

apply the changes agreed upon in Article XXVIII negotiations is also demonstrated by the diverse views presented by the third parties in this case.⁷⁵⁰

7.550. We are well aware of the importance of certification in the context of the WTO legal system. However, having carefully considered the existing provisions of the GATT 1994, the Procedures for Negotiations under Article XXVIII, and the Procedures for Modification and Rectification of Schedules, it does not appear to be the case that certification is a legal prerequisite that must be completed before a Member modifying its concessions can proceed to implement the changes agreed upon in Article XXVIII negotiations at the national level.

7.11.5 Conclusion

7.551. In the present case, China has not suggested that the tariff rates applied by the European Union exceed those agreed upon in the Article XXVIII negotiations with Brazil and Thailand.⁷⁵¹ Accordingly, having found that certification is not a legal prerequisite that must be completed before a Member modifying its concessions can proceed to implement the changes agreed upon in Article XXVIII negotiations at the national level, we are unable to uphold China's claims that the European Union violated Article II by giving effect to the modifications arising from the Article XXVIII negotiations prior to the changes being reflected in the authentic text of its Schedule through certification.

7.552. In arriving at this conclusion, we wish to stress that pursuant to Article 3.2 of the DSU, the task of panels in the dispute settlement system of the WTO is "to preserve the rights and obligations of Members under the covered agreements, and to *clarify the existing provisions* of those agreements in accordance with customary rules of interpretation of public international law."⁷⁵² As the Appellate Body has previously confirmed, determining what the applicable rules and procedures ought to be is not "the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO".⁷⁵³

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. In respect of the Panel's terms of reference,
 - i. China's contention that the European Union acted inconsistently with the chapeau of Article XIII:2 of the GATT 1994 by failing to set aside TRQ shares for "all others" at

⁷⁵⁰ See responses of Argentina, Brazil, Canada, Russia, Thailand and the United States to Panel question No. 10 to third parties. Argentina states that "pursuant to Article II of the GATT and similar WTO provisions, the lack of the fulfillment of the certification obligation could put into question the consistency of the change introduced in the national custom tariff with a Member's Schedule of Concessions and, as a result, with its WTO obligations". Russia agrees with China that "changes that were agreed upon in Article XXVIII negotiations and include tariff rates in excess of a Member's bound rates cannot be implemented prior to certification" of the modified schedule. Canada states that "[a]t the point where negotiations are concluded and the relevant period (for negotiations under Article XXVIII:1) or notice (for negotiations conducted under Article XXVIII:4 or Article XXVIII:5) has occurred, then the substantive changes to Schedules have been determined" and "[w]hat remains is to formally incorporate the substantive changes into the Schedules through use of the 1980 Procedures". Thailand states that certification is "an administrative procedure that allows for the incorporation of the new tariff concessions in the modifying Member's Schedule", and "is not a substantive requirement that must be completed before a Member can implement the changes in its modified Schedule". Brazil states that "[s]ince Schedules are an integral part to the covered Agreements, it is certainly useful that any changes to them be certified accordingly", but then states that "[i]t seems, however, that GATT/WTO practice indicates that the certification is not indispensable prior to the modification of the Schedule by the Member". The United States indicates that the Member modifying concessions "may 'give effect to' such changes *before* they are formally certified pursuant to paragraph 8 of the Procedures for Modification and Rectification of Schedules of Tariff Concessions" (emphasis original); however, the United States then states that because "formal effect" will only be given to those changes after the modified schedule is certified, then "so long as the modified schedule remains uncertified, the prior, certified schedule would continue to constitute the formal legal basis for the Member's rights and obligations under the WTO Agreements".

⁷⁵¹ We recall that paragraph 7 of the Procedures for Negotiations under Article XXVIII provides that a Member will be free to give effect to "the changes agreed upon" in the negotiations.

⁷⁵² Appellate Body Report, *US – Certain EC Products*, para. 92. (emphasis original)

⁷⁵³ Appellate Body Report, *US – Certain EC Products*, para. 92.

- levels that allow other WTO Members to achieve a substantial supplying interest going forward falls within the scope of the panel's terms of reference;
- ii. China's contentions that the European Union acted inconsistently with the chapeau of Article XIII:2 and Article XIII:4 of the GATT 1994 by failing to proactively disclose the historical trade data, the representative period selected or the special factors appraised are new claims that are outside the Panel's terms of reference;
 - iii. China's contentions that the European Union acted inconsistently with Article XIII:1 and the chapeau of Article XIII:2 of the GATT 1994 by failing to annually update the initial TRQ allocations constitute new claims that are outside the Panel's terms of reference;
 - iv. Insofar as China is claiming that the European Union acted inconsistently with paragraph 7 of the Procedures for Negotiations under Article XXVIII or paragraph 1 of the Procedures for Modification and Rectification of Schedules, such claims are not properly before the Panel;
 - v. Insofar as China is claiming that the European Union acted inconsistently with Article II of the GATT 1994 by implementing the higher out-of-quota rates arising from the First Modification Package over the period 2007-2009, such claim is not properly before the Panel;
- b. China has not demonstrated that the European Union acted inconsistently with Article XXVIII:1 of the GATT 1994 by not recognizing China as a Member holding a principal or substantial supplying interest in the concessions at issue in the First and Second Modification Packages;
 - c. China has not demonstrated that the tariff rates and the TRQs negotiated and implemented by the European Union under the First and Second Modification Packages are inconsistent with Article XXVIII:2 of the GATT 1994, read in conjunction with paragraph 6 of the Understanding on the Interpretation of Article XXVIII of the GATT 1994, by failing to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that existing prior to the modification;
 - d. In respect of China's claims under Article XIII:2(d) of the GATT 1994,
 - i. China has not demonstrated that the European Union acted inconsistently with Article XIII:2(d) by determining which countries had a substantial interest in supplying the products concerned on the basis of their actual share of imports into the European Union, rather than on the basis of an estimate of what import shares would have been in the absence of the SPS measures restricting poultry imports from China;
 - ii. China has demonstrated that the increase in imports from China over the period 2009-2011 following the relaxation of the SPS measures in July 2008 was a "special factor" that had to be taken into account by the European Union when determining which countries had a substantial interest in supplying the products concerned, and the European Union acted inconsistently with Article XIII:2(d) by not recognizing China as a Member holding a substantial interest in supplying the products under tariff lines 1602 39 29 and 1602 39 80⁷⁵⁴ and by failing to seek agreement with China on the allocation of the TRQs for those particular tariff lines;
 - e. In respect of China's claims under the chapeau of Article XIII:2 of the GATT 1994,
 - i. China has not demonstrated that the European Union acted inconsistently with the chapeau of Article XIII:2 by determining the TRQ shares allocated to "all others" on the basis of actual share of imports into the European Union, rather than on the

⁷⁵⁴ Tariff line 1602 39 80 merged with tariff line 1602 39 40 into tariff line 1602 39 85, effective 1 January 2012.

basis of an estimate of what import shares would have been in the absence of the SPS measures restricting poultry imports from China;

- ii. China has demonstrated that the increase in imports from China over the period 2009-2011 following the relaxation of the SPS measures in July 2008 was a "special factor" that had to be taken into account by the European Union when determining the size of the TRQ shares to be allocated to "all others", and that the European Union acted inconsistently with the chapeau of Article XIII:2 by not allocating a greater "all others" share under tariff lines 1602 39 29 and 1602 39 80⁷⁵⁵;
- iii. China has failed to demonstrate that the European Union acted inconsistently with the chapeau of Article XIII:2 by not allocating an "all others" share of at least 10% for all of the TRQs under the First and Second Modification Packages;
- f. China has not demonstrated that the European Union acted inconsistently with Article XIII:1 of the GATT by allocating all or the vast majority of the TRQs to Brazil and Thailand;
- g. China has not demonstrated that the European Union acted inconsistently with Article I:1 of the GATT 1994 by allocating all or the vast majority of the TRQs to Brazil and Thailand;
- h. China has not demonstrated that the European Union acted inconsistently with Article XIII:4 of the GATT 1994 by refusing to enter into meaningful consultations with China; and
- i. China has not demonstrated that the European Union acted inconsistently with Article II:1 of the GATT 1994 by giving effect to the modifications resulting from the Article XXVIII negotiations prior to the changes being reflected in the authentic text of its Schedule through certification.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with Article XIII:2(d) and the chapeau of Article XIII:2 of the GATT 1994, they have nullified or impaired benefits accruing to China under the GATT 1994.

8.3. Pursuant to Article 19.1 of the DSU, having found that the European Union has acted inconsistently with its obligations under Article XIII:2(d) and the chapeau of Article XIII:2 of the GATT 1994, the Panel recommends that the Dispute Settlement Body request that the European Union bring its measures at issue into conformity with its obligations under the GATT 1994.

⁷⁵⁵ Tariff line 1602 39 80 merged with tariff line 1602 39 40 into tariff line 1602 39 85, effective 1 January 2012.