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1 ARTICLE XIII

1.1 Text of Article XIII

Article XIII*

Non-discriminatory Administration of Quantitative Restrictions

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

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

- (a) Wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed, and notice given of their amount in accordance with paragraph 3 (b) of this Article;
- (b) In cases in which quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;
- (c) Contracting parties shall not, except for purposes of operating quotas allocated in accordance with subparagraph (d) of this paragraph, require that import licences or permits be utilized for the importation of the product concerned from a particular country or source;
- (d) In cases in which a quota is allocated among supplying countries the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.*

3. (a) In cases in which import licences are issued in connection with import restrictions, the contracting party applying the restrictions shall provide, upon the request of any contracting party having an interest in the trade in the product concerned, all relevant information concerning the administration of the restrictions, the import licences granted over a recent period and the distribution of such licences among supplying countries; *Provided* that there shall be no obligation to supply information as to the names of importing or supplying enterprises.

(b) In the case of import restrictions involving the fixing of quotas, the contracting party applying the restrictions shall give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value. Any supplies of the product in question which were *en route* at the time at which public notice was given shall not be excluded from entry; *Provided* that they may be counted so far as practicable, against the quantity permitted to be imported in the period in question, and also, where necessary, against the quantities permitted to be imported in the next following period or periods; and *Provided* further that if any contracting party customarily exempts from such restrictions products entered for consumption or withdrawn from warehouse for consumption during a period of thirty days after the day of such public notice, such practice shall be considered full compliance with this subparagraph.

(c) In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall promptly inform all other contracting parties having an interest in supplying the product concerned of the shares in the quota currently allocated, by quantity or value, to the various supplying countries and shall give public notice thereof.

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

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

1.2 Text of note *ad* Article XIII

Ad Article XIII

Paragraph 2 (d)

No mention was made of "commercial considerations" as a rule for the allocation of quotas because it was considered that its application by governmental authorities might not always be practicable. Moreover, in cases where it is practicable, a contracting party could apply these considerations in the process of seeking agreement, consistently with the general rule laid down in the opening sentence of paragraph 2.

Paragraph 4

See note relating to "special factors" in connection with the last subparagraph of paragraph 2 of Article XI.

1.3 General

1. In *EC – Bananas III*, the Panel, in a finding not reviewed by the Appellate Body, held that the object and purpose of Article XIII:2 is to minimize the impact of quantitative restrictions on trade flows, and set out how the provisions of Article XIII work together:

"The working of Article XIII is clear. If quantitative restrictions are used (as an exception to the general ban on their use in Article XI), they are to be used in the least trade-distorting manner possible. ... Article XIII:5 makes it clear ... that Article

XIII applies to the administration of tariff quotas. In light of the terms of Article XIII, it can be said that the object and purpose of Article XIII:2 is to minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate under such measures the trade shares that would have occurred in the absence of the regime. In interpreting the terms of Article XIII, it is important to keep their context in mind. Article XIII is basically a provision relating to the administration of restrictions authorized as exceptions to one of the most basic GATT provisions—the general ban on quotas and other non-tariff restrictions contained in Article XI.

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

2. The Panel Report in *EC – Bananas III (Article 21.5 – Ecuador II)* noted that "Article XIII of the GATT 1994 is relevant to one of the few remaining permissible practices of with a quantitative dimension in agriculture: tariff quotas."²

3. The Panel in *US – Line Pipe* found that safeguard measures are subject to Article XIII in addition to the Agreement on Safeguards, and consequently that the safeguard measure at issue in that dispute was subject to Article XIII.³ See also paragraph 57 below.

4. The Panel in *China – TRQs* noted that "the drafters designed [Article XIII] in such a way that an importing Member is subject to a particular publication or notification obligation depending on how it administers quantitative restrictions and TRQs."⁴

1.4 Article XIII:1: "the importation ... is similarly restricted"

1.4.1 General

5. In *EC – Bananas III*, the Appellate Body reviewed the Panel's finding that the EC import regime for bananas was inconsistent with Article XIII because the European Communities allocated tariff quota shares to some Members without allocating such shares to other Members. The European Communities claimed that "there [were] two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all other imports of bananas" and argued that "the non-discrimination obligations of Article I:1, X:3(a) and XIII of GATT 1994 and Article 1.3 of the *Licensing Agreement* apply only *within* each of these separate regimes."⁵ Rejecting this argument, the Panel found:

"[Article XIII:1 and Article XIII:2] do not provide a basis for analysing quota allocation regimes separately because they have different legal bases or because different tariff rates are applicable. Article XIII applies to allocations of shares in an import market for a particular product which is restricted by a quota or tariff quota. In our view, its non-discrimination requirements apply to that market for that product, irrespective of whether or how a Member subdivides it for administrative or other reasons. Indeed, to accept that a Member could establish quota regimes by different legal instruments and argue that they are not as a consequence subject to Article XIII would be, as argued by the Complainants, to eviscerate the non-discrimination provisions of Article XIII."⁶

6. Upholding this finding, the Appellate Body applied Article XIII to the whole import regime as follows:

¹ Panel Report, *EC – Bananas III*, paras. 7.68-7.69.

² Panel Report, *EC – Bananas II (Article 21.5 – Ecuador II)*, para. 7.287.

³ Panel Report, *US – Line Pipe*, paras. 7.30-7.50.

⁴ Panel Report, *China – TRQs*, para. 7.188.

⁵ Appellate Body Report, *EC – Bananas III*, para. 189.

⁶ Panel Report, *EC – Bananas III*, para. 7.79.

"The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member."⁷

7. In *EC – Bananas III*, the Appellate Body found that the European Communities' import regime for bananas violated Article XIII:1, stating as follows:

"[A]llocation to Members not having a substantial interest must be subject to the basic principle of non-discrimination. When this principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest. To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is 'similarly' restricted."⁸

1.4.2 Relationship between Articles XIII:1 and XIII:2 in the context of TRQs and country share allocation

8. Prior panel and Appellate Body reports have, unsurprisingly, interpreted Article XIII:1 so as not to conflict with the obligations in Article XIII:2 relating to the allocation of TRQs. Notably, the Panel in *EC – Bananas III* explained:

"While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned."⁹

9. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body sought to delineate the scope of Article XIII:1 from the scope of Article XIII:2. Beginning with an examination of the terms of Article XIII:1 taken together with Article XIII:5, the Appellate Body set forth its understanding of the scope of Article XIII:1:

"Applying Article XIII:1 to a tariff quota requires that the word 'restriction' be read as a reference to a tariff quota. Article XIII:1 is then rendered thus: no tariff quota shall be applied by a Member on the importation of any product of the territory of any other Member, unless the importation of the like product of all third countries is similarly made subject to the tariff quota. The application of the tariff quota is thus on a product-wide basis. The principle of non-discriminatory application captured by Article XIII:1 requires that, if a tariff quota is applied to one Member, it must be applied to all; and, consequently, the term 'similarly restricted' means, in the case of tariff quotas, that imports of like products of all third countries must have access to, and be given an opportunity of, participation. If a Member is excluded from access to, and participation in, the tariff quota, then imports of like products from all third countries are not 'similarly restricted'. "¹⁰

⁷ Appellate Body Report, *EC – Bananas III*, para. 190.

⁸ Appellate Body Report, *EC – Bananas III*, para. 161.

⁹ Panel Report, *EC-Bananas III*, para. 7.75.

¹⁰ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 337.

10. After clarifying how Article XIII:1 applies to TRQs, the Appellate Body then turned to the subject matter of Article XIII:2. The Appellate Body stated that:

"Article XIII:2 regulates the distribution of the tariff quota among Members. The chapeau of Article XIII:2 requires that the tariff quota be distributed so as to serve the aim of a distribution of trade approaching as closely as possible the shares that various Members may be expected to obtain in the absence of the tariff quota. In this way, all Members producing the like product are afforded access to, and competitive opportunities under, the tariff quota in a manner that mimics their comparative advantage vis-à-vis other Members who would participate under the quota. Thus, while Article XIII:1 establishes a principle of non-discriminatory access to and participation in the overall tariff quota, the chapeau of Article XIII:2 stipulates a principle regarding the distribution of the tariff quota in the least trade-distorting manner. The provisions of Article XIII:2(a)-(d) are specific instances of authorized forms of allocation when a Member chooses to allocate shares of the tariff quota."¹¹

11. In *EU – Poultry (China)*, China claimed that the allocation of all or the vast majority of the TRQs to only two WTO Members (Brazil and Thailand) violated Article XIII:1 of the GATT 1994 because the importation of the like product from other WTO Members is not "similarly prohibited or restricted" as required by the terms of that provision. China's claim and the arguments of the parties raised the issue of the relationship between the obligations found in Article XIII:1 and Article XIII:2, and in particular whether the allocation of TRQ shares among supplying countries is governed by the general non-discrimination obligation in Article XIII:1. In the course of rejecting China's claim, the Panel stated:

"[I]t would follow from such an interpretation of Article XIII:1 that Members are legally prohibited, by the terms of Article XIII:1, from ever allocating a TRQ among supplying countries. This is because where a TRQ is allocated among supplying countries, the 'similarly restricted' requirement of Article XIII:1 would never be met, insofar as that requirement is applied at the level of the amount of the shares allocated. It is axiomatic that the terms of Article XIII:1 cannot be read in isolation from Article XIII:2, which expressly authorizes a Member to allocate shares in a TRQ, in varying amounts, among different supplying countries. Therefore, we cannot interpret Article XIII:1 as prohibiting a Member from allocating shares in a TRQ in varying amounts among different supplying countries insofar as this would conflict with Article XIII:2.

...

... [T]he Appellate Body did not read the 'similarly restricted' requirement of Article XIII:1 as applying at the level of the amount of the TRQ shares allocated among supplying countries. Rather, the Appellate Body equated the term 'restriction' in Article XIII:1 with the TRQ as a whole, rather than at the level of the individual shares allocated among supplying countries. The Appellate Body understood the obligation in Article XIII:1 to be that no tariff quota shall be applied by a Member on the importation of any product from some Members, unless the importation of the like product of all third countries is similarly 'made subject to the tariff quota'. Under this reading, a violation of Article XIII:1 would be established if the products from one Member are 'made subject to the tariff quota', but the products of one or more other Members are not made subject to the tariff quota.

...

In the present case, China has not alleged that Brazil or Thailand were not 'made subject to the tariff quota'. Nor has China alleged that the TRQ is applied other than 'on a product-wide basis'. China has not articulated what are the different elements of the TRQs, or their allocation, that China is challenging under Article XIII:1, separately from that which China has already challenged under Article XIII:2. Rather, China's claims under Article XIII:1 appear to be based on essentially the same elements as its

¹¹ Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 338.

claims regarding the TRQ allocation under the chapeau of Article XIII:2. All of China's argumentation under Article XIII:1 relates to the amount of the TRQ shares allocated to 'all others', or to the allocation of country-specific shares only to Brazil and/or Thailand but not to China which claimed it was also a substantial supplier."¹²

1.5 Article XIII:2

1.5.1 Chapeau of Article XIII

12. In *US – Line Pipe*, the Panel held: "the chapeau of Article XIII:2 contains a general rule, and not merely a statement of principle. This is confirmed by the Note *Ad Article XIII:2*, which refers to "the general rule laid down in the opening sentence of paragraph 2".¹³

13. In *US – Line Pipe*, the Panel examined a US safeguard measure which provided that, for three years and one day, a higher tariff (declining each year) would be imposed on all imports from each country in excess of 9,000 short tons. Mexico and Canada were excluded from the remedy. The Panel found that this measure was inconsistent with the "general rule" in the chapeau of Article XIII:2 because it was not based on historical trade patterns, and did not aim at tracking the distribution of trade that would be expected in its absence:

"[I]n our view, Korea is correct to argue that a Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures without respecting traditional trade patterns (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, as a result of changed circumstances, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure.

There is nothing in the record before the Panel to suggest that the line pipe measure was based in any way on historical trade patterns in line pipe, or that the United States otherwise 'aim[ed] 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' the line pipe measure. Instead, as noted by Korea, 'the in-quota import volume originating from Korea, the largest supplier historically to the US market, was reduced to the same level as the smallest – or even then non-existent – suppliers to the US market (9,000 short tons)'. For this reason, we find that the line pipe measure is inconsistent with the general rule contained in the chapeau of Article XIII:2."¹⁴

14. The Panel in *US – Line Pipe*, in a statement not reviewed by the Appellate Body, highlighted the importance of respecting traditional trade patterns when imposing safeguards measures:

"In our view, Korea is correct to argue that a Member would violate the general rule set forth in the chapeau of Article XIII:2 if it imposes safeguard measures without respecting traditional trade patterns (at least in the absence of any evidence indicating that the shares a Member might be expected to obtain in the future differ, as a result of changed circumstances, from its historical share). Trade flows before the imposition of a safeguard measure provide an objective, factual basis for projecting what might have occurred in the absence of that measure."¹⁵

15. In *EC – Bananas III*, the Appellate Body found a violation of Article XIII:2 in respect of the European Communities' import regime for bananas and, more specifically, in respect of the treatment granted to countries which had concluded with the European Communities the so-called Banana Framework Agreement (BFA). A quota share not utilized by one of the BFA countries could, at the joint request of all BFA countries, be transferred to another BFA country. No equivalent regulation existed with respect to banana exporting countries that were not part of the BFA. The Panel found that this aspect of the measure was inconsistent with the requirement to approximate,

¹² Panel Report, *EU – Poultry (China)*, paras. 7.429, 7.432 and 7.434.

¹³ Panel Report, *US – Line Pipe*, fn. 64.

¹⁴ Panel Report, *US – Line Pipe*, paras. 7.53-7.55.

¹⁵ Panel Report, *US – Line Pipe*, para. 7.54.

in the administration of a quantitative restriction, the relative trade flows which would exist in the absence of the measure at issue:

"Pursuant to these reallocation rules, a portion of a tariff quota share not used by the BFA country to which that share is allocated may, at the joint request of the BFA countries, be reallocated to the other BFA countries. ... [T]he reallocation of unused portions of a tariff quota share exclusively to other BFA countries, and not to other non-BFA banana-supplying Members, does not result in an allocation of tariff quota shares which approaches 'as closely as possible the shares which the various Members might be expected to obtain in the absence of the restrictions'. Therefore, the tariff quota reallocation rules of the BFA are also inconsistent with the chapeau of Article XIII:2 of the GATT 1994."¹⁶

16. In *EC – Poultry*, Brazil challenged the European Communities' calculation of the tariff quota shares because imports from China – at that time not a Member of the WTO – had been included in this allocation of tariff quota shares. The Panel, in a finding expressly endorsed by the Appellate Body¹⁷, found that nothing in Article XIII required the calculation of tariff quota shares only on the basis of imports from WTO Members:

"We note that Article XIII carefully distinguishes between Members ('contracting parties' in the original text of GATT 1947) and 'supplying countries' or 'source'. There is nothing in Article XIII that obligates Members to calculate tariff quota shares on the basis of imports from Members only.¹⁸ If the purpose of using past trade performance is to approximate the shares in the absence of the restrictions as required under the chapeau of Article XIII:2, exclusion of a non-Member, particularly if it is an efficient supplier, would not serve that purpose.

This interpretation is also confirmed by the use in Article XIII:2(d) of the term 'of the total quantity or value of imports of the product' without limiting the total quantity to imports from Members.

The conclusion above is not affected by the fact that the TRQ in question was opened as compensatory adjustment under Article XXVIII because Article XIII is a general provision regarding the non-discriminatory administration of import restrictions applicable to any TRQs regardless of their origin."¹⁹

17. The Panel Report on *EC – Bananas III (Article 21.5 – Ecuador II)* found that the EC banana regime as amended failed to "aim at a distribution of trade in [bananas] approaching as closely as possible the shares which the various [Members, including both ACP and MFN countries] might be expected to obtain in the absence of such restrictions," based on the exclusion of MFN producers from the tariff rate quota, and statements by the EC and ACP countries indicating that the preferential tariff quota regime was indispensable to the existence of ACP exports to the EC. The Panel consequently found that "on its face the European Communities' current banana import

¹⁶ Appellate Body Report, *EC – Bananas III*, para. 163.

¹⁷ Appellate Body Report, *EC – Poultry*, para. 106.

¹⁸ (*footnote original*) We note in this regard that in the *Banana III* case, the panel made the following observation (which was not affected by the subsequent appeal): "The consequence of the foregoing analysis is that Members may be effectively required to use a general 'others' category for all suppliers other than Members with a substantial interest in supplying the product. The fact that in this situation tariff quota shares are allocated to some Members, notably those having a substantial interest in supplying the product, but not to others that do not have a substantial interest in supplying the product, would not necessarily be in conflict with Article XIII:1. While the requirement of Article XIII:2(d) is not expressed as an exception to the requirements of Article XIII:1, it may be regarded, to the extent that its practical application is inconsistent with it, as *lex specialis* in respect of Members with a substantial interest in supplying the product concerned". See Panel Reports on *EC – Bananas III*, para. 7.75. The quoted passage, particularly the use of the phrase "*all suppliers other than Members with a substantial interest in supplying the product*" (emphasis added), indicates that the *Banana III* panel did not take the view that allocation of quota shares to non-Members under Article XIII:2(d) was not permitted.

¹⁹ Panel Report, *EC – Poultry*, paras. 230-232.

regime, including its preferential ACP tariff quota, is inconsistent with the chapeau of Article XIII:2 of the GATT 1994."²⁰

18. In *EU – Poultry (China)*, the Panel found that the *chapeau* contains an obligation that can be violated independently of Article XIII:2(d) (or other subparagraphs). Recalling prior jurisprudence, the Panel stated that:

"The chapeau states that Members '*shall* aim at a distribution of trade [...] approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions'. The wording of the chapeau ('*shall*') suggests that it contains a binding obligation, and this is reinforced by the fact that the Ad Note to Article XIII:2(d) refers to the chapeau as containing a 'general rule'. In this case, the parties agree that the chapeau of Article XIII:2 imposes a mandatory legal obligation that must be respected when allocating a TRQ among supplying countries. In that sense, we understand the European Union to agree with China that the chapeau of Article XIII:2 'states a general rule capable of being violated separately from the provisions of Article XIII:2(d)'.

We see no reason to disagree with the parties, taking into account that in several prior cases, panels or the Appellate Body have upheld claims of violation based on the chapeau of Article XIII:2. In *US – Line Pipe*, the panel found that the measure at issue was 'not consistent with the general rule contained in the chapeau of Article XIII:2 because it has been applied without respecting traditional trade patterns'. The panel stated that:

'In our view, the chapeau of Article XIII:2 contains a general rule, and not merely a statement of principle. This is confirmed by the Note Ad Article XIII:2, which refers to "the general rule laid down in the opening sentence of paragraph 2".'

This understanding is further confirmed by the Appellate Body's finding that Article XIII:2(d) is a permissive 'safe harbour' only insofar 'as substantial suppliers are concerned', and that a Member allocating shares to substantial suppliers in accordance with Article XIII:2(d) 'must also respect the requirement in the chapeau of Article XIII:2'. We understand this to mean that the general rule in the chapeau of Article XIII:2 contains a legal requirement relating to the allocation of TRQ shares among supplying countries that is capable of being violated separately from the provisions of Article XIII:2(d). ...

...

'[A] TRQ allocation agreed among substantial suppliers could be inconsistent with the rights of non-substantial suppliers under the general rule in the chapeau of Article XIII:2 insofar as the basis for the allocation, as agreed by the substantial suppliers, was not based on a 'previous representative period' or did not take due account 'special factors', in a manner that was biased against one or more non-substantial suppliers.'"²¹

1.5.2 Article XIII:2(a): "quotas representing the total amount of permitted imports ...shall be fixed"

19. The Panel in *US – Line Pipe*, in a finding not reviewed by the Appellate Body, held that the US safeguard measure described in paragraph 13 was inconsistent with Article XIII:2(a), because the measure did not fix an overall quantity of imports eligible for the lower tariff rate, and the US had not demonstrated that it was not practicable to do so; the Panel observed that "we see no

²⁰ Panel Report, *EC – Bananas III (21.5 – Ecuador II)*, para. 7.366.

²¹ Panel Report, *EU – Poultry (China)*, paras. 7.383-7.385 and 7.394.

reason why the United States could not have chosen another type of measure consistent with the general rule set forth in the chapeau of Article XIII:2."²² The Panel held:

"Irrespective of whether or not tariff quotas constitute "quotas" within the meaning of Article XIII:2(a), tariff quotas are necessarily subject to the disciplines contained in Article XIII:2(a) as a result of the express language of Article XIII:5. Thus, Article XIII:2(a) must have meaning in the context of tariff quotas. We believe that, in respect of tariff quotas, Article XIII:2(a) requires Members to fix, wherever practicable, the total amount of imports permitted at the lower tariff rate."²³²⁴

1.5.3 Article XIII:2(b): Import licensing schemes

20. Article 4 of the Understanding on the Balance-of-Payments Provisions of the GATT 1994 provides that "In the administration of quantitative restrictions, a Member shall use discretionary licensing only when unavoidable and shall phase it out progressively. Appropriate justification shall be provided as to the criteria used to determine allowable import quantities or values."

1.5.4 Article XIII:2(d): quota allocation

1.5.4.1 Agreements under Article XIII:2(d)

21. The Panel in *EC – Bananas III* observed regarding Article XIII:2(d):

"Article XIII:2(d) ... specifies the treatment that, in case of country-specific allocation of tariff quota shares, must be given to Members with 'a substantial interest in supplying the product concerned'. For those Members, the Member proposing to impose restrictions may seek agreement with them as provided in Article XIII:2(d), first sentence. If that is not reasonably practicable, then it must allot shares in the quota (or tariff quota) to them on the basis of the criteria specified in Article XIII:2(d), second sentence.

The terms of Article XIII:2(d) make clear that the combined use of agreements and unilateral allocations to Members with substantial interests is not permitted. The text of Article XIII:2(d) provides that where the first 'method', i.e., agreement, is not reasonably practicable, then an allocation must be made. Thus, in the absence of agreements with all Members having a substantial interest in supplying the product, the Member applying the restriction must allocate shares in accordance with the rules of Article XIII:2(d), second sentence. In the absence of this rule, the Member allocating shares could reach agreements with some Members having a substantial interest in supplying the product that discriminated against other Members having a substantial interest supplying the product, even if those other Members objected to the shares they were to be allocated."²⁵

22. The Appellate Body Report on *EC – Poultry* rejected Brazil's claim that a bilateral agreement with the EC constituted an agreement under Article XIII:2(d) to allocate the entire amount of a tariff quota to Brazil, and observed:

"To conform to Article XIII:2(d), all other Members having a 'substantial interest' in supplying the product concerned would have to agree. That is not the case here. As the European Communities did not seek an agreement with Thailand, the other contracting party having a substantial interest in the supply of frozen poultry meat to the European Communities at that time, the Oilseeds Agreement cannot be considered an agreement within the meaning of Article XIII:2(d) of the GATT 1994."²⁶

²² Panel Report, *US – Line Pipe*, fn. 74.

²³ (*footnote original*) The obligation cannot extend to fixing the total amount of permitted imports at the higher tariff rate, because that would effectively undermine the distinction between tariff quotas and quantitative restrictions.

²⁴ Panel Report, *US – Line Pipe*, para. 7.58.

²⁵ Panel Report, *EC – Bananas III*, paras. 7.71-7.72.

²⁶ Appellate Body Report, *Brazil – Poultry*, para. 93.

1.5.4.2 Allocation of import quotas to Members other than those with a "substantial interest" (including an "all others" share)

23. The Panel in *EC – Bananas III*, in a finding not addressed by the Appellate Body, found that country-specific quota shares can be allocated to Members that do not have a substantial interest in supplying the product; the Panel emphasized that any allocation to Members not having a substantial interest in supplying the product at issue would have to comply with the principle of non-discrimination. The Panel endorsed allocation on the basis of imports during a representative period consisting of the three years prior to the quota:

"[W]e note that the first sentence of Article XIII:2(d) refers to allocation of a quota 'among supplying countries'. This could be read to imply that an allocation may also be made to Members that do not have a substantial interest in supplying the product. If this interpretation is accepted, any such allocation must, however, meet the requirements of Article XIII:1 and the general rule in the chapeau to Article XIII:2(d). Therefore, if a Member wishes to allocate shares of a tariff quota to some suppliers without a substantial interest, then such shares must be allocated to all such suppliers. Otherwise, imports from Members would not be similarly restricted as required by Article XIII:1.²⁷ As to the second point, in such a case it would be required to use the same method as was used to allocate the country-specific shares to the Members having a substantial interest in supplying the product, because otherwise the requirements of Article XIII:1 would also not be met.

...

In so far as this in practice results in the use of an 'others' category for all Members not having a substantial interest in supplying the product, it comports well with the object and purpose of Article XIII, as expressed in the general rule to the chapeau to Article XIII:2. When a significant share of a tariff quota is assigned to 'others', the import market will evolve with the minimum amount of distortion. Members 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. New entrants will be able to compete in the market, and likewise have an opportunity to gain 'substantial supplying interest' status. For the share of the market allocated to Members with a substantial interest in supplying the product, the situation may also evolve in light of adjustments following consultations under Article XIII:4. In comparison to a situation where country-specific shares are allocated to all supplying countries, including Members with minor market shares, this result is less likely to lead to a long-term freezing of market shares. This is, in our view, consistent with the terms, object and purpose, and context of Article XIII."²⁸

24. The Panel in *EC – Bananas III (Article 21.5 – Ecuador)* examined the consistency with Article XIII of the European Communities' regime for imports of bananas, as revised by the

²⁷ (footnote original) In this regard, we note with approval the statement by the 1980 *Chilean Apples* panel:

"[I]n keeping with normal GATT practice, the Panel considered it appropriate to use as a 'representative period' a three-year period previous to 1979, the year in which the EC measures were in effect. Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977, 1978 as a 'representative period'".

Panel Report on "EEC Restrictions on Imports of Dessert Apples - Complaint by Chile", adopted on 10 November 1980, BISD 27S/98, 113, para. 4.8. In the report of the "Panel on Poultry", issued on 21 November 1963, GATT Doc. L/2088, para. 10, the panel stated: "[T]he shares in the reference period of the various exporting countries in the Swiss market, which was free and competitive, afforded a fair guide as to the proportion of the increased German poultry consumption likely to be taken up by United States exports". See also Panel Report, "Japan - Restrictions on Imports of Certain Agricultural Products", adopted on 22 March 1988, BISD 35S/163, 226-227, para. 5.1.3.7.

²⁸ Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 7.73 and 7.76.

European Communities in response to the DSB's recommendation. In this revised regime, bananas could be imported under the MFN tariff-rate quota on the basis of past trade performance by exporting countries during the past representative period from 1994 to 1996, while bananas from traditional ACP supplier countries could be imported up to a collective amount which was originally set to reflect the overall amount of the pre-1991 best-ever export by individual traditional ACP suppliers. The Panel found the revised regime to be inconsistent with Article XIII:2(d):

"[F]or traditional ACP supplier countries the average exports during the three-year period from 1994 to 1996 were collectively at a level of approximately 685,000 tonnes, which is only about 80 per cent of the 857,700 tonnes reserved for traditional ACP imports under the previous as well as under the revised regime. In contrast, the MFN tariff quota of 2.2 million tonnes (autonomously increased by 353,000 tonnes) has been virtually filled since its creation (over 95 per cent) and there have been some out-of-quota imports. Thus, the allocation of an 857,700 tonne tariff quota for traditional banana imports from ACP States is inconsistent with the requirements of Article XIII:2(d) because the EC regime clearly does not aim at a distribution of trade approaching as closely as possible the shares which various Members might be expected to obtain in the absence of restrictions."²⁹

1.5.4.3 Allocation of quotas to non-Members and newly acceded Members

25. In *EC – Poultry*, the Appellate Body upheld the Panel's finding that the European Communities acted consistently with Article XIII in calculating a tariff-rate quota share for a Member based upon the total quantity of imports including those from non-Members.³⁰ See also paragraph 16 above. See also under Article XIII:4 regarding adjustment of quotas in light of the accession to the WTO of a supplier.

1.5.4.4 Meaning of a "substantial interest" under Articles XIII:2(d) and XXVIII of the GATT 1994

26. In *EU – Poultry (China)*, the Panel addressed whether the notion of a "substantial interest" means the same thing in the context of Articles XIII:2(d) and XXVIII. The Panel stated that:

"The European Union argues that there is no reason to interpret the notion of a 'substantial interest' in different ways in Article XXVIII and Article XIII. To be clear, we are not suggesting that the meaning of the terms 'substantial interest' in the context of Article XIII:2(d) should be interpreted without regard to the parallel determination that must be made in the context of Article XXVIII negotiations. We consider that the need for a harmonious interpretation is particularly important taking into account the existence of situations where, as in the present case, negotiations on the total amount of the TRQs under Article XXVIII occurs simultaneously with negotiations on the allocation of the TRQs under Article XIII:2(d). Thus, we consider that these two provisions should be interpreted harmoniously.

More specifically, we consider that a determination of which Members hold a principal or substantial supplying interest under Article XXVIII based on trade statistics for the last three-year period preceding the notification of the intention to modify concessions, in accordance with paragraph 4 of the Procedures for Negotiations under Article XXVIII, would generally satisfy the requirement, in Article XIII:2(d), that the determination be based on a 'previous representative period'. Furthermore, there are the attractions of methodological ease and consistency in using a 10% import share benchmark as the means of determining 'substantial interest' in Article XIII as has been done in the context of Article XXVIII. In this regard, China stated that it 'does not consider that it is an *ipso facto* violation of Articles XXVIII and XIII for a member to use the 10% threshold to determine SSI status'. In these and other respects, we consider that the determination of which Members hold a 'substantial interest' under Article XIII:2(d) may generally rely on the determination that has been made in the context of Article XXVIII.

²⁹ Panel Report, *EC – Bananas III*, para. 6.28.

³⁰ Appellate Body Report, *EC – Poultry*, para. 108.

However, in the context of Article XIII:2, we consider that the determination of which Members hold a 'substantial supplying interest' under Article XIII:2(d) must be supplemented by the cumulative consideration of whether there are 'special factors' within the meaning of Article XIII:2. In our view, this reading seeks a harmonious interpretation and application of Article XIII:2 and Article XXVIII, and at the same time gives due regard to the particular legal standards reflected in the text of the provisions concerned."³¹

1.5.4.5 "a previous representative period"

1.5.4.5.1 General

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

"[T]he second sentence of Article refers only to 'a previous representative period', and does not specify that such period must precede the opening of the TRQs. In addition, the reference to 'a' previous representative period in Article XIII:2(d) implies that there is no general rule that applies in all cases regarding the selection of the reference period. Furthermore, Article XIII:4 envisages the 'the selection of a representative period' being made 'initially' by the importing Member, subject to reappraisal. The clear implication is that there is no general rule, applicable to all cases, regarding the reference period that must be used for the purpose of Article XIII:2(d)."³²

1.5.4.5.2 Period affected by import ban

28. In *EU – Poultry (China)*, the complainant argued that for a period to be "representative" within the meaning of Article XIII:2, the "period cannot be affected by an import ban". The Panel disagreed, and stated in the course of its analysis:

"We agree with China that the European Union was obliged to base its determinations under Article XIII:2(d) on a 'previous representative period'. We also consider that the existence of one or more import restrictions during the reference period selected for the purpose of Article XIII:2(d) could, depending on the facts of a case, warrant the conclusion that the reference period selected might not be 'representative'. The GATT panel report in *EEC – Apples I (Chile)* supports this understanding. When considering the representative period for the imposition of quantitative restrictions, the years 1975, 1977 and 1978 were taken into account by the panel, while 1976 was excluded because it was not 'representative' as voluntary restraint agreements with the EEC were in effect at that time. In these circumstances, the panel stated:

'Due to the existence of restrictions in 1976, the Panel held that that year could not be considered as representative, and that the year immediately preceding 1976 should be used instead. The Panel thus chose the years 1975, 1977 and 1978 as a 'representative period'".

Likewise, we note that the panel in *EC – Bananas III (Art. 21.5 – Ecuador)* considered that a period during which some EC member States applied 'import restrictions or prohibitions' could not serve as a previous representative period.

However, we do not read either of these prior reports to say that the existence of any import restrictions during a previous period means that *ipso facto*, such a period cannot be 'representative'. Thus, we do not agree with the sweeping conclusion that for a period to be 'representative' within the meaning of Article XIII:2, the 'period cannot be affected by an import ban'. ...

...

³¹ Panel Report, *EU – Poultry (China)*, paras. 7.320-7.322.

³² Panel Report, *EU – Poultry (China)*, para. 7.349.

... whether the existence of certain import restrictions over a period means that the period is one that is not 'representative' depends on the particular factual circumstances of a case. In the present case, it is not in dispute that all tariff items at issue were prohibited or restricted before and after the period 2002-2008, when importation of all Chinese poultry products was prohibited. It appears that EU imports from China under all of the tariff lines at issue had been at 0% or negligible levels over the 1999-2002 period, and that EU imports from China under a number of the tariff lines at issue were still prohibited as a consequence of the heat treatment measure, until 2015 at least. From this perspective, we are not persuaded by the argument that the existence of the SPS measures in place during the reference periods 2003-2005 and 2006-2008 means that these periods were, in the circumstances of this case, not 'representative'".³³

1.5.4.6 "special factors"

1.5.4.6.1 Import bans and SPS measures

29. In *EU – Poultry (China)*, China contended that by using a reference period that was tainted by the existence of import prohibitions due to the SPS measures, the European Union did not base its determinations of which Members held a substantial supplying interest, or the TRQ allocation, taking due account of "special factors which may have affected or may be affecting the trade in the product". According to China, the "special factor" in this regard was "the reduced ability to export as a result of import bans due to SPS measures". The Panel stated that:

"In this respect, we find it difficult to characterize the SPS measures as such as 'special factors', insofar as they apply equally to imports from all Members in the same situation. As already noted, in our view, there is nothing unusual about Members applying WTO-consistent measures which may, directly or indirectly, affect the importation of certain products. It is not in dispute that 'the reduced ability to export as a result of import bans due to SPS measures' was the result of the determination that Chinese poultry producers had not complied with the applicable SPS measures maintained by the European Union. We have some difficulty with the notion that a Member setting a TRQ would need to make allowance for import restrictions arising from foreign producers' non-compliance with applicable SPS measures.

...

We consider that the Ad Note to Article XIII:2(d), and the text of that provision itself, convey that the rules governing the allocation of TRQs among supplying countries should not be interpreted in a manner that would establish requirements that governmental authorities cannot put into practice, or which are otherwise not feasible. This mirrors the objective, expressed in the text of paragraph 4 of the Ad Note to Article XXVIII:1, of ensuring that negotiations and agreement under Article XXVIII are not 'unduly difficult' and that 'complications in the application of this Article' are avoided.

In our view, treating the SPS measures that were in place over the 2003-2005 and 2006-2008 periods as 'special factors' would result in a rule for the allocation of the TRQs that is not practicable. The reason is that estimating what poultry imports would be without any of the SPS measures affecting Chinese poultry imports would be an extremely complex task involving the use of highly speculative estimates. Under such an approach, the European Union would have been obligated to take into account not only the range of SPS measures that applied to China and which are of concern to China (including the residues measure, the avian influenza measure, and the heat treatment measure), but also the SPS measures applied to many other WTO Members and, more generally, for its entire sanitary regime applied to imports of poultry products."³⁴

³³ Panel Report, *EU – Poultry (China)*, paras. 7.330-7.335.

³⁴ Panel Report, *EU – Poultry (China)*, paras. 7.337 and 7.340-7.341.

1.5.4.6.2 Changes in import shares

30. In *EU – Poultry (China)*, the Panel found that a sharp increase in imports from China in several product lines following the removal of those SPS measures did constitute a "special factor" within the meaning of Article XIII:2(d). In the course of its analysis of that issue, the Panel stated that:

"Article XIII:2(d) refers to 'special factors which may have affected or which may be affecting the trade in the product'. Similar formulations are used in other provisions of the covered agreements. We consider that, in certain circumstances, consideration of 'special factors' in the context of Article XIII:2(d) could require the Member allocating a TRQ among supplying countries to take into account changes in the import shares held by different Members which may have occurred between the end of the representative period selected and the time of the TRQ being allocated. In other words, while for the reasons set forth above we consider that there is no general requirement in Article XIII:2 to always use more recent data taking into account developments subsequent to the reference period to re-determine which Members hold a substantial interest in supplying the products at issue, we are of the view this may be required in particular circumstances insofar as such changes in import shares are linked to 'special factors'.

We consider that our understanding is supported by the ordinary meaning of the terms accompanying 'special factors' in the text of Article XIII:2(d). In this connection, we recall that the text of Article XIII:2(d) refers to the proportions supplied by different countries during a 'previous' representative period, with due account being taken of any special factors 'which may have affected or may be affecting' the trade in the product. We consider that the reference to special factors including not only those which may have affected trade in the previous reference period, but also those which 'may be affecting' trade, implies consideration of trade developments which may have occurred between the end of the representative period selected and the time of the TRQ being allocated.

We consider that this understanding is also consistent with the text of the Ad Note which clarifies that the term 'special factors' includes 'changes' in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not 'changes' artificially brought about by means not permitted under the Agreement. We understand the basic thrust of this clarification to be that changes artificially brought about by certain forms of unfair trade, e.g. dumping or subsidization, should not be taken into account under the rubric of 'special factors'. In that respect, the Ad Note is not directly relevant to the circumstances in this case. However, the fact that 'special factors' is explicitly linked in the Ad Note to 'changes brought about' lends support to the view that an analysis of special factors is dynamic, and may entail consideration of developments that have taken place between the end of the reference period selected and the time of the TRQ being allocated."³⁵

1.6 Article XIII:3

1.6.1 Paragraph 3(b)

31. In examining the scope of the notice obligation embodied in Article XIII:3(b), the Panel in *China – TRQs* underlined the linkages between paragraphs 2 and 3 of Article XIII:

"Hence, paragraph 2 identifies two ways of 'applying import restrictions', namely (i) by fixing the total amount of a quota and (ii) by using import licences or permits. It also sets forth obligations to be observed in cases where a quota is allocated among different supplying countries.

Paragraph 3 of Article XIII lays down two sets of rules concerning publication or notification in the administration of TRQs, each corresponding to one of the two ways

³⁵ Panel Report, *EU – Poultry (China)*, paras. 7.354-7.356.

of applying TRQs described in its paragraph 2. Thus, subparagraph (a) of paragraph 3 explains the notification requirements '[i]n cases in which import licences are issued in connection with import restrictions'. Subparagraph (b) addresses the notification requirements '[i]n the case of import restrictions involving the fixing of quotas'. Subparagraph (c) sets out the notification requirements '[i]n the case of quotas allocated among supplying countries'.³⁶

32. In *China – TRQs*, the Panel noted that in the case at hand, China administered its TRQs by fixing their total amounts and the United States had brought claims against that administration, under Article XIII:3(b).³⁷ The Panel then moved on to assessing whether the phrase "give public notice of the total quantity or value of the product or products which will be permitted to be imported during a specified future period" under Article XIII:3(b) requires publication of the total TRQ amounts that are available for allocation or the total amounts of TRQs that are actually allocated:

"[P]aragraph 3(b) sets out a forward-looking public notice obligation '[i]n the case of import restrictions involving the fixing of quotas', requiring public notice of 'the total quantity or value of the product or products which will be permitted to be imported during a specified future period and of any change in such quantity or value'. In our view, whereas the obligation in paragraph 3(a) requires the importing Member to provide information concerning its administration and the import licences actually granted by it over a recent period, the forward-looking obligation in paragraph 3(b) requires public notice of the total TRQ amounts that are available for allocation during a specified future period.

...

For the reasons set out above, we conclude that Article XIII:3(b) of the GATT 1994 requires public notice of the total TRQ amounts that are available for allocation, and any changes thereto, and not the total TRQ amounts that are actually allocated, and changes hereto. We therefore reject the United States' claim that China violates Article XIII:3(b) by publishing only the TRQ amounts available for allocation, and any changes thereto.³⁸

1.7 Article XIII:4: Adjustment of quota allocation

1.7.1 General

33. The Panel in *EC – Bananas III* found that country-specific quota shares can be allocated to Members that do not have a substantial interest in supplying the product. In that context, the Panel suggested that the maintenance of an "all others" category in a TRQ comports well with the obligation in Article XIII:4:

"In so far as this in practice results in the use of an 'others' category for all Members not having a substantial interest in supplying the product, it comports well with the object and purpose of Article XIII, as expressed in the general rule to the chapeau to Article XIII:2. When a significant share of a tariff quota is assigned to 'others', the import market will evolve with the minimum amount of distortion. Members 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. New entrants will be able to compete in the market, and likewise have an opportunity to gain 'substantial supplying interest' status. For the share of the market allocated to Members with a substantial interest in supplying the product, the situation may also evolve in light of adjustments following consultations under Article XIII:4. In comparison to a situation where country-specific shares are allocated to all supplying countries, including Members with minor market shares, this result is less likely to

³⁶ Panel Report, *China – TRQs*, paras. 7.185-7.186.

³⁷ Panel Report, *China – TRQs*, para. 7.188.

³⁸ Panel Report, *China – TRQs*, paras. 7.192 and 7.197.

lead to a long-term freezing of market shares. This is, in our view, consistent with the terms, object and purpose, and context of Article XIII."³⁹

1.7.2 "having a substantial interest in supplying that product"

34. In *EU – Poultry (China)*, the Panel found that the determination of which Members hold a "substantial supplying interest" for purposes of Article XIII:4 must take into account changes in market shares that occurred following the initial TRQ share allocation. The Panel stated that:

"In our view, the determination of which Members have a substantial supplying interest under Article XIII:4 cannot be based solely on import shares held during the reference period initially used to determine which Members held a substantial supplying interest under Article XIII:2, without taking into account changes in market shares that occurred following the initial TRQ share allocation. This is because Article XIII:4 aims in part to provide the opportunity for a Member which has increased its market share in a product subject to a TRQ to request, among other things, a readjustment of the TRQ shares based on more recent market developments. As the panel in *EC – Bananas III* observed, where a Member not having a substantial supplying interest is able to gain market share in the 'others' category and possibly achieve a substantial supplying interest, this, in turn, 'would provide them the opportunity to receive a country-specific allocation by invoking the provisions of Article XIII:4'. This recognizes that a Member that did not have a substantial supplier interest during the initial allocation of a TRQ can nonetheless become a substantial supplier at a later point in time, such that it can request consultations with the Member that imposed the TRQ to adjust the TRQ shares under Article XIII:4. We note that the European Union itself recognizes that 'a Member which was not a substantial supplier at the moment of the opening of the TRQ, and which at a certain point in time acquires an important import share in the product concerned (in or outside the TRQ) could claim a substantial supplying interest under Article XIII:4'. There is nothing in the text of Article XIII:4 to suggest that the possibility to request consultations is limited only to Members that held a substantial supplying interest when the TRQ was initially allocated under Article XIII:2(d). It follows that the reference period used to determine which Members held a substantial supplying interest at the moment of the initial TRQ allocation can be different from the reference period relied upon to determine substantial supplying interest under Article XIII:4."⁴⁰

1.7.3 "shall consult promptly regarding the need for an adjustment"

35. The nature of the obligation to "consult" in Article XIII:4 has been considered in several cases. The Panel in *EC – Bananas III*, in another finding not addressed by the Appellate Body, discussed the obligations of a Member that maintains an allocated tariff quota to adjust the allocation to take into account the rights of a new WTO Member that is a substantial supplier. The Panel also made reference to Article XIII:4 in this context:

"The general rule in the chapeau to Article XIII:2 indicates that the aim of Article XIII:2 is to give to Members the share of trade that they might be expected to obtain in the absence of a tariff quota. There is no requirement that a Member allocating shares of a tariff quota negotiate with non-Members, but when such countries accede to the WTO, they acquire rights, just as any other Member has under Article XIII whether or not they have a substantial interest in supplying the product in question.

[A]lthough the EC reached an agreement with all Members who had a substantial interest in supplying the product at one point in time, under the consultation provisions of Article XIII:4, the EC would have to consider the interests of a new Member who had a substantial interest in supplying the product if that new Member requested it to do so.⁴¹ The provisions on consultations and adjustments in

³⁹ Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 7.73 and 7.76.

⁴⁰ Panel Report, *EU – Poultry (China)*, para. 7.470.

⁴¹ (*footnote original*) While the provisions of Article XIII:4 on consultations and adjustments seem to be primarily aimed at adjustments to quota shares allocated pursuant to Article XIII:2(d), second sentence, they

Article XIII:4 mean in any event that the BFA could not be invoked to justify a permanent allocation of tariff quota shares. Moreover, while new Members cannot challenge the EC's agreements with Colombia and Costa Rica in the BFA on the grounds that the EC failed to negotiate and reach agreement with them, they otherwise have the same rights as those Complainants who were GATT contracting parties at the time the BFA was negotiated to challenge its consistency with Article XIII. Generally speaking, all Members benefit from all WTO rights."⁴²

36. In *EC – Bananas III (Article 21.5 – US I) / (Article 21.5 – Ecuador II)*, the Appellate Body suggested that Article XIII:4 may require an adjustment of a TRQ allocation, including in situations where the TRQ has been allocated by agreement. When examining the allocation agreement originally entered into between the European Communities and several other Members, as contained in paragraph 9 of the Bananas Framework Agreement, the Appellate Body stated in passing that:

"In our view, paragraph 9 of the Bananas Framework Agreement, which set an expiry date for the agreement at 31 December 2002, provided for consultations between the European Communities and 'Latin American suppliers that are GATT Members' by 2001, and the review of the functioning of the agreement within three years, reflects the requirements of Article XIII:4, which requires consultation with substantial suppliers, reappraisal of special factors, and an adjustment of the allocation agreement."⁴³

37. In *EU – Poultry (China)*, the Panel accepted that the ordinary meaning of "consult" in Article XIII:4 suggests that it only imposes an obligation on the Member receiving a request from a substantial supplier to enter into consultations and not an obligation to reallocate TRQ shares, but that an importing Member's discretion is not unfettered. In the course of its analysis, the Panel stated that:

"We recall that Article XIII:4 states that a Member imposing a TRQ shall 'consult promptly' upon request from a Member holding a substantial supplying interest. On its face, the wording of Article XIII:4 only imposes a mandatory obligation to consult upon the request of a Member holding a substantial supplying interest. The obligation to 'consult' contained in Article XIII:4 is, in accordance with its ordinary meaning, an obligation to 'confer about', 'deliberate upon', or 'consider' the matters listed in Article XIII:4. There is nothing in the ordinary meaning of this term, or in the text of Article XIII:4, to suggest that the consultations should lead to a specific outcome, in this case the reallocation of the TRQ shares. We note that our reading of Article XIII:4 conforms to a general understanding of the term 'consultations' as used elsewhere in the covered agreements. Based on the ordinary meaning of the term 'consult', we are therefore inclined to agree with the European Union that Article XIII:4 only imposes an obligation to 'confer about', 'deliberate upon', or 'consider' the matters listed in Article XIII:4, and not an obligation to reallocate TRQ shares upon request from a Member with a substantial supplying interest.

...

Proceeding on the understanding that a Member does not have unfettered discretion to refuse to reallocate the TRQ shares upon the request of a Member holding a substantial supplying interest following a change in import shares, we do not however see any indication in the wording of Article XIII:4 of any time frame as to when or how often such reallocation would have to take place, or based on the occurrence of which events. There is no specific guidance in the text of Article XIII:4 on whether, for

also apply in the case where agreements were reached pursuant to Article XIII:2(d), first sentence, with Members having a substantial interest in supplying the product concerned. In addition, in so far as a new Member has a substantial interest in supplying that product, its share of the "others" category can be viewed, for purposes of Article XIII:4, as a provision established unilaterally relating to the allocation of an adequate quota.

⁴² Panel Report, *EC – Bananas III*, paras. 7.91-7.92.

⁴³ Appellate Body Reports in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 428.

example, the reallocation would have to be done yearly or instead at some other regular interval, or whether it would have to be done when any Member that did not receive a country-specific share experiences a surge in its import shares of the relevant product, or even when a Member that has already received a country-specific share significantly increases its share of imports beyond that which it has been allocated. We note in that regard that paragraph 9 of the Bananas Framework Agreement, which was at issue in the *EC – Bananas III (Article 21.5 – US I) / (Article 21.5 – Ecuador II)* dispute, provided that the initial allocation of the TRQ shares was set to expire on 31 December 2002. We understand that the Bananas Framework Agreement was agreed in 1994. Paragraph 9 also expressly provided that 'full consultations with the Latin American suppliers that are GATT Members should start no later than in year 2001.' As noted above, the Appellate Body suggested that the foregoing 'reflects the requirements of Article XIII:4'. While the Appellate Body did not elaborate, this suggests that an allocation agreement which was set to remain in force for eight years was nonetheless considered to meet the requirements of Article XIII:4, taking into account that it had an expiry date and provided for consultations. Based on the foregoing, we do not see that any purported obligation to reallocate TRQ shares arising under Article XIII:4 is subject to any particular time frame.

...

Finally, we note that the prevalence and centrality of historical market shares in TRQ share allocations also suggest that, insofar as there is indeed an obligation to reallocate the shares allocated among supplying countries upon the request of a Member holding a substantial supplying interest under Article XIII:4, there is no obligation to do within any specified time frame, or with any particularly frequency."⁴⁴

1.7.4 Relationship to Article XIII:2(d), first sentence

38. In *EC – Bananas III*, the shares of a TRQ had been allocated by agreement with all the Members which held a substantial interest in supplying the product in question. The Panel observed that:

"While the provisions of Article XIII:4 on consultations and adjustments seem to be primarily aimed at adjustments to quota shares allocated pursuant to Article XIII:2(d), second sentence, they also apply in the case where agreements were reached pursuant to Article XIII:2(d), first sentence, with Members having a substantial interest in supplying the product concerned. In addition, in so far as a new Member has a substantial interest in supplying that product, its share of the 'others' category can be viewed, for purposes of Article XIII:4, as a provision established unilaterally relating to the allocation of an adequate quota."⁴⁵

39. In *EU – Poultry (China)*, the European Union argued that the obligation to consult provided for in Article XIII:4 only applies when the TRQ shares are allocated unilaterally pursuant to the second sentence of Article XIII:2(d), and that in cases where a Member allocating the shares of a TRQ has reached an agreement with all Members having a substantial interest in supplying the product under the terms of the first sentence of Article XIII:2(d), there is no obligation to enter into consultations pursuant to Article XIII:4. The Panel rejected this interpretation, reasoning that:

"The scope of Article XIII:4 is set out in its introductory sentence, which states that it applies '[w]ith regard to restrictions applied in accordance with paragraph 2(d) of this Article...'. Paragraph 2(d) applies 'in cases in which a quota is allocated among supplying countries'. The text of Article XIII:4 does not distinguish between allocation by agreement under the first sentence of paragraph 2(d), and unilateral allocation under the second sentence of paragraph 2(d). Rather, it refers generally to restrictions imposed pursuant to paragraph 2(d). We believe that more precise language would have been needed to exclude from the scope of application of Article XIII:4 the situation where a Member allocates the shares of a TRQ based on agreements reached pursuant to Article XIII:2, first sentence.

⁴⁴ Panel Report, *EU – Poultry (China)*, paras. 7.473, 7.478 and 7.480.

⁴⁵ Panel Report, *EC – Bananas III (Ecuador)*, fn 373.

...

The phrase 'established unilaterally' in Article XIII:4 is not specifically linked to the allocation of shares among different supplying countries as provided under the first or the second sentence of Article XIII:2. We also note that the word 'unilateral' does not appear in the text of the second sentence of Article XIII:2(d). Contrary to what the European Union argues, we do not consider that the phrase 'established unilaterally' qualifies all the matters which can be the object of the consultations provided for in Article XIII:4, on the grounds that it is placed at the end of the list of matters that are subject to consultations as specified in Article XIII:4. Rather, we read this language as relating more to the conditions or formalities regarding the utilization of the quota as per the terms of the third sentence of Article XIII:2(d).

Continuing with our textual analysis of Article XIII:4, we note that it provides for consultations regarding the need for an adjustment to the reference period selected (i.e. the 'base period'), or the reappraisal of special factors. The European Union observes that reference to a 'representative period' and 'special factors' is explicitly made only in the second sentence of Article XIII:2(d). We agree that, if the subject-matter of the consultations provided for in Article XIII:4 were clearly confined to matters that only arise in cases of unilateral allocation of TRQ shares under the second sentence of Article XIII:2(d), then it may follow, by necessary implication, that the scope of the obligation to enter into consultations would not extend to cases where TRQ shares are allocated by agreement. However, the European Union itself acknowledges that consideration of 'special factors' is also relevant in the context of allocating the shares of a TRQ by agreement pursuant to the first sentence of Article XIII:2(d). We have found that due account must be taken of a previous representative period and special factors in the context of allocating the shares of a TRQ by agreement with substantial suppliers, and also in determining which Members are substantial suppliers, in the context of the first sentence of Article XIII:2(d). Therefore, we are not persuaded that consideration of the subject-matter of the consultations under Article XIII:4 gives rise to the necessary implication that the scope of the obligation to enter into consultations extends only to cases where shares of a TRQ are allocated unilaterally pursuant to the second sentence of Article XIII:2(d).⁴⁶

1.8 Article XIII:5

1.8.1 Application of Article XIII to tariff quotas

40. The Panel in *EC – Bananas III (Article 21.5 - Ecuador)* found that "a tariff quota is a quantitative limit on the availability of a specific tariff rate".⁴⁷

41. The Panel in *US – Line Pipe* examined a US safeguard measure which provided that, for three years and one day, a higher tariff (declining each year) would be imposed on all imports from each country in excess of 9,000 short tons. Mexico and Canada were excluded from the remedy. As a threshold measure, the Panel determined that "the line pipe measure at issue is a tariff quota, since there are country-specific limits (9000 short tons) placed on the application, or availability, of the lower tariff rate, and it is these country-specific limits that determine whether or not line pipe from specific countries enters the United States at the lower or higher rate of duty".⁴⁸ The Panel Report also holds that "By virtue of Article XIII:5, Article XIII:2(a) applies to tariff quotas. ... a tariff quota may exist, even though no overall limit is provided for."⁴⁹

42. The Panel Report on *EC – Bananas III (Article 21.5 – Ecuador II)* addressed the application of Article XIII to tariff quotas:

"The words "any" (both before the terms "tariff quota" and "contracting party") and "shall" in Article XIII:5 underscore the absolute and categorical nature of the

⁴⁶ Panel Report, *EU – Poultry (China)*, paras. 7.459 and 7.461-7.462.

⁴⁷ Appellate Body Report, *EC – Bananas III (Article 21.5 - Ecuador)*, para. 6.20.

⁴⁸ Panel Report, *US – Line Pipe*, para. 7.23.

⁴⁹ Panel Report, *US – Line Pipe*, para. 7.22.

application of "the provisions of ... Article [XIII]" to tariff quotas. The Panel notes also that Article XIII:5 uses the term "*any tariff quota* instituted or maintained by any [Member]" in the singular. The Panel reads this to mean that Article XIII of the GATT 1994 is also applicable to one single tariff quota, and that this is so irrespective of whether that single tariff quota is part of an import regime with more tariff quotas or is part of an import regime that comprises only one tariff quota."⁵⁰

43. On appeal, the Appellate Body also addressed this issue:

"In contrast to quantitative restrictions, tariff quotas do not fall under the prohibition in Article XI:1 and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I. Members are required, in accordance with Article II, to provide treatment no less favourable than that bound in their Schedules of Concessions. Accordingly, in-quota and out-of-quota tariffs must not exceed bound tariff rates, and import quantities made available under the tariff quota must not fall short of the scheduled amount. In addition, tariff quotas are, under the terms of Article XIII:5, made subject to the disciplines of Article XIII."⁵¹

1.9 Paragraph 116 of China's Working Part Report

44. In *China – TRQs*, the United States brought a number of claims under Paragraph 116 of China's Working Party Report, which contains commitments regarding China's administration of its agricultural TRQs and stipulates:

"The representative of China stated that upon accession, China would ensure that TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis using clearly specified timeframes, administrative procedures and requirements that would provide effective import opportunities; that would reflect consumer preferences and end-user demand; and that would not inhibit the filling of each TRQ."⁵²

45. After noting that China's commitments under Paragraph 116 are enforceable under the DSU, the Panel made the following observations about the nature of the obligations set forth in this provision:

"Paragraph 116 contains multiple obligations, which may be grouped into three categories. The first category concerns the basis of China's TRQ administration, and requires this basis to be transparent, predictable, uniform, fair, and non-discriminatory. The second category concerns the timeframes, administrative procedures and requirements China uses in its TRQ administration, and requires these timeframes, administrative procedures and requirements to be clearly specified. The third category concerns the effects of the aforementioned time-frames, administrative procedures and requirements, and requires that they provide effective import opportunities, reflect consumer preferences and end-user demand, and not inhibit the filling of each TRQ.

All obligations set forth in Paragraph 116 apply only to China's administration of its TRQs, as opposed to the TRQs themselves. In this regard, we consider that China's administration of its TRQs covers the legal instruments and acts of the relevant authorities that implement the TRQs or put them into practical effect.

Paragraph 116 lists the multiple obligations contained therein using the conjunction 'and', which, as both parties agree, suggests that these are legally independent obligations. Therefore, a breach of any of these obligations would lead to a violation of Paragraph 116. In our assessment, we focus only on the six obligations the United States has invoked in challenging China's TRQ administration under Paragraph 116, namely the obligations to (a) administer TRQs on a transparent basis; (b) administer TRQs on a predictable basis; (c) administer TRQs on a fair basis; (d) administer TRQs

⁵⁰ Panel Report, *EC – Bananas III (Article 21.5 - Ecuador)*, para. 6.20.

⁵¹ Appellate Body Report, *EC – Bananas III (Article 21.5 - Ecuador)*, para. 335.

⁵² See Panel Report, *China – TRQs*, para. 7.3.

using clearly specified administrative procedures; (e) administer TRQs using clearly specified requirements; and (f) administer TRQs using timeframes, administrative procedures and requirements that would not inhibit the filling of each TRQ."⁵³

46. The Panel then went on to clarify the meaning of the individual obligations, found in Paragraph 116, which were invoked by the United States in this dispute:

"The first three obligations concern the 'basis' for China's TRQ administration, in other words, the underlying set of rules or principles according to which China administers its TRQs. In our view, these obligations require China to administer its TRQs through an underlying set of rules or principles that are easily understood or discerned by applicants and other interested parties (administer TRQs on a transparent basis); that allows applicants and other interested parties to easily anticipate how decisions regarding TRQ administration are made (administer TRQs on a predictable basis); and that is impartial and equitable, requiring the relevant authorities to administer TRQs in accordance with the applicable rules and standards (administer TRQs on a fair basis). With respect to the fourth and fifth obligations, we consider that they require China to use administrative procedures and requirements that are set out in plain or obvious detail (use clearly specified administrative procedures and requirements). The sixth obligation, concerning the effects of China's TRQ administration, requires China to employ timeframes, administrative procedures and requirements that would not restrain or prevent the filling of each TRQ (administer TRQs in a manner that would not inhibit the filling of each TRQ). Although this obligation concerns the effects of China's TRQ administration on the filling of each TRQ, we do not believe that the United States is required to quantify such effects in order to prevail under this claim. Rather, the United States can substantiate this claim with reference to the design, architecture and structure of China's TRQ administration, in its relevant context."⁵⁴

1.10 Relationship with other GATT provisions

1.10.1 Article I

47. In *EC – Bananas III*, the European Communities argued that even though the waiver for EC measures under the Lomé Convention only waived GATT Article I:1, the Lomé waiver also excused violation of Article XIII by discriminatory tariff quota allocation measures pursuant to the Lomé Convention Banana Protocol, due to the inherent substantive link between Articles I and XIII. While the Panel agreed with the European Communities' argument, the Appellate Body rejected it.⁵⁵ The Panel in *EC – Bananas III (Article 21.5 – Ecuador II)* commented on this finding: "the rejection by the Appellate Body of the panel's finding on the scope of the Lomé Waiver indicates that Articles I and XIII of the GATT 1994 do not have the same scope, and that an inconsistency with Article XIII is possible irrespective of an inconsistency with Article I."⁵⁶

48. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body sought to delineate the scope of Article I:1 from the scope of Article XIII, indicating that they are "distinct" and that the two provisions may apply to "different elements" of a measure or import regime.⁵⁷ The Appellate Body stated:

"We consider that the notion of 'non-discrimination' in the application of tariffs under Article I:1 and the notion of non-discriminatory application of a 'prohibition or restriction' under Article XIII are distinct, and that Article XIII ensures that a Member applying a restriction or prohibition does not discriminate among all other Members. Article I:1, which applies to tariffs, and Article XIII:1, which applies to quantitative restrictions and tariff quotas, may apply to different elements of a measure or import regime. Article XIII adapts the MFN-treatment principle to specific types of measures, that is, quantitative restrictions, and, by virtue of Article XIII:5, tariff quotas. Tariff

⁵³ Panel Report, *China – TRQs*, paras. 7.6-7.8.

⁵⁴ Panel Report, *China – TRQs*, para. 7.9.

⁵⁵ Appellate Body Report, *EC – Bananas III*, paras. 183-187.

⁵⁶ Panel Report, *EC – Bananas III (21.5 – Ecuador II)*, para. 7.303.

⁵⁷ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 343.

quotas must comply with the requirements of both Article I:1 and Article XIII of the GATT 1994. This, in our view, does not make Article XIII redundant in respect of tariff quotas: if a Member imposes differential in-quota duties on imports of like products from different supplier countries under a tariff quota, Article I:1 would be implicated; if that Member fails to give access to or allocate tariff quota shares on a non-discriminatory basis among supplier countries, the requirements of Articles XIII:1 and XIII:2 would apply. In the absence of Article XIII, Article I would not provide specific guidance on how to administer tariff quotas in a manner that avoids discrimination in the allocation of shares."⁵⁸

49. In *EU – Poultry Meat (China)*, China claimed that the allocation of all or the vast majority of the tariff rate quotas (TRQs) at issue to only two WTO Members (Brazil and Thailand) violated the terms of Article I:1 because the TRQ allocation results in an "advantage, favour, privilege or immunity" being accorded to Brazil and Thailand which is not accorded "immediately and unconditionally" to the like product originating in or destined for the territories of all other Members. China's claim and the arguments of the parties raised the issue of the relationship between the obligations found in Article I:1 and Article XIII:2, and in particular whether the allocation of TRQ shares among supplying countries is governed by the general MFN obligation in Article I:1. In the course of rejecting China's claim, the Panel stated that:

"[I]t would follow from such an interpretation of Article I:1 that Members are legally prohibited, by the terms of Article I:1, from ever allocating a TRQ among supplying countries. This is because where a TRQ is allocated among supplying countries, the advantages granted to those who receive the largest TRQ shares would not be accorded 'immediately and unconditionally' to all other Members'. It is axiomatic that the terms of Article I:1 cannot be read in isolation from Article XIII:2, which expressly authorizes a Member to allocate shares in a TRQ, in varying amounts, among different supplying countries. Therefore, to interpret Article I:1 as prohibiting a Member from allocating shares in a TRQ in varying amounts among different supplying countries would conflict with Article XIII:2.

Prior panel and Appellate Body Reports have, unsurprisingly, interpreted Article I:1 so as not to conflict with the obligations in Article XIII:2 specifically relating to the allocation of TRQs. The panel in *EEC – Apples (Chile I)* considered it 'more appropriate to examine the matter in the context of Article XIII which deals with the non-discriminatory administration of quantitative restrictions rather than Article I:1'. Likewise, the panel in *EEC – Dessert Apples* also 'considered it more appropriate to examine the consistency of the EEC measures with the most-favoured-nation principles of the General Agreement in the context of Article XIII', as '[t]his provision deals with the non-discriminatory administration of quantitative restrictions and is thus the *lex specialis* in this particular case'. In *EC – Bananas III*, the panel found that 'it is more appropriate to consider these issues under Article XIII because that is the more specific provision', and accordingly made 'no finding on the compatibility of the EC's tariff quota share allocations and BFA reallocation rules with Article I:1'.⁵⁹

50. After recalling the Appellate Body's guidance in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, which is quoted further above, the Panel in *EU – Poultry (China)* stated that:

"In the present case, China has not alleged that the TRQs impose 'differential in-quota duties on imports of like products from different supplier countries under a tariff quota'. Nor has China articulated what are the 'different elements' of the TRQs or their allocation that is being challenged under Article I:1, as opposed to Article XIII. Rather, China's claim under Article I:1 appears to be based on essentially the same elements as its claims regarding the TRQ allocation under Article XIII:2, simply articulated in a more general way.

...

⁵⁸ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 343.

⁵⁹ Panel Report, *EU – Poultry (China)*, paras. 7.444-7.445.

The Appellate Body has clarified that Article I and XIII may apply to 'different elements' of a measure or import regime, and we do not exclude, *a priori*, that certain elements relating to the allocation of a TRQ among supplying countries could potentially fall within the scope of the general MFN obligation in Article I:1. However, in the present case, China has not identified any elements of the TRQ allocation that fall within the scope of Article I:1."⁶⁰

1.10.2 Article II

51. The Panel in *EC – Bananas III* discussed the relationship between GATT Articles II and XIII.⁶¹

1.10.3 Article XI

52. The Panel in *Colombia – Ports of Entry*, like a number of other panels,⁶² declined to make findings in relation to a claim under Article XIII:1 regarding a quantitative restriction that it had found to be prohibited under Article XI:1:

"[I]n addition to being a prohibited restriction within the meaning of Article XI:1, the ports of entry measure is imposed only on certain textile, apparel or footwear goods arriving from Panama, independent of the products' origin, and not like-product imports originating in, and shipped from, any other Member or third country. Whether or not it is discriminatory in its design, the restrictions on ports of entry are prohibited under Article XI:1."⁶³

1.10.4 Article XXIV

53. The Panel in *US – Line Pipe Safeguards* found that the US was entitled to rely on an Article XXIV defence against claims under Articles I, XIII and XIX regarding the exclusion of Canada and Mexico from its safeguard measure (described in paragraph 13).⁶⁴ On appeal, the Appellate Body found that the exclusion of Canada and Mexico violated Articles 2 and 4 of the Safeguards Agreement, and modified the Panel finding by declaring it moot and of no legal effect.⁶⁵

1.10.5 Article XXVIII

54. The *EC – Poultry* dispute concerned a tariff quota on imports into the European Communities, which had been agreed with Brazil as compensation under Article XXVIII. Brazil argued that the EC had failed to implement a bilateral agreement under which the tariff quota was to be allocated only to imports from Brazil. In this regard, Brazil argued that Articles I and XIII of GATT do not apply to tariff quotas provided as compensation under Article XXVIII, and argued that the tariff quota's administration had violated Article XIII. The Appellate Body stated that "the concessions contained in Schedule LXXX pertaining to the tariff-rate quota for frozen poultry meat must be consistent with Article I and XIII of the GATT 1994."⁶⁶ The Appellate Body stated that compensatory measures negotiated under Article XXVIII remain subject to GATT Articles I and XIII, citing the negotiating history of Article XXVIII:

"We see nothing in Article XXVIII to suggest that compensation negotiated within its framework may be exempt from compliance with the non-discrimination principle inscribed in Articles I and XIII of the GATT 1994. As the Panel observed, this interpretation is, furthermore, supported by the negotiating history of Article XXVIII. Regarding the provision which eventually became Article XXVIII:3, the Chairman of the Tariff Agreements Committee at Geneva in 1947, concluded:

⁶⁰ Panel Report, *EU – Poultry (China)*, paras. 7.447-7.450.

⁶¹ Panel Report, *EC – Bananas III*, paras. 7.113-7.114.

⁶² Panel Report, *US – Shrimp*, para. 7.22 (Article XIII claim regarding ban on imports of shrimp from some but not all countries); Panel Report, *India – Quantitative Restrictions*, para. 5.17 (Article XIII claim regarding discretionary import licensing scheme).

⁶³ Panel Report, *Colombia – Ports of Entry*, para. 7.291.

⁶⁴ Panel Report, *US – Line Pipe*, para. 7.146.

⁶⁵ Appellate Body Report, *US – Line Pipe*, paras. 197 and 199.

⁶⁶ Appellate Body Report, *EC – Poultry*, para. 99.

'It was agreed that there was no intention to interfere in any way with the operation of the most-favoured-nation clause. This Article is headed 'Modification of Schedules'. It refers throughout to concessions negotiated under paragraph 1 of Article II, the Schedules, and there is no reference to Article I, which is the Most-Favoured-Nation Clause. Therefore, I think the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation Clause.'⁶⁷

Although this statement refers specifically to the MFN clause in Article I of the GATT, logic requires that it applies equally to the non-discriminatory administration of quotas and tariff-rate quotas under Article XIII of the GATT 1994."⁶⁸

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

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

According to China, paragraph 6 of the Understanding applies 'at the level of the share allocation of each tariff rate quota as well as at the level of the global tariff rate quota'. However, we recall that paragraph 6 contains three different formulae for calculating future trade prospects, and the importing Member is required to select the formula that yields the greatest amount. Therefore, if paragraph 6 of the Understanding applies at the level of the share allocation, the importing Member would have to apply different formulae to different Members insofar as that would yield a greater amount in any case. Based on the text of paragraph 6 of the Understanding, we consider that the application of the formulae set forth in paragraph 6(a) and 6(b) at the level of TRQ allocation would not only lead to results that conflict with the allocation rules set forth in Article XIII:2, but which would also be unworkable."⁶⁹

1.11 Relationship with other WTO Agreements

1.11.1 Agreement on Agriculture

56. In *EC – Bananas III*, the European Communities argued that, in light of the meaning and intent of Articles 4.1 and 21.1 of the *Agreement on Agriculture*, it was permitted, with respect to market access concessions, to act inconsistently with the requirements of Article XIII of the *GATT 1994*. The Panel concluded that the *Agreement on Agriculture* did not permit the European Communities to act inconsistently with Article XIII. The Appellate Body confirmed the Panel's finding:

"[W]e do not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII of the *GATT 1994*. There is

⁶⁷ (footnote original) EPCT/TAC/PV/18, p. 46.

⁶⁸ Appellate Body Report, *EC – Poultry*, para. 100.

⁶⁹ Panel Report, *EU – Poultry (China)*, paras. 7.299-7.230.

nothing in Articles 4.1 or 4.2, or in any other article of the *Agreement on Agriculture*, that deals specifically with the allocation of tariff quotas on agricultural products. If the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly. The *Agreement on Agriculture* contains several specific provisions dealing with the relationship between articles of the *Agreement on Agriculture* and the GATT 1994. For example, Article 5 of the *Agreement on Agriculture* allows Members to impose special safeguards measures that would otherwise be inconsistent with Article XIX of the GATT 1994 and with the *Agreement on Safeguards*. In addition, Article 13 of the *Agreement on Agriculture* provides that, during the implementation period for that agreement, Members may not bring dispute settlement actions under either Article XVI of the GATT 1994 or Part III of the *Agreement on Subsidies and Countervailing Measures* for domestic support measures or export subsidy measures that conform fully with the provisions of the *Agreement on Agriculture*. With these examples in mind, we believe it is significant that Article 13 of the *Agreement on Agriculture* does not, by its terms, prevent dispute settlement actions relating to the consistency of market access concessions for agricultural products with Article XIII of the GATT 1994. As we have noted, the negotiators of the *Agreement on Agriculture* did not hesitate to specify such limitations elsewhere in that agreement; had they intended to do so with respect to Article XIII of the GATT 1994, they could, and presumably would, have done so. We note further that the *Agreement on Agriculture* makes no reference to the *Modalities* document⁷⁰ or to any 'common understanding' among the negotiators of the *Agreement on Agriculture* that the market access commitments for agricultural products would not be subject to Article XIII of the GATT 1994."⁷¹

1.11.2 Agreement on Safeguards

57. The Panel in *US – Line Pipe* held, in a statement not reviewed by the Appellate Body, that Article XIII applies to tariff quota safeguard measures, in addition to the Safeguards Agreement. In support of its finding, the Panel argued that a contrary finding would open the door for discriminatory tariff rate quotas, which would be inconsistent with the objectives set out in the preamble of the Safeguards Agreement:

"[I]t is the paucity of disciplines governing the application of tariff quota safeguard measures in Article 5 of the Safeguards Agreement that supports our interpretation of Article XIII. If Article XIII did not apply to tariff quota safeguard measures, such safeguard measures would escape the majority of the disciplines set forth in Article 5. This is an important consideration, given the quantitative aspect of a tariff quota. For example, if Article XIII did not apply, quantitative criteria regarding the availability of lower tariff rates could be introduced in a discriminatory manner, without any consideration to prior quantitative performance.⁷² In our view, the potential for such discrimination is contrary to the object and purpose of both the Safeguards Agreement, and the WTO Agreement. In this regard, the preamble of the Safeguards Agreement refers to the "need to clarify and reinforce the disciplines of GATT 1994" in the context of safeguards. We consider that the "disciplines of GATT 1994" surely include those providing for non-discrimination. In any event "the elimination of discriminatory treatment in international trade relations" is referred to explicitly in the preamble to the WTO Agreement. We further note that the preamble of the Safeguards Agreement also mentions that one of the objectives of the Safeguards Agreement is to "establish multilateral control over safeguards and eliminate measures that escape such control". We are of the view that non-application of Article XIII in the context of safeguards would result in tariff quota safeguard measures partially escaping the control of multilateral disciplines. This result would be contrary to the objectives set out in the preamble of the Safeguards Agreement."⁷³

⁷⁰ *Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme*, MTN.GNG/MA/W/24, 20 December 1993.

⁷¹ Appellate Body Report, *EC – Bananas III*, para. 157.

⁷² (*footnote original*) The same concern does not arise in respect of tariff measures – which also appear not to be covered by all Article 5 disciplines – because tariff measures affect all exporting Members equally.

⁷³ Panel Report, *US – Line Pipe*, para. 7.49.

58. The Panel in *US – Line Pipe* discussed the relationship between Article XIII and Article 5.2 of the Safeguards Agreement:

"Just because some provisions of Article XIII are replicated in the Safeguards Agreement, that alone does not mean that the remaining provisions cease to be binding on Members....⁷⁴ We therefore decline to draw any conclusions from the fact that certain Article XIII provisions are not replicated in the Safeguards Agreement. Like the Appellate Body, we consider that if the Uruguay Round negotiators had intended to expressly omit Article XIII from the safeguards context, 'they would and could have said so in the *Agreement on Safeguards*. They did not'.⁷⁵

... Although there may be some duplication between Article XIII:2(d) and Article 5.2 of the Safeguards Agreement, duplication is not the same as nullification."⁷⁶

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⁷⁴ (*footnote original*) There may be good reasons for replicating only certain Article XIII disciplines in the Safeguards Agreement. For example, only certain Article XIII:2(d) disciplines may have been replicated in Article 5.2(a) because of the introduction through the Safeguards Agreement of quota modulation, which negotiators apparently did not want to apply in respect of all Article XIII:2(d) disciplines. The fact that Article XIII:2(d) is not replicated in its entirety in Article 5.2(a) does not necessarily mean that the non-replicated disciplines no longer apply; on the contrary, it may mean that Article 5.2(b) quota modulation does not allow Members to depart from those non-replicated Article XIII:2(d) disciplines. In other words, since quota modulation may not have been intended to apply in respect of all Article XIII:2(d) disciplines, it may have been necessary to specify in Article 5.2(a) precisely which Article XIII:2(d) disciplines it does apply to.

⁷⁵ (*footnote original*) *Argentina – Footwear Safeguard (AB)* at para. 88.

⁷⁶ Panel Report, *US – Line Pipe*, paras. 7.44-7.46.