil) by agreement under Article XIII:2(d), first sentence, and in accordance with paragraph 6 of the Understanding on Article XXVIII. The EU did so based on the shares held by each of the Members that had a SSI in each relevant tariff line during the same reference period that was used to determine the "all others" share in the TRQs. Thus, the share in each TRQ for "all others" was determined as a reflection of the shares allocated to Members that had a SSI. The EU complied with Article XIII:2(d), first sentence, in allocating shares in the TRQ to the Members that had a SSI as well as to Members in the "all others" category. It follows that the EU respected the chapeau of Article XIII:2 both in terms of the Members that had a SSI and of Members in the "all others" category.

1.33. Thailand notes that there is a TRQ in CN 1602 39 21 (processed duck, geese, guinea fowl meat, uncooked containing 57% or more of weight of poultry meat or offal) was accorded 100% to Thailand. This allocation reflects the fact that during the relevant representative period, 100% of imports of these products in the EU came from Thailand. No other WTO Member had any share of the trade in these products even though there were no restrictions in place at the time. In this situation, even a 100% TRQ can be consistent with the chapeau of Article XIII:2. The Appellate Body itself recognised this possibility when it stated in footnote 408: [The distribution of trade approaching as closely as possible the trade that that Members may be expected to obtain in the absence of the restriction] ... is ***usually*** done by allocating a share to a general "others" category for all suppliers other than Members with a substantial interest in supplying the product. In situations where other Members are not expected to obtain a share of the trade, the importing Member, *in casu*, the EU is not required to allocate an "all others" category.

1.34. "Special factors" that may have affected trade in the product are only required to be taken into account in Article XIII:2(d), second sentence, which does not apply in this case. The term "special factors" does not appear in Article XIII:2(d), first sentence. It appears only in Article XIII:2(d), second sentence, to address situations where it is not possible to arrive at an agreement on the allocation of shares in a TRQ with Members that had a SSI. It is not necessary to conduct an analysis of what does (or does not) constitute a special factor as the conditions in Article XIII:2, second sentence, do not apply in this case.

[7] Appellate Body Reports, *EC − Bananas III (Article 21.5 - Ecuador II); EC − Bananas III (Article 21.5 - US)*, para. 338 and footnote 408.

E. China's claims under Article II:1 and Article I:1 of the GATT 1994 should be consequentially dismissed

1.35. China's claim that the EU acted inconsistently with its obligations under Article II:1 of the GATT 1994 because it implemented changes in its Schedule even though those changes had not been certified by the Director-General is without merit. Certification is an administrative procedure that allows for the incorporation of modifications in the applicant Member's Schedule. It is not a substantive requirement that must be completed before the modifications may enter into force.[8]

1.36. China's claim that the EU acted inconsistently with its obligations under Article I:1 of the GATT 1994 because the EU granted market access to Thailand and Brazil in the TRQs and not to other Members, including China, is also without merit. The EU's actions are consistent with its obligations to provide non-discriminatory treatment under Article XIII:1. Therefore, a harmonious interpretation of both non-discriminatory provisions requires that its actions also be considered as consistent with its obligations under Article I:1 of the GATT 1994.

[8] See EU's first written submission citing *Anwarul Hoda, Tariff negotiations and renegotiations under the GATT and the WTO*, Cambridge University Press; 2001, p.115.

ANNEX C-6

EXECUTIVE SUMMARY THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY ORAL STATEMENT

I. Introduction

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

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

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

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

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

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

6. This procedure, then, would appear to provide its own remedy for the withdrawal or modification of the concession by that proposing Member. That is, the first and second set of Members can rebalance their own concessions in light of the withdrawal or modification. It could be viewed as incongruous to both permit a self-judging rebalancing of concessions under the Article XXVIII procedures and a claim for breach of the Article XXVIII procedures. And it is not clear how an alleged failure to follow a procedure resulting in a change to a Member's WTO *Schedule* would constitute a "measure affecting the operation of any covered agreement taken within the territory of" the proposing Member. In substance, of course, a Member may potentially challenge the treatment accorded to imports, following a modification or withdrawal, pursuant to numerous Articles of GATT 1994, including Articles I, II, XI, and XIII.

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

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

9. As mentioned, Article XXVIII:1 establishes that a Member proposing to modify or withdraw a concession may do so "by negotiation and agreement" with any Member having an initial negotiating right "and with any other [Member] determined by the CONTRACTING PARTIES to have a principal supplying interest" and "subject to consultation with any other [Member] determined by the CONTRACTING PARTIES to have a substantial interest in such concession." Thus, by the very terms of Article XXVIII:1, a Member entitled to negotiate and agree is that "determined by the CONTRACTING PARTIES to have a principal supplying interest". Likewise, the Member entitled to "consultation" on the proposed modification or withdrawal is that "determined by the CONTRACTING PARTIES to have a substantial interest."

10. China has not established or even alleged that it was "determined by the CONTRACTING PARTIES" (to be understood as a reference to Ministerial Conference or General Council, or as delegated) to have a principal supplying interest or a substantial interest in any such concession. Nor does China allege that the EU accepted China's assertion of a substantial interest, which under the Procedures for Negotiations under Article XXVIII, could be deemed to constitute such a determination. Therefore, the United States does not understand the basis on which China considers that it could make a claim under Article XXVIII:1 in relation to a status that it does not even allege it had.

11. As noted above, China's claim under Article XXVIII:1 raises a novel legal issue, one which has been discussed by the GATT Contracting Parties and which, pragmatically, did not result in review by a GATT panel. As the United States understands the facts in this dispute, the Panel may similarly decline to make a finding on this legal issue. China has not asserted or established a fact that is a necessary element of its claim, even assuming, for the limited purposes of this analysis, that such a claim can be considered under the DSU.

II. The Relationship between Article XIII and Article XXVIII

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

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

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

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

16. Second, as the obligations in Article XIII apply to the application or administration of restrictions on imports, they apply whenever a Member seeks to apply or administer such a

restriction. That is, while the procedure in Article XXVIII comes to a close with the possible modification or withdrawal of concessions in the relevant Members' Schedules, the treatment of imports by a Member at any given time must comply with Article XIII, and other provisions that govern "treatment" of imports, such as Articles I, II, III, or XI.

17. Accordingly, the United States considers that the existence of a tariff concession in the form of a tariff-rate quota in a Schedule does not determine the WTO-consistency of the treatment of imports under a tariff-rate quota that is applied by a Member through a domestic tariff measure. As noted, a concession in a Member's GATT 1994 Schedule is not − at the level of the concession − subject to an ongoing WTO obligation. Rather, a failure to accord to imports the treatment set out in the Schedule − such as concession for a particular Member expressed as a tariff-rate quota − would give rise to a claim under GATT 1994 Article II:1(b). If a tariff-rate quota is imposed by a Member through a domestic tariff measure, the treatment given to imports through that import restriction must conform to the requirements of Article XIII.

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

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

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

2. As described above, Article XXVIII allows a Member to modify or withdraw a scheduled commitment as long as it negotiates and consults with the appropriate WTO Members. According to the text of Article XXVIII and the *Procedures for Negotiations under Article XXVIII*, the Members having a right to participate in these negotiations and consultations as determined by the Contracting Parties at the start of the negotiations. If the Contracting Parties did not make such a determination with respect to a Member, that Member does not have recourse to the remedy provided for in paragraph 3 of Article XXVIII.

3. Paragraph 7 to the Note Ad Article XXVIII establishes that the concept of "discriminatory quantitative restrictions" is one that the then-CONTRACTING PARTIES agreed for purposes of guiding *their own* "judgment" on whether a Member would merit the status of having a "principal supplying interest" or a "substantial interest". In this, the Ad Article corresponds to the language of Article XXVIII previously reviewed, which establishes that a Member's status for purposes of negotiations or consultations on proposed modifications of concessions is a matter reserved to the decision of the Ministerial Conference or General Council.

4. Again, as elaborated in the U.S. third-party oral statement, this is not an interpretive issue for the Panel to resolve. China has not established or even alleged that it was "determined by the CONTRACTING PARTIES" (to be understood as a reference to Ministerial Conference or General Council, or as delegated) to have a principal supplying interest or a substantial interest in any such concession. If China were dissatisfied with the EU's non-recognition of its status under Article XXVIII, its proper recourse was to the Ministerial Conference or the General Council. It would not be for the Panel to determine that those bodies had failed to make a determination, even aside from the fact that China has not even asked those bodies to make that determination.