

In WTO Dispute with the European Union Over Poultry, China Wins Narrow Victory

On March 28, 2017, a World Trade Organization (“WTO”) panel (the “Panel”) issued its report in *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products*.¹ The dispute concerned the modification of tariff concessions on certain poultry products by the European Union (“EU”). The poultry products included prepared turkey meat, cooked chicken meat, processed chicken meat, and processed duck, geese and guinea fowl meat. These modifications were implemented after negotiations had been held under Article XXVIII of the GATT 1994. The EU had modified its concessions on the relevant poultry products through two distinct negotiations that resulted in two “modification packages.”²

Importantly, in response to an outbreak of avian influenza (bird flu) in China, the EU had adopted several sanitary and phytosanitary measures (“SPS measures”) that prevented importation of certain poultry products from China in February 2004.³ The WTO-consistency of these SPS measures was not challenged by China in this dispute. Instead, China challenged the modification of tariff concessions on certain poultry products adopted by the EU. Essentially, China claimed that by not taking the existence of these SPS measures into account in the renegotiation of the EU’s tariff rate quota (“TRQ”) involving these products, the EU “cemented these SPS measures in stone” and prevented China from ever obtaining a

significant share of the EU’s poultry market. China considered that the measures adopted by the EU were inconsistent with the EU’s obligations under Articles I, II, XIII and XXVIII of the GATT 1994. After consultations failed to resolve the dispute, the Panel was established on July 20, 2015.

In its Report the Panel rejected the majority of China’s claims. For example, it declined to find that the EU had acted inconsistently with its obligations under Articles I, II and XXVIII of the GATT 1994. However, the Panel did find that the EU had acted inconsistently with Article XIII of the GATT 1994 by not recognizing that China held a substantial interest in supplying the products under tariff lines 1602 39 29 and 1602 39 80.

The Panel’s Findings with Respect to Tariff Lines 1602 39 29 and 1602 39 80 Under Article XIII:2(d) and the Chapeau of Article XIII:2 of the GATT 1994 and the Interpretation of the Term “Special Factors”

China had argued that by not recognizing China as a WTO member (a “Member”) holding a substantial interest in supplying the products covered by tariff lines 1602 39 29 and 1602 39 80, and by failing to seek agreement with China on the allocation of the TRQs, the EU had acted inconsistently with Article XIII:2(d) of the GATT

1994.⁴ The Panel therefore had to assess whether China was indeed a Member holding a substantial interest in supplying these products and whether, as China had argued, the SPS measures constituted “special factors” that “may have affected trade” in the relevant product. The Panel declined to find that the SPS measures themselves constituted “special factors” “insofar as they apply equally to imports from all Members in the same situation.”⁵ However, the Panel considered that “changes in the import shares held by different Members that have occurred between the end of the representative period selected and the time of the TRQ being allocated” may need to be taken into account as “special factors.” Consequently, the Panel found that China’s increased ability to export poultry products under certain tariff lines following the relaxation of the SPS measures in July 2008 was a “special factor” within the meaning of Article XIII:2(d) and that the EU had acted inconsistently with that provision by not recognizing China as a Member holding a substantial interest in supplying the relevant products. For essentially the same reasons, the WTO Panel found that the EU had acted inconsistently with the chapeau of Article XIII:2 by not allocating a greater “all others” share of the TRQs under the relevant tariff lines.⁶

The Panel’s Findings with Respect to Articles I, II, XIII:4 and XXVIII of the GATT 1994

China had also brought claims under three other provisions of the GATT 1994. All of these claims were rejected by the Panel.

ARTICLE XIII:4

In addition to its claims under Article XIII:2, China argued that by refusing to enter into “meaningful consultations” with China, the EU violated its obligations under Article XIII:4 of the GATT 1994. The Panel found that there were insufficient agreed facts concerning the conduct of the consultations to determine whether the

EU had indeed failed to do so. Accordingly, the Panel held that China had failed to discharge its burden of proof on this point and had failed to demonstrate that the EU had indeed violated its obligations under this provision.⁷

ARTICLE XXVIII:1 AND ARTICLE XXVIII:2

China further claimed that by refusing to recognize China’s “principal supplying interest” and “substantial interest” in the concessions at issue in the First and Second Modification Packages, the EU violated Article XXVIII:1 of the GATT 1994. According to China, different and more recent import reference periods should have been used because these would have provided a more accurate reflection of China’s supplying interest. The Panel assessed whether changes in import shares oblige the importing Member to reappraise which Members hold a principal or substantial supplying interest. Relying, *inter alia*, on GATT/WTO practice, the Panel found that such a legal obligation does not exist.⁸ Therefore, the Panel rejected China’s claim under Article XXVIII:1.

China further claimed that the TRQs adopted as part of the First and Second Modification Packages did not “maintain a general level of reciprocal and mutually advantageous concessions” not less favorable to trade than those provided for in the GATT 1994 prior to the negotiations within the meaning of Article XXVIII:2. In China’s view, the TRQs should have reflected “future trade prospects” calculated in accordance with paragraph 6 of the Understanding on the Interpretation of Article XXVIII.⁹ Accordingly, the EU should have calculated these prospects on the basis of what import levels would have been in the absence of the SPS measures. The Panel did not accept China’s argument that the SPS measures constituted “discriminatory quantitative restrictions” and, therefore, rejected China’s claim that the EU had acted inconsistently with Article XXVIII:2 of the GATT 1994.¹⁰ Similarly, the Panel rejected China’s claim that the EU was obliged to calculate the total amount of the TRQs

based on the import levels over the three years preceding the conclusion of the Article XXVIII negotiations.

ARTICLE I

In addition to its claims under Articles XIII and XXVIII, China also claimed that by allocating all, or the vast majority, of the TRQs to Brazil and Thailand, the EU accorded an advantage to the products originating in these countries that was not accorded immediately and unconditionally to the like product originating in China. Thereby, according to China, the EU acted inconsistently with the MFN-treatment obligation in Article I:1 of the GATT 1994. The Panel did not agree with China's argumentation on this point and found that it had failed to demonstrate that "any elements of the TRQ allocation fall within the scope of Article I:1."¹¹

ARTICLE II

Finally, China also claimed that the higher out-of-quota tariff rates violated Article II:1 of the GATT 1994 as they exceeded the bound rates inscribed in the EU's Schedule of Concessions. Essentially, China claimed that WTO certification of the changes to a schedule arising from modifications is a prerequisite for the entry into force of such changes. The Panel rejected this argument and found that nothing prevents a Member from implementing the changes agreed upon in Article XXVIII negotiations prior to such certification. Therefore, the Panel was unable to uphold China's claim that the EU violated Article II by giving effect to the modifications arising from the negotiations prior to the changes being reflected in the authentic text of its schedule through certification.¹²

Relevance of the Findings in the Panel Report

The importance of the Panel Report in *EU – Poultry* is twofold. First, the Panel Report provides an interpretation of Article XIII of the GATT 1994, which deals with TRQs, and of

Article XXVIII, which deals with the modification of the schedules of Members. These provisions may become relevant in the context of Brexit. When the United Kingdom formally leaves the EU, the EU may be required to renegotiate the value of its tariff concessions with other Members. Similarly, it may have to adjust its TRQs. The Panel's interpretation of both provisions could be highly relevant in this regard. Second, the Panel Report interprets the term "special factors" in the sense of Article XIII of the GATT 1994. It thereby clarifies the standard of proof that a Member claiming that it has a substantial supplying interest in the product concerned has to fulfil in order to be recognized as such. It also clarifies that the existence of regulatory measures (such as SPS measures) does not, in and of itself, constitute a "special factor." However, the increase in imports that occurs after the relaxation of such SPS measures is a special factor that should be taken into account by the Member imposing the TRQ when it reassesses the allocation of that TRQ. This interpretation will be relevant in other disputes involving TRQs.

For more information about the topics raised in this Legal Update, please contact any one of the lawyers below:

Authors

Duane Layton

+1 202 263 3811

dlayton@mayerbrown.com

Dylan Geraets

+32 2 5515948

dgeraets@mayerbrown.com

Contacts

EUROPE

Paulette Vander Schueren

+32 2 551 5950

[pvanderschueren@mayerbrown.com](mailto:pvaarderschueren@mayerbrown.com)

LATIN AMERICA

Eduardo Gaban

+55 11 2504 4639

egaban@mayerbrown.com

NORTH AMERICA

Duane Layton

+1 202 263 3811

dlayton@mayerbrown.com

in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Any tax advice expressed above by Mayer Brown LLP was not intended or written to be used, and cannot be used, by any taxpayer to avoid U.S. federal tax penalties. If such advice was written or used to support the promotion or marketing of the matter addressed above, then each offeree should seek advice from an independent tax advisor.

Mayer Brown comprises legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown Mexico, S.C., a sociedad civil formed under the laws of the State of Durango, Mexico; Mayer Brown JSM, a Hong Kong partnership and its associated legal practices in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. Mayer Brown Consulting (Singapore) Pte. Ltd and its subsidiary, which are affiliated with Mayer Brown, provide customs and trade advisory and consultancy services, not legal services.

"Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

This publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.

© 2017 The Mayer Brown Practices. All rights reserved.

Endnotes

- ¹ Panel Report, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products*, WT/DS92/R, 28 March, 2017 (hereinafter: *EU – Poultry*). https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_So09-DP.aspx?language=E&CatalogueIdList=235301,235302&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True
- ² The "First Modification Package" covered products under tariff lines 0210 99 39, 1602 31, and 1602 32 19 and was initiated in 2006. The "Second Modification Package" included tariff lines 1602 20 10, 1602 32 11, 1602 32 30, 1602 32 90, 1602 39 21, 1602 39 29, 1602 39 40 and 1602 39 80, and was initiated in 2009. Tariff subheadings 1602 39 40 and 1602 39 80 were combined in 2012 to create a new tariff subheading, 1602 39 85.
- ³ Panel Report, *EU – Poultry*, para. 7.87.
- ⁴ Panel Report, *EU – Poultry*, paras. 3.1 and 7.344.
- ⁵ Panel Report, *EU – Poultry*, paras. 7.337-7.343.
- ⁶ Panel Report, *EU – Poultry*, paras. 7.388-7.406.
- ⁷ Panel Report, *EU – Poultry*, paras. 7.494-7.495.
- ⁸ Panel Report, *EU – Poultry*, para. 7.227.
- ⁹ Panel Report, *EU – Poultry*, para. 7.258.
- ¹⁰ Panel Report, *EU – Poultry*, para. 7.262.
- ¹¹ Panel Report, *EU – Poultry*, para. 7.450.
- ¹² Panel Report, *EU – Poultry*, para. 7.551.

Mayer Brown is a global legal services organization advising clients across the Americas, Asia, Europe and the Middle East. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. We provide legal services