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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.

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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

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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

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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.