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

Paragraph 1

1. If the CONTRACTING PARTIES specify a period other than a three-year period, a contracting party may act pursuant to paragraph 1 or paragraph 3 of Article XXVIII on the

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

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

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

4. When a tariff concession is modified or withdrawn on a new product (i.e. a product for which three years' trade statistics are not available) the Member possessing initial negotiating rights on the tariff line where the product is or was formerly classified shall be deemed to have an initial negotiating right in the concession in question. The determination of principal supplying and substantial interests and the calculation of compensation shall take into account, *inter alia,* production capacity and investment in the affected product in the exporting Member and estimates of export growth, as well as forecasts of demand for the product in the importing Member. For the purposes of this paragraph, "new product" is understood to include a tariff item created by means of a breakout from an existing tariff line.

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

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

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

(b) trade in the most recent year increased by 10 per cent.

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

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

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

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

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

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

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

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

> "Paragraph 3(a) of Article XXVIII provides that where agreement with the Members concerned cannot be reached, the Member proposing to modify or withdraw the concession 'shall, nevertheless, be free to do so'. Paragraph 3(a) then stipulates that if such action is taken, the Members concerned shall then be free 'not later than six months after such action is taken, to withdraw, upon the expiration of thirty days from the day on which written notice of such withdrawal is received by the Members, substantially equivalent concessions initially negotiated with the applicant Member'. Article XXVIII:3(b) further provides that if agreement with Members concerned is reached, but the agreement reached is not satisfactory to Members having a substantial supplying interest, those Members 'shall be free, not later than six months after the action under such agreement is taken, to withdraw, up the expiration of thirty days from the day on which written notice of such withdrawal is received by the Members, substantially equivalent concessions initially negotiated with the applicant Member'.
>
> China considers that the prior incorporation of such changes into the Schedule through certification is a legal prerequisite for giving effect to the changes in the context of Article XXVIII:3. We have difficulty reconciling such an interpretation with the ordinary meaning of this provision. The specification of a timeframe for the modification or withdrawal of concessions, by reference to the point in time when 'such action is taken' by the applicant Member or when 'action under such agreement is taken',

[7] Panel Report, *EU – Poultry (China)*, para. 7.244.
[8] Panel Report, *EU – Poultry (China)*, para. 7.272.

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

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

> reference to Article I, which is the Most-Favoured-Nation Clause. Therefore, I think the intent is clear: that in no way should this Article interfere with the operation of the Most-Favoured-Nation Clause.'[12]
>
> Although this statement refers specifically to the MFN clause in Article I of the GATT, logic requires that it applies equally to the non-discriminatory administration of quotas and tariff-rate quotas under Article XIII of the *GATT 1994*."[13]

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

> "[I]f the allocation of TRQ shares among supplying countries is not regulated by Article XXVIII:2 and paragraph 6 of the Understanding, it does not follow that the allocation of TRQ shares among supplying countries is unregulated, or 'would result in over-compensation for some and under-compensation for others, thereby creating discrimination'. Rather, it would mean that the allocation of TRQs shares among supplying countries is regulated only by the relevant obligations in Article XIII. Interpreting Article XXVIII:2 and paragraph 6 of the Understanding as also regulating the allocation of TRQs among supplying countries would thus mean tha