WORLD TRADE ORGANIZATION

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EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF FROZEN BONELESS CHICKEN CUTS

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 13 June 2005, from the Delegation of the European Commission, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the European Communities ("EC") hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the reports of the Panel established in response to the requests from Brazil and Thailand in the disputes *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (WT/DS269/R, WT/DS286/R) and certain legal interpretations developed by the Panel in these reports.

The European Communities seeks review of:

1) The Panel's conclusion that "Frozen boneless chicken cuts that have been impregnated with salt, with a salt content of 1.2% - 3% (the product at issue) are covered by the concession contained in heading 02.10 of the EC Schedule" (para. 8.1(a) of the Panel Reports) and that, as a consequence, EC Regulation No. 1223/2002 and EC Decision 2003/97/EC result in the EC imposing customs duties in excess of those provided for in the EC's Schedule in respect of products falling under heading 02.10 (para. 8.1(b) of the Panel Reports) such that the EC has acted inconsistently with the requirements of Articles II:1(a) and II:1(b) of the GATT 1994 (para. 8.1(c) of the Panel Reports).

2) The Panel's conclusion is based on several elements of erroneous legal reasoning. Its ultimate erroneous conclusion is that the term "salted" in heading 02.10 is not based on the notion of preservation (para. 7.424). It reaches this erroneous conclusion by failing properly to examine the term "salted" in heading 02.10 in light of the applicable rules of treaty interpretation. The EC seeks review of all elements of this incorrect examination.

   The Panel erroneously applies Article 31 of the *Vienna Convention of the Law of Treaties*. In particular, but not necessarily exclusively, the Panel fails properly to apply the notions of:

a) Ordinary meaning (paras. 7.105; 7.114-7.115; 7.117; 7.140-7.151), in particular, by taking into consideration what the Panel referred to as "the factual context for the consideration of the ordinary meaning";

b) Context (paras. 7.161-7.163; 7.171-7.173; 7.179-7.180; 7.189; 7.199-7.202; 7.205; 7.241; 7.245), in particular by failing to properly examine the immediate context of the term "salted" in heading 02.10 and the relevant aspects of the Harmonised System;

c) Subsequent practice (paras. 7.251; 7.253-7.256; 7.265-7.276; 7.284; 7.288-7.290; 7.298-7.299; 7.302-7.303), in particular, by misinterpreting the notion of "subsequent practice" and by considering that the unilateral "practice"[1] of one party could have a bearing on a multilaterally agreed text and by wrongly analysing the existence of "practice" at the EC and multilateral level.

d) Object and purpose of the treaty (paras. 7.316 to 7.328), in particular, the Panel's reliance on "security and predictability".

e) To the extent that the Panel's conclusions are premised on an erroneous assessment of the facts, the EC seeks review of that assessment pursuant to Article 11 of the DSU.

3) The Panel erroneously applies Article 32 of the *Vienna Convention* (paras. 7.336 - 7.423). In particular, but not necessarily exclusively, the Panel fails to examine properly the circumstances of conclusion (paras. 7.340 et seq.) with a view to establishing the common intention of the parties to the treaty in the sense that it:

a) wrongly limits its analysis to "the prevailing situation in the European Communities" ignoring the prevailing situation internationally (that is the multilateral context) and the practice of other Members (para. 7.340; 7.421);

b) develops and applies an erroneous notion of constructive knowledge (para. 7.346*);*

c) wrongly analyses prior practice of the Community, relying exclusively on or giving undue probative value to and misinterpreting, EC Commission Regulation 535/94, classification between 1996-2002 and other irrelevant post-1994 acts as part of the circumstances of conclusion (paras. 7.359-7.364 7.365-7.370), thereby failing to give proper consideration to prevailing EC law and practice throughout the Uruguay Round, in particular in respect of case-law of the European Court of Justice interpreting heading 02.10 of the *Council Regulation establishing the Combined Nomenclature* (paras. 7.390-7.405), EC Explanatory Notes (7.411-7.413) and ignoring the legal relationship between the different elements of EC law and practice;

d) To the extent that the Panel's conclusions are premised on an erroneous assessment of the facts, the EC seeks review of that assessment pursuant to Article 11 of the DSU.

The provisions of the covered agreements which the European Communities consider to have been erroneously interpreted or applied by the Panel include:

- Heading 02.10 of the EC's Schedule read in conjunction with Article II :1(a) and II:1(b) of the GATT 1994;

[1] For the avoidance of doubt, the EC does not consider that the actions examined by the Panel can be qualified as "practice".

The EC also considers that the Panel erroneously interpreted and applied Article 3.2 of the DSU read in conjunction with the customary rules of interpretation of public international law, in particular Article 31 (3)(b) and Article 32 of the *Vienna Convention* and misapplied Article 11 of the DSU.