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European Communities – Customs Classification of Frozen Boneless Chicken Cuts

(AB-2005-5)

THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES

July 25, 2005

Introduction

1. In our written submission, the United States set forth its views on four issues presented in this appeal. We would be pleased to address any questions that the Division might have on those topics. In today's statement, the United States would like to focus on an additional issue raised by the European Communities ("EC"): the relationship between the Harmonized System ("HS") and the EC's schedule of tariff concessions for the Uruguay Round, Schedule LXXX ("EC Schedule").

Discussion

2. The United States recalls its view that this dispute does not concern customs classification as such, but concerns instead the tariff treatment by the 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 the EC Schedule.[1] In its appellant submission, the EC blurs this distinction by asserting that, "absent a contrary expressed intention the provisions of the [GATT] Schedules which reproduce the HS nomenclature are to

[1] Third Participant Submission of the United States ("U.S. Third Participant Submission"), para. 8.

be interpreted in the same way as those of the HS."[2] This confuses what the panel's task was. While the EC has an obligation as a party to the HS Convention to use the HS headings and subheadings in its Combined Nomenclature, the EC's obligation under GATT Article II:1(a) is to apply the treatment provided for in its Schedule. The task of the panel, therefore, was to interpret the EC Schedule and the concession the EC made therein with respect to "salted" meat, rather than to interpret the HS. In interpreting the EC Schedule, the terms of which are treaty terms of the GATT 1994 and the WTO Agreement, the panel was bound to follow the customary rules of interpretation reflected in Vienna Convention Articles 31 and 32.[3] Those rules require an analysis of the ordinary meaning of the text in its context, and in light of the object and purpose of the agreement, with recourse to supplementary materials in certain circumstances. As part of this analysis, the panel considered the HS as "context" under Article 31(2) of the Vienna Convention.[4]

3. The United States notes that it disagrees with the panel's conclusion that the HS qualifies as "context" under Article 31(2). The HS is neither an agreement relating to the WTO Agreement that all the Members made in connection with the conclusion of the WTO Agreement, nor an instrument made by one or more Members in connection with the conclusion of the WTO Agreement and accepted by the other Members as an instrument related to the WTO Agreement. In *EC – LAN*, the Appellate Body stated that a proper interpretation of the EC's Schedule should have included an examination of the HS and its Explanatory Notes.[5] The

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[2] Appellant's Submission of the European Communities ("EC Appellant Submission"), para. 17.

[3] Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

[4] Panel Report, para. 7.189.

[5] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* (*EC – LAN)*, WT/DS62, 67, 68/AB/R, adopted June 5, 1998, para. 89.

United States considers that the HS and its Explanatory Notes could be deemed as part of the "circumstances of the conclusion" of the WTO Agreement within the meaning of Article 32 of the Vienna Convention and, therefore, could be used as a "supplementary means of interpretation" of the EC Schedule. The United States notes, however, that the Explanatory Notes are not generally considered to be legally binding, and that therefore they should be treated with caution.[6]

4. In any event, the EC is wrong to suggest that the panel should have embarked upon an interpretation of the HS – which the panel had no authority to do under the WTO Agreement – instead of an interpretation of the EC Schedule. The United States generally supports Thailand's view that, while the panel should *consider* the HS and its Explanatory Notes in interpreting the EC's Schedule, consistent with the Appellate Body's report in the *EC – LAN* dispute,[7] the panel's task is to interpret that Schedule, not the HS.[8]

5. Indeed, even the EC appears to acknowledge that distinct rules are relevant in interpreting the HS as opposed to a WTO Member's Schedule: it says that, "The EC believes that General Rule 3(c) should be seen as a rule intended for classification of particular consignments rather than for the kind of interpretation that is required in the present dispute."[9] Of course, the interpretation required in this dispute is interpretation pursuant to the customary rules of interpretation reflected in the Vienna Convention.

6. The United States also observes that it is far from clear whether there is a single, "correct" interpretation of the HS itself that a panel might always rely on to interpret a

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[6] *Id.*, para. 38.
[7] *Id.*, para. 89.
[8] Appellee's Submission of Thailand ("Thailand Appellee Submission"), para. 33.
[9] Other Appellee's Submission of the European Communities ("EC Appellee Submission"), para. 93.

concession in a Member's Schedule "correctly." The EC asserts that, "The *HS Convention* provides exclusive authority for interpreting the nomenclature to the HS Committee and the Council."[10] The EC cites Articles 7 and 8 of the HS Convention in support of this proposition. Those articles enumerate certain functions of the Committee and the Council, respectively, but do not say that only these two WCO bodies may interpret the HS. Furthermore, we note Article 10(1) of the HS Convention, which instructs parties to settle disputes concerning interpretation by negotiation between them, "so far as possible." If parties cannot reach a settlement and the dispute is referred to the HS Committee or Council, then under Article 10(4) of the HS Convention the parties may – or may not – agree to accept the Committee's or Council's recommendations as binding.

7. Lastly, the United States notes that Article 9 of the HS Convention states that "the Contracting Parties do not assume by this Convention any obligation in relation to rates of Customs duty." By contrast, GATT Article II obligates each Member to provide tariff treatment no less favorable than that provided for in the Member's Schedule, and not to apply ordinary customs duties in excess of those set forth in that Schedule. Thus, it is clear that, in a WTO dispute settlement proceeding, the panel's task is to decide whether the Member is applying a duty rate with respect to a certain product that is no less favorable than the rate it committed to apply, not whether the Member is correctly classifying the product for purposes of the HS. We

[10] EC Appellant Submission, para. 136 (footnote omitted).

urge the Appellate Body to reject any attempts to muddy the issues in this dispute by turning the dispute into a technical argument about "correct" classification.

Conclusion

8. This concludes our presentation. Thank you for your attention.