European Communities - Customs Classification of Frozen Boneless Chicken Cuts

(WT/DS269 and WT/DS286)

THIRD-PARTY ORAL STATEMENT OF THE UNITED STATES
AT THE FIRST MEETING OF THE PANEL

September 29, 2004

Introduction

1. Mr. Chairman and members of the Panel, thank you for providing the United States, as a third party in this proceeding, the opportunity to make a statement at this meeting of the Panel.

2. This dispute does not concern customs classification as such. Rather, this dispute concerns the tariff treatment by the European Communities ("EC") of frozen boneless chicken cuts from Brazil and Thailand, specifically whether the EC is providing tariff treatment to those products that is less favorable than that provided for in its schedule of tariff concessions for the Uruguay Round, Schedule LXXX. The United States would like to take the opportunity this morning to make the limited but important point that, in analyzing the meaning of the terms of the relevant concession, one must consider evidence of how the EC understood those terms at the time the EC made the concession.

Discussion

3. As Brazil and Thailand explained in their submissions, the key term at issue in this dispute is "salted." Whether the products Brazil and Thailand export to the EC may benefit from the concession the EC made for heading 0210, which covers "other salted meat," depends on the

meaning of the term "salted." Thus, in view of the obligations contained in paragraphs 1(a) and (b) of Article II of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the issue is whether the EC made a concession in the Uruguay Round with respect to the tariff treatment of "salted meat" under heading 0210 that covers the products Brazil and Thailand export.

4. Brazil and Thailand present evidence that, in 1994, prior to the conclusion of Schedule LXXX, the EC published Regulation 535/1994, which states that the EC would distinguish "fresh, chilled or frozen meat" of heading 0207 of its Combined Nomenclature ("CN") from "salted meat" of heading 0210 by considering meat with a total salt content of 1.2% or more by weight as "salted meat." Accordingly, the EC inserted an additional note in Chapter 2 of its CN that states: "For purposes of heading No. 0210, the term 'salted' means meat or edible meat offal which has been deeply and homogeneously impregnated with salt in all parts, having a total salt content of not less than 1,2% by weight." While Brazil and Thailand were not exporting the frozen boneless chicken cuts at issue to the EC at the time of the Uruguay Round, Thailand began to export such products in 1996, and Brazil followed suit in 1998. For several years thereafter, the EC accorded to frozen boneless chicken cuts from Brazil and Thailand that had a total salt content greater than 1.2% by weight the tariff treatment provided in the EC's Schedule under heading 0210.

5. In 2002, the EC published Regulation 1223/2002, which stated that, for purposes of heading 0207, "The addition of salt does not alter the character of the product as frozen meat of heading 0207." In 2003, the European Commission "clarified and confirmed" that frozen boneless chicken cuts with a salt content by weight of 1.2% to 1.9% were to be classified under heading 0207, not 0210, and required Germany to withdraw a decision that salt contents of 1.9%

to 3.0% were classifiable under heading 0210. Later that year, the EC published Regulation 1871/2003, which amended the note in chapter 2 of its CN defining "salted meat" for the purpose of heading 0210 to add the conditions that "it is the salting which ensures long-term preservation."

6. The EC now argues that, "[f]or Brazil and Thailand to prevail they must show that 'salty chicken' can be considered 'salted' for the purpose of the interpretation of the EC's schedule."[1] The EC asserts that Brazil and Thailand cannot prove their case, because, at the time the EC bound its tariff rate for heading 0210, "the figure of a 1.2% salt content was conceived of as a *minimum* salt content" and that "[i]t was never considered that the mere existence of a salt content of greater than 1.2% in itself made a product 'salted' for the purpose of 02.10."[2] Brazil and Thailand disagree that there was an understood criterion of long-term preservation associated with the term "salted" in the definition that existed in the EC's CN at the time Schedule LXXX was concluded, and believe that the EC's concession for heading 0210 covers the product they export.

7. Without taking a view on who is correct, the United States wishes to emphasize that the evidence of the meaning of the terms in the EC's CN before the EC concluded Schedule LXXX must be relevant to understanding what tariff concession the EC granted and, therefore, what the EC's obligations are under Article II of the GATT 1994. The Appellate Body noted in *European Communities – Customs Classification of Certain Computer Equipment* that the "only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty

[1] First Written Submission by the European Communities ("EC First Submission"), para. 1.
[2] EC First Submission, para. 88.

interpretation set out in the *Vienna Convention*."[3] The United States agrees that the term "salted" in heading 0210 must be examined pursuant to the customary rules of interpretation of public international law reflected in Article 31(1) of the *Vienna Convention*; that is, "in accordance with the ordinary meaning to be given to the term . . . in [its] context and in the light of [the treaty's] object and purpose." The United States believes that the meaning the EC gave to the word "salted" prior to the conclusion of its Schedule is relevant evidence of the ordinary meaning of that term. In other words, the meaning that the EC itself assigned to the term "salted" would appear to be evidence of what the EC itself accepts as being within the scope of the ordinary meaning of the term.

8. The obligations of Article II:1(a) regarding "treatment" apply to the "treatment provided for" in a Member's Schedule, and the obligations of Article II:1(b) regarding duty rates apply with respect to the "products described" in a Member's Schedule. The ordinary meaning of "describe" is "to state the characteristics of." Before it concluded Schedule LXXX, the EC "described" or "stated the characteristics of" the product "salted" meat in its CN as "deeply and homogeneously impregnated with salt in all parts, having a total salt content of not less than 1,2% by weight."

9. As Brazil points out, "there is nothing in the ordinary meaning of the term 'salted' that suggests that it is exclusively a process used to ensure [long-term] preservation."[4] On the other hand, it is clear that the ordinary meaning of "salted" does include the meaning contained in the

[3] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* (*EC - LAN)*, WT/DS62, 67, 68/AB/R, adopted June 5, 1998, para. 84.

[4] First Written Submission of Brazil ("Brazil First Submission"), para. 100 (emphasis and brackets in original).

1994 CN note. Even the EC acknowledges that one meaning of "salted" is that the meat's "flavour has been altered by the addition of salt."[5]

10. Alternatively, the Panel could consider the 1994 CN note defining the term "salted," as well as the classification practice of the EC during the Uruguay Round of these products, as part of "the circumstances of [the] conclusion" of the WTO Agreement that may be used as a supplementary means of interpretation pursuant to the customary rules of interpretation reflected in Article 32 of the *Vienna Convention*. As the Appellate Body observed in *European Communities – Customs Classification of Certain Computer Equipment,* "we consider that the classification practice in the European Communities during the Uruguay Round is part of 'the circumstances of [the] conclusion' of the WTO Agreement and may be used as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention."[6] Further, "If the classification practice of the importing Member at the time of the tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, surely that Member's legislation on customs classification at that time is also relevant."[7] Accordingly, recourse may be had to the 1994 CN note and the EC's classification practice to confirm the ordinary meaning of "salted" or to determine its meaning if its meaning is otherwise ambiguous or obscure.

Conclusion

11. This concludes my presentation. The United States appreciates this opportunity to present its views.

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[5] EC First Submission, para. 121.
[6] Appellate Body Report, *EC - LAN,* para. 92.
[7] Appellate Body Report, *EC - LAN,* para. 94.