BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

# *European Communities – Customs Classification of Frozen Boneless Chicken*

**(AB-2005-5)**

## THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

July 8, 2005

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## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this submission, the United States comments on four issues. The U.S. views expressed in detail in each of subsections II(A) through (D) of this submission are summarized in the following subparagraphs (a) to (d):

(a) Regulation 535/1994 could have been considered by the Panel as evidence of what the European Communities ("EC") itself accepted as being within the scope of the ordinary meaning of the term "salted." Alternatively, the Panel could permissibly do what it in fact did, namely consider Regulation 535/1994 as part of the circumstances of the conclusion of the WTO Agreement.

(b) The EC argues that what it calls the classification practice of other Members supports its position. In fact, the EC refers only to a single customs ruling by the United States. This ruling does not, however, confirm the EC's assertions about U.S. "practice." Among other things, that customs classification was of a product which is not "identical in all material respects" to the product at issue in this dispute.

(c) The United States agrees with the Panel that a treaty provision must be interpreted in light of the *treaty's* object and purpose, not the "object and purpose" of that particular *provision*, as the EC has urged.

(d) The United States generally agrees with the approach taken by the EC in its appellant submission that determination of a Member's municipal law is a question of fact which must be evaluated within the municipal legal system itself.

## II. ARGUMENT

### A. The Relevance of Regulation 535/1994

2. The issues in this dispute arise out of the question whether, 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"), the EC made a concession in the Uruguay Round with respect to the tariff treatment of "salted meat" under heading 0210 in Schedule LXXX ("EC Schedule"). During the panel proceeding, it appears that the parties agreed – and that the Panel accepted – that the outcome largely turned on the meaning of the term "salted" in heading 0210 in the EC Schedule.

3. In its analysis of that term, the Panel considered evidence presented by Brazil and Thailand that, in 1994, prior to the conclusion of the EC Schedule, 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."[1] The Panel considered Regulation 535/1994 relevant in its examination of the "circumstances of conclusion" of the EC Schedule.[2]

4. In its appeal, the EC argues that the Panel should not have considered Regulation 535/1994 as part of the "circumstances of conclusion" of the negotiations because the Regulation was not in existence at the time the EC Schedule was drafted; i.e., the moment of actual negotiations.[3]

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[1] Panel Report, 7.348-7.358.

[2] Panel Report, para. 7.364.

[3] Appellant's Submission of the European Communities ("EC Appellant Submission"), paras. 245, 253. The United States notes that the EC's notice of appeal and appellant submission claim that the Panel erroneously applied certain articles of the Vienna Convention. Given that the Vienna Convention is not a "covered agreement" within the meaning of Article 1.1 of the *Understanding on Rules and Procedures Governing the Settlement of*

5. The United States wishes to recall the views that it furnished to the Panel on the relevance of Regulation 535/1994. The United States noted to the Panel 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 under the customary rules of interpretation reflected in Article 31(1) of the Vienna Convention. The United States explained that the meaning that the EC itself assigned to the term "salted" would be evidence of what the EC itself accepted as being within the scope of the ordinary meaning of the term. The obligations of GATT 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 recite the characteristics of."[4] Before it concluded its Schedule, 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."[5] Thus, in the view of the United States, the Panel could have taken this approach to assessing the importance of Regulation 535/1994 to the issues in this dispute.

6. The United States did also suggest that the Panel could consider Regulation 535/1994, and the note defining the term "salted" that the Regulation inserted in the CN, 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

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*Disputes* ("DSU"), we understand the EC's phrasing to be shorthand for a claim that the Panel erroneously applied certain customary rules of public international law reflected in those Vienna Convention articles; *see* DSU Article 3.2.

[4] *The New Shorter Oxford English Dictionary*, 1993 edition, page 644.

[5] Third-Party Oral Statement of the United States ("U.S. Statement"), paras. 7-8; Panel Report, Annex B-2.

of the Vienna Convention. Indeed, the Panel adopted this approach. As the Appellate Body observed in *EC – LAN,* "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, "[i]f 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 could be had to Regulation 535/1994 to confirm the ordinary meaning of "salted" or to determine its meaning if its meaning in the EC Schedule is otherwise ambiguous or obscure, to the extent Regulation 535/1994 was issued "during the Uruguay Round."[8] In this regard, the United States notes the arguments of Brazil and Thailand that the Regulation was issued prior to the completion of the verification process on March 25, 1994.[9]

### B. The EC's Discussion of Certain U.S. Customs Classification Rulings

7. In its report, the panel was presented with evidence of U.S. tariff classification rulings, but concluded that such evidence was "of limited usefulness for this case."[10] In its appeal, the EC asserts that "equal consideration must be given to all countries' practice in the assessment of subsequent practice,"[11] and discusses certain of the U.S. tariff classification rulings that had been

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[6] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* (*EC – LAN)*, WT/DS62, 67, 68/AB/R, adopted June 5, 1998, para. 92.

[7] Appellate Body Report, *EC – LAN,* para. 94.

[8] U.S. Statement, para. 10.

[9] Panel Report, para. 7.348

[10] Panel Report, para. 7.288.

[11] EC Appellant Submission, para. 151.

presented to the Panel. In particular, the EC describes them as "background" in paragraphs 41 to 43 of its Appellant Submission. In its legal argumentation, the EC asserts that one of those rulings "confirms that heading 0210 does not cover meat products that are not preserved thru one of the processes listed therein."[12]

8. With respect to the background set out in paragraphs 41-43 of the EC Appellant Submission, the U.S. respectfully refers the Appellate Body to the discussion that the United States furnished to the Panel in its answers to the Panel's questions.[13] In this connection the United States would also like to recall its observation to the Panel that this dispute concerns not *customs classification* as such, but rather *tariff treatment* – and in particular whether the EC is providing tariff treatment to certain products that is less favorable than that provided for in the EC Schedule.[14]

9. Turning to paragraphs 290-93 of its submission, the EC argues in those paragraphs that what it calls the classification practice of other Members supports its position. In fact, the EC refers only to a single customs ruling by the United States. The United States has previously explained why this ruling does not confirm the EC's assertions: The Panel asked the United States if it agreed with the EC view that this ruling stands for the proposition that frozen meat that has been deeply and homogeneously impregnated with salt is to be classified under heading 02.07 rather than under heading 02.10 of the EC Schedule. In response,[15] the United States noted that U.S. customs authorities had described the product at issue in this ruling as "similar to

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[12] EC Appellant Submission, para. 293.

[13] Answers from the United States to Questions from the Panel in Connection with the First Substantive Meeting of the Panel (October 14, 2004); Panel Report, Annex C-11.

[14] *Id.*, para. 1.

[15] *Id.*, para. 5.

fresh beef sprinkled and packed in salt," whereas the product in this case is described as "deeply and evenly impregnated" with salt. Thus, it was not clear to the United States how similar the two products are. This led the United States to consider that it could not confirm the EC's view. On appeal, the EC makes the even stronger statement that the United States supposedly "refused to classify a product identical in all material aspects to the product at issue under heading 02.10"[16]; as the United States has explained, it does not see the basis for the assumption that the product in its ruling is "identical in all material respects" to the product at issue in this dispute, nor does it see the basis for the EC statement that the United States requires that products must be preserved by salting in order to be covered by heading 02.10, as the EC implies.

10. Furthermore, the United States notes that the legal analysis that the EC presents in paragraphs 292-93 is not entirely clear. First, the United States is not certain of the EC's basis for taking considerations that might be applicable to "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (as referred to in Article 31(3)(b) of the Vienna Convention) and transposing those considerations to an analysis of "circumstances of . . . conclusion" (as referred to in Article 32 of the Vienna Convention). Second, to the extent that the EC's legal argument would imply (or the EC is arguing outright) that a single customs classification ruling by a single Member could constitute "subsequent practice" for the purposes of interpreting the WTO Agreement, the United States disagrees.

[16] EC Appellant Submission, para. 157.

### C. "Object and Purpose" under Customary Rules on Interpretation

11. The United States agrees with the panel that, under Article 31(1) of the Vienna Convention, a treaty must be interpreted in light of the *treaty's* object and purpose, rather than in light of the object and purpose of particular *terms of a treaty*, as the EC had argued.[17] On appeal, the EC argues that the Appellate Body must determine the object and purpose of Article II of GATT 1994 and heading 02.10 of the EC Schedule, rather than the object and purpose of the treaty as a whole, because its concession is part of the terms of the treaty.[18]

12. The United States disagrees with the EC. Article 31(1) of the Vienna Convention provides that, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." It is apparent that the "its" before "object and purpose" refers to the singular "treaty," rather than to the plural "terms of the treaty." This view has been confirmed, for example, by the panel in *Japan – Sunset*, which refers explicitly to the "object and purpose of the *treaty*,"[19] and the Appellate Body in *EC – Hormones*, which discusses "the *treaty's* object and purpose."[20]

13. With respect to the two citations that the EC provides in support of its position that the Appellate Body must examine the object and purpose of the terms of the treaty, the United States notes first that, curiously, the EC's reference to paragraph 81 of the Appellate Body's report in *EC – Tube and Pipe Fittings*[21] mentions neither "object and purpose" nor Article XIX of GATT

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[17] Panel Report, para. 7.316.

[18] EC Appellant Submission, paras. 179-182.

[19] Panel Report, *United States – Sunset Review of Antidumping Duties on Corrosion – Resistant Carbon Steel Flat Products from Japan* (*Japan – Sunset*), WT/DS244/R, adopted January 9, 2004, para. 7.44 (emphasis added).

[20] Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (EC – Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted February 13, 1998, para. 104 (emphasis added).

[21] EC Appellant Submission, para. 180.

1994. The United States does not see anything else in that report that would support the EC's position. Second, with respect to *Chile – Price Band System*, the United States observes that the Appellate Body begins the discussion that leads up to the paragraph the EC cites by saying it will "discuss the ordinary meaning of these terms in their context, and in the light of *their* object and purpose."[22] The use of the plural "their", however, as pointed out above, is not consistent with the singular "its" in the actual language of Article 31(1) of the Vienna Convention.

14. The United States wonders whether the EC has perhaps confused the technical meaning of the phrase "object and purpose" (as referred to in Article 31(1) of the Vienna Convention) with a separate question of what a particular treaty provision's "purpose" or function might be. It is of course correct that individual treaty provisions have individual "purposes" or functions – for example, GATT Article I sets out MFN obligations, GATT Article III sets out national treatment obligations, and so on. But the "purpose" of any provision can be determined only by ascertaining what the provision *means*. In turn, ascertaining the meaning of a provision requires interpreting that provision; and, under customary international law (and therefore under DSU Article 3.2) that process of interpretation proceeds in accordance with the rules of interpretation reflected in Articles 31 and 32 of the Vienna Convention (*i.e.*, "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," etc.). For an international agreement, any attempt to *first* identify *a priori* some supposed "purpose" and *then* interpret the text on the basis of that "purpose" is simply to put the cart before the horse. It is also an invitation to import into the

[22] Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* (*Chile – Price Band System*), WT/DS207/AB/R, adopted October 23, 2002, para. 231.

WTO Agreement obligations not found there; when the "purpose" of specific agreement provisions is not set forth in the agreement, it should not be left to parties to a dispute (or to panels) to divine "purposes" for reasons of policy or otherwise in order to obtain a desired result.

### D. The Analysis of a Member's Municipal Law

15. In its submission, the EC makes the point that, "[w]here the rules of a legal system are being used because of their meaning . . . , then that meaning can only be divined by looking at those rules in the totality of that system. Any attempt to extract individual rules will lead to arbitrary results."[23] According to the EC, "it is not possible to take some parts of a legal system and reject other parts, and yet produce an outcome that is coherent."[24]

16. While the United States does not take a view on whether the panel properly interpreted Regulation 535/1994, the United States generally agrees with the EC's description of the general analytical approach to municipal law that a WTO panel should take.

17. From the standpoint of WTO dispute settlement, the meaning of a Member's municipal law is a fact which a WTO panel may need to determine in order to evaluate whether the Member is complying with its WTO obligations.[25] In order to determine the meaning of a purported measure, it is necessary to examine the status and meaning of that measure *within* the municipal legal system itself. By definition, the measure at issue has an effect *because* of how it operates within the municipal legal system of which it forms a part. An analysis of the meaning of a measure which neglects its actual status and meaning within the municipal legal system of

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[23] EC Appellant Submission, para. 273.

[24] *Id.*

[25] *See India – Patents,* paras. 65-71 (citing *Certain German Interests in Polish Upper Silesia*, [1926], PCIJ Rep., Series A, No. 7, p. 19. "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures.").

the Member involved will not, and cannot, reflect an "objective assessment" under DSU Article 11.

18. In *US – German Steel*, the Appellate Body explained, "[t]he party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion."[26] Again, that evidence must, of necessity, demonstrate the measure's meaning under municipal law if it is to yield an objectively correct result. The Appellate Body in *US – German Steel* went on to explain that,

> "[s]uch evidence [of the scope and meaning of municipal law] will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."[27]

19. The Appellate Body's emphasis on the case-by-case nature of the evidence necessary to determine the scope and meaning of a measure reflects both the differences among the municipal legal systems of Members as well as the different types of measures they maintain. This accords with the EC's emphasis on the need to look at the rules of a system in their totality.

## III. CONCLUSION

20. The United States thanks the Appellate Body for providing this opportunity to comment in writing on the issues in this appeal.

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[26] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion – Resistant Carbon Steel Flat Products From Germany* (*US – German Steel*), WT/DS213/AB/R, adopted December 19, 2002, para. 157.

[27] *US – German Steel,* para. 157.