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EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF FROZEN BONELESS CHICKEN CUTS

ARB-2005-4/21

Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes

Award of the Arbitrator
James Bacchus

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EC – Chicken Cuts	Appellate Body Report, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005
EC – Chicken Cuts	Panel Reports, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R (*Brazil*), and WT/DS286/R (*Thailand*), adopted 27 September 2005, as modified by Appellate Body Report, WT/DS269/AB/R, WT/DS286/AB/R
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
EC – Export Subsidies on Sugar	Award of the Arbitrator, *European Communities – Export Subsidies on Sugar – Arbitration under Article 21.3(c) of the DSU*, WT/DS265/33, WT/DS266/33, WT/DS283/14, 28 October 2005
EC – Hormones	Award of the Arbitrator, *EC Measures Concerning Meat and Meat Products (Hormones) – Arbitration under Article 21.3(c) of the DSU*, WT/DS26/15, WT/DS48/13, 29 May 1998, DSR 1998:V, 1833
EC – Tariff Preferences	Award of the Arbitrator, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries – Arbitration under Article 21.3(c) of the DSU*, WT/DS246/14, 20 September 2004
Korea – Alcoholic Beverages	Award of the Arbitrator, *Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU*, WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Gambling	Award of the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Arbitration under Article 21.3(c) of the DSU*, WT/DS285/13, 19 August 2005

Short Title	Full Title and Citation
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Hot-Rolled Steel	Award of the Arbitrator, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Arbitration under Article 21.3(c) of the DSU*, WT/DS184/13, 19 February 2002, DSR 2002:IV, 1389
US – Offset Act (Byrd Amendment)	Award of the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000 – Arbitration under Article 21.3(c) of the DSU*, WT/DS217/14, WT/DS234/22, 13 June 2003
US – Oil Country Tubular Goods Sunset Reviews	Award of the Arbitrator, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Arbitration under Article 21.3(c) of the DSU*, WT/DS268/12, 7 June 2005
US – Section 110(5) Copyright Act	Award of the Arbitrator, *United States – Section 110(5) of the US Copyright Act – Arbitration under Article 21.3(c) of the DSU*, WT/DS160/12, 15 January 2001, DSR 2001:II, 657

WORLD TRADE ORGANIZATION
AWARD OF THE ARBITRATOR

European Communities – Customs Classification of Frozen Boneless Chicken Cuts

ARB-2005-4/21

Arbitrator:

James Bacchus

Parties:

Brazil
European Communities
Thailand

I. Introduction

1. On 27 September 2005, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report[1] and the Panel Reports[2], as modified by the Appellate Body Report, in *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*.[3] At the meeting of the DSB held on 18 October 2005, the European Communities stated that it intended to comply with the recommendations and rulings of the DSB in this dispute, and that it would need a reasonable period of time in which to do so.[4]

2. On 22 November 2005, Brazil informed the DSB that consultations with the European Communities had not resulted in an agreement on the reasonable period of time for implementation. Brazil therefore requested that such period be determined through binding arbitration, pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[5] Thailand similarly informed the DSB, on 9 December 2005, that it had been unable to

[1]Appellate Body Report, WT/DS269/AB/R, WT/DS286/AB/R.

[2]Panel Reports, WT/DS269/R, WT/DS286/R. This case involved two complaining parties (Brazil and Thailand) and one responding party (the European Communities). Before the Panel, the European Communities requested, pursuant to Article 9.2 of the DSU, that the Panel issue two separate reports. These two reports had the same descriptive part and findings; the only "material difference" between these separate reports was the cover page and the conclusions. (Appellate Body Report, footnote 1 to para. 1 (quoting Panel Reports, para. 6.21)) The Appellate Body issued one Report addressing the appeals of Brazil, the European Communities, and Thailand from both Panel Reports.

[3]WT/DS269/10, WT/DS286/12.

[4]WT/DSB/M/199, para. 30.

[5]WT/DS269/11.

reach agreement with the European Communities on the reasonable period of time for implementation, and requested arbitration pursuant to Article 21.3(c) of the DSU.[6]

3. By joint letter of 9 December 2005, Brazil and the European Communities requested me to act as Arbitrator, pursuant to Article 21.3(c) of the DSU, to determine the reasonable period of time for implementation of the recommendations and rulings of the DSB in this dispute.[7] Thailand and the European Communities also requested, by joint letter of 13 December 2005, that I serve as Arbitrator.[8] As the 90-day period following adoption of the Panel and Appellate Body Reports was to expire on 26 December 2005, the parties, in their respective letters, "confirm[ed] that the award of the arbitrator within the time period to be agreed shall be deemed to be the award of the arbitrator for the purpose of Article 21.3(c) of the DSU."[9] I accepted the appointments on 14 December 2005 and proposed to conduct both proceedings simultaneously, undertaking to issue the Award no later than 20 February 2006.[10] No party objected to the proposed date for circulation of the Award.

4. The European Communities filed its written submission on 6 January 2006. Brazil and Thailand each filed its written submission on 13 January 2006. An oral hearing was held on 26 January 2006.

II. Arguments of the Parties

A. *European Communities*

5. The European Communities requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be 26 months from the date of adoption by the DSB of the Panel and Appellate Body Reports, until 27 November 2007.

6. The European Communities identifies two measures challenged in this dispute and found by the Panel and the Appellate Body to be inconsistent with Articles II:1(a) and II:1(b) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"): Regulation 1223/2002 of the European Commission (the "Commission") and Commission Decision 2003/97/EC. Because the "effects" of

[6]WT/DS286/13.

[7]WT/DS269/12.

[8]WT/DS286/14.

[9]Letter from Brazil and the European Communities to the Appellate Body Secretariat, dated 9 December 2005, p. 2; letter from Thailand and the European Communities to the Appellate Body Secretariat, dated 13 December 2005, p. 1.

[10]WT/DS269/12; WT/DS286/14; letter from the Arbitrator to Brazil, the European Communities, and Thailand, dated 14 December 2005, p. 1.

the DSB's recommendations and rulings "go beyond" these measures[11], however, the European Communities asserts that it must also "repeal[]" or "effectively update[]"[12] other Community measures, namely: Additional Note 7 to heading 02.10 of the European Communities' Combined Nomenclature; the *Dinter*[13] and *Gausepohl*[14] judgments of the European Court of Justice (the "ECJ"); as well as certain Explanatory Notes of the Combined Nomenclature.

7. The European Communities proposes to implement the DSB's recommendations and rulings in this dispute by the following steps: (1) seeking a decision from the World Customs Organization (the "WCO") "confirming the interpretation of Chapter 02.10 of the [Harmonized System] provided by the panel and the Appellate Body and verifying whether, upon confirmation, ... heading 02.10 as opposed to heading 02.07 is the correct classification of the product at issue"[15]; (2) on the basis of this decision of the WCO, adopting a Commission Regulation amending Additional Note 7 to heading 02.10 of the European Communities' Combined Nomenclature; and (3) if necessary, depending on the decision of the WCO, amending additional Explanatory Notes of the Combined Nomenclature and adopting a "classification regulation" with respect to the product at issue in this dispute.[16]

8. The European Communities emphasizes that it is the prerogative of the implementing Member to select the means of implementation that it deems "most appropriate".[17] Only after the Member has selected how it will implement the DSB's recommendations and rulings should an arbitrator consider whether the proposed reasonable period of time is "the shortest period possible" for the anticipated means of implementation within the legal system of that Member.[18] Such

[11]European Communities' submission, para. 25.

[12]European Communities' submission, para. 28.

[13]European Court of Justice, Judgment, *Dinter v Hauptzollamt Köln-Deutz*, Case C-175/82, ECR [1983] 969 (Exhibit-EC-12 submitted by the European Communities to the Panel).

[14]European Court of Justice, Judgment, *Gausepohl-Fleisch GmbH v. Oberfinanzdirektion Hamburg*, Case C-33/92, ECR [1993] I-3047 (Exhibit EC-14 submitted by the European Communities to the Panel).

[15]European Communities' submission, para. 30.

[16]European Communities' submission, para. 32.

[17]European Communities' submission, para. 19.

[18]European Communities' submission, para. 18 (citing Award of the Arbitrator, *EC – Hormones*, para. 26; Award of the Arbitrator, *Australia - Salmon*, para. 38; Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 37; Award of the Arbitrator, *Canada – Autos*, para. 41; Award of the Arbitrator, *Canada – Patent Term*, para. 38; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 42; Award of the Arbitrator, *EC – Tariff Preferences*, para 26; Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 25).

consideration necessarily involves an appreciation of the flexibility inherent in the concept of "reasonableness", such that the "particular circumstances of each case" are taken into account.[19]

1. Ruling from the World Customs Organization

9. The first "particular circumstance" invoked by the European Communities in this arbitration is that "the scope [of the relevant WTO provisions in this dispute is] determined by the actions and decisions of … the WCO."[20] According to the European Communities, WTO Members agreed to use the headings and sub-headings of the Harmonized Commodity Description and Coding System of the WCO (the "Harmonized System") as the basis for tariff negotiations, and their agreement to do so was found by the Appellate Body to constitute context for the interpretation of a Member's schedule, pursuant to Article 31(2) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"). As the WCO Secretariat indicated to the Panel in its response to the Panel's questions, any interpretation of a WTO Member's tariff schedule would effectively be an interpretation of the headings and sub-headings of the Harmonized System. However, the scope of the headings and sub-headings of the Harmonized System is the subject of negotiations among the Contracting Parties of the WCO, not among the Members of the WTO. In the view of the European Communities, this competence of the WCO was recognized by the Appellate Body in its decision in *EC – Computer Equipment*.[21]

10. The European Communities asserts that the *Harmonized System Convention* mandates the uniform interpretation and application of the headings and sub-headings of the Harmonized System, and to this end includes a procedure providing for WCO organs to resolve classification disputes between WCO Contracting Parties. According to the European Communities, because WTO Members base their schedules on the nomenclature set out by the Harmonized System, and Contracting Parties of the WCO have committed to maintaining a uniform interpretation of headings in the Harmonized System, implementation in this dispute "requires [the European Communities] to ensure that it is acting in conformity with its HS obligations."[22]

[19]European Communities' submission, para. 22 (quoting Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 42, itself citing Award of the Arbitrator, *US – Hot Rolled Steel*, para. 25).

[20]European Communities' submission, para. 35.

[21]European Communities' submission, para. 46 (citing Appellate Body Report, *EC – Computer Equipment*, paras. 89-90).

[22]European Communities' submission, para. 45.

11. The European Communities also maintains that, in its interpretation of heading 02.10 of the European Communities' Combined Nomenclature—which is based on the identical heading used in the Harmonized System—the Appellate Body "did not fully examine the application of" the Harmonized System's General Rules of Interpretation.[23] Indeed, the Appellate Body even acknowledged that the Harmonized System did not prevent the European Communities from considering preservation as a criterion in determining whether a product was "salted". Moreover, the European Communities asserts that "a WCO ruling will give the Commission the possibility to go beyond a previous judgment of the ECJ which interprets heading 02.10 in a manner different from that ultimately followed by the panel and the Appellate Body."[24]

12. Viewed in this light, the European Communities argues, implementation of the DSB's recommendations and rulings requires the European Communities to seek a decision from the WCO on the scope of heading 02.10 in order to ascertain precisely what measures must be taken within the Community legal order. Such a first step is not "extraneous" to the objective of implementing the DSB's recommendations and rulings in this dispute[25], but rather, is "fully within the EC's discretion to choose the most appropriate means of implementation."[26]

13. On 6 January 2006, the European Communities took the first step to initiate the dispute settlement procedure at the WCO, namely, placing the matter on the agenda of the March 2006 meeting of the Harmonized System Committee of the WCO. Practice suggests that the matter will be referred to the scientific sub-committee for further examination. Because this sub-committee meets only in January, the matter cannot be considered until the sub-committee's next meeting in January 2007. The Harmonized System Committee will therefore be able to take a decision on the matter only at its next meeting after January 2007. Given that the Harmonized System Committee must meet twice a year, and that its last meeting in 2006 will be in October, the first meeting after January 2007 may reasonably be expected to be in March 2007.

[23]European Communities' submission, para. 54.

[24]European Communities' submission, para. 44.

[25]European Communities' submission, para. 45.

[26]European Communities' submission, para. 44.

2. Steps Under Community Law

14. The second "particular circumstance" identified by the European Communities is "that the findings of the Appellate Body that there is no requirement of preservation in the [European Communities'] Schedule directly contradict standing case law" of the ECJ.[27]

15. The European Communities recalls that judgments of the ECJ make clear that heading 02.10 in the Combined Nomenclature contains a requirement of long-term preservation for products falling under that heading. Implementation of the DSB's recommendations and rulings in this dispute therefore requires that the scope of heading 02.10 be modified under Community law, in particular by amending Additional Note 7 to heading 02.10.

16. The European Communities contends that, although the Commission "enjoys a wide discretion in determining the subject matter of a tariff heading", such discretion is not unlimited.[28] In this respect, the ECJ has ruled that the Commission may not alter the scope of those tariff headings that are based on the Harmonized System because the European Communities has undertaken in the *Harmonized System Convention not* to modify the scope of those headings. The European Communities submits that this constraint is particularly relevant here, where the WCO Secretariat raised before the Panel its concerns regarding the interrelationship between the rules of the WCO and the WTO in this dispute. Accordingly, in the European Communities' view, a ruling from the WCO will be necessary for the Commission to secure a Regulation revising the scope of heading 02.10 in a manner contrary to ECJ jurisprudence.

17. Passing such a Regulation requires that the Commission follow the procedures set out in Council Regulation 2658/87 after receiving a decision from the WCO's Harmonized System Committee. The first step is for the responsible Directorate General of the Commission to review that decision and prepare draft legislation accordingly, a process estimated to take three or four weeks. The draft legislation is then sent for discussion to the Agriculture/Chemicals section of the Customs Code Committee before being submitted for "formal interservice consultation" among the relevant Commission departments.[29] The interservice consultation stage lasts two to three weeks, after which the draft legislation is translated into the twenty official Community languages.

[27]European Communities' submission, para. 61.

[28]European Communities' submission, para. 66 (citing *French Republic v. Commission*, Case C-267/94, ECR [1995] I-4845, para. 20 (Exhibit EC-22 submitted by the European Communities to the Panel)).

[29]European Communities' submission, para. 75.

18. The Agriculture/Chemicals section of the Customs Code Committee then reviews the draft legislation and provides an opinion. Because that section meets only four times per year, the European Communities estimates that the legislation could not be discussed until a meeting in May/June 2007 and an opinion could not be provided until October 2007, both assuming a WCO decision in March 2007. After receiving the opinion, the Commission must vote to adopt the legislation which will likely require an additional two to three weeks. In the light of this procedure, the European Communities argues, a new Commission Regulation amending Additional Note 7 to heading 02.10 could not be finalized before November 2007. Should additional classification Regulations be necessary from the Commission, however, or revisions to explanatory notes in the Combined Nomenclature, these implementation measures could be adopted within the same time-frame.

B. *Complaining Parties*

1. Brazil

19. Brazil requests that I determine the "reasonable period of time" to be five months and ten days from the date of adoption of the Panel and Appellate Body Reports, to expire on 9 March 2006.

20. Brazil submits that various provisions of the DSU, including, in particular, Article 21, call for "prompt compliance" by the implementing Member. Pursuant to Article 21.3(c), a Member is entitled to a "reasonable" period of time for implementation only when immediate implementation is "impracticable". Therefore, according to Brazil, the implementing Member bears the burden of demonstrating that it would be impracticable to comply immediately with the recommendations and rulings of the DSB, as well as the burden of demonstrating that the period of time it seeks for implementation is "reasonable" within the meaning of Article 21.3(c). In Brazil's view, the European Communities has failed to meet its burden here.

21. Brazil notes that the European Communities' proposed reasonable period of time of 26 months is intended to allow for multiple actions to be taken in order to implement the DSB's recommendations and rulings. According to Brazil, of the proposed actions, only the adoption of a Commission Regulation amending Additional Note 7 is required to ensure conformity with the European Communities' WTO obligations set out in the Panel and Appellate Body Reports. Once Additional Note 7 is amended, customs authorities will base their classification decisions on that amendment and will therefore need no further guidance in the form of additional regulations or explanatory notes. Therefore, the other actions proposed by the European Communities—that is, requesting a ruling from the WCO, adopting classification regulations, and amending Explanatory

Notes—are "not pertinent or necessary for compliance" and should not be taken into account in determining the reasonable period of time.[30]

22. In addition, Brazil asserts that the European Communities took no action following adoption of the Panel and Appellate Body Reports until it filed a letter with the WCO on 6 January 2006. This failure to act, in Brazil's view, renders the European Communities "negligent in taking immediate steps towards implementation."[31] In this respect, Brazil argues that because the DSU mandates prompt compliance, such lack of initiative by an implementing Member "must be adversely taken into account" in the determination of the reasonable period of time.[32] Brazil finds support for this proposition in the Awards of the Arbitrators in *US – Section 110(5) Copyright Act* and *Chile – Price Band System*.[33]

(a) Ruling from the World Customs Organization

23. Brazil contends that the first phase of the European Communities' proposed implementation, seeking a ruling from the WCO over a period of 18 months, is "neither pertinent nor necessary for compliance."[34] The European Communities' rationale for requesting a ruling from the WCO stems from its view that any unilateral amendment to the scope of the European Communities' tariff headings would effectively modify the headings and sub-headings of the Harmonized System, contrary to the obligations of the *Harmonized System Convention*. As the Panel and the Appellate Body recognized, however, the scope of heading 02.10 of the European Communities' schedule is a distinct matter from the interpretation given to heading 02.10 of the Harmonized System. Although it is relevant as context for the interpretation of heading 02.10 of the European Communities' schedule, the Harmonized System does not itself determine the scope of a concession in a Member's tariff heading.

24. In this respect, Brazil contends that the European Communities "regularly clarifies or amends the [Combined Nomenclature] without modifying the [Harmonized System] or consulting the WCO."[35] Brazil recalls that the initial introduction of preservation as a criterion in the classification of the product at issue resulted from application of the Combined Nomenclature and from

[30]Brazil's submission, para. 16. (emphasis removed)

[31]Brazil's submission, para. 161.

[32]Brazil's submission, para. 158.

[33]Brazil's submission, paras. 159-160 (citing Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 46; Award of the Arbitrator, *Chile – Price Band System*, para. 43).

[34]Brazil's submission, para. 83.

[35]Brazil's submission, para. 110.

Commission Regulation 1871/2003, which replaced Additional Note 7 to heading 02.10. This amendment did not involve a modification to the Harmonized System and did not compel the European Communities to seek authorization from the WCO. Similarly, Brazil points to Commission Regulations 535/94, 1223/2002, 1871/2003, and 2344/2003 as examples of Combined Nomenclature classification regulations and amendments that did not modify the Harmonized System and that did not require recourse to the WCO by the European Communities. Therefore, Brazil asserts, the European Communities is capable of modifying its Combined Nomenclature without altering the Harmonized System and thereby violating the *Harmonized System Convention*.

25. Brazil argues that by seeking a decision from the WCO, the European Communities is in fact "suggesting that the Appellate Body's findings, and the DSB's recommendations, be subject to the approval of the WCO, and that the WCO be the organization that ultimately determines whether the measures at issue are consistent with" the European Communities' obligations in its WTO schedule.[36] Indeed, Brazil questions what the implications would be for implementation in this dispute if the WCO were to arrive at a decision contrary to the findings of the Panel and Appellate Body. Because, in Brazil's view, such a decision could not relieve the European Communities of the obligation to implement the DSB's recommendations and rulings in this dispute, recourse to the WCO is unwarranted. Instead, Brazil argues, seeking a ruling from the WCO is an "extraneous objective" to the recommendations and rulings of the DSB in this dispute.[37]

(b) Steps Under Community Law

26. Brazil contests that the European Communities requires eight months to pass a Commission Regulation implementing the DSB's recommendations and rulings in this dispute. According to Brazil, the European Communities "agrees that actual compliance in its system can be achieved by a simple amendment to the [Combined Nomenclature]."[38] Given that the Commission has the power to adopt measures amending and clarifying the Combined Nomenclature without having recourse to the Council, Brazil contends that, contrary to the European Communities' assertions, the implementation required in this dispute is of an executive or administrative rather than legislative nature. Indeed, as evidenced by the implementation process put forward by the European Communities, any purported complexity of implementation is illusory and accordingly does not warrant a longer implementation period.

[36]Brazil's submission, para. 88.

[37]Brazil's submission, para. 51 (referring to Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 69).

[38]Brazil's submission, para. 57.

27. Brazil states that a new Commission Regulation requires that a draft proposal be prepared and submitted for interservice consultation before being accepted by the Commission and translated into the 20 official languages of the European Communities. Noting the European Communities' contention that this stage may take between one month and five days and one month and nineteen days, Brazil argues that the shortest period possible for completion of this stage would be one month and five days.

28. In the next stage of examining a proposal to amend the Combined Nomenclature, according to Brazil, the Commission is guided by procedures set out in Council Decision 1999/468/EC, in particular, the "management procedure" found in Article 4 of that Decision. Pursuant to this procedure, the Customs Code Committee must generally provide an opinion on the draft proposal within a time limit established by the Committee Chair. If that opinion is favourable, the Commission may adopt the proposal immediately. Otherwise, the Commission must communicate the proposal to the Council and may defer application of the proposal for a period no longer than three months. Brazil emphasizes that this three-month period is the *longest* (rather than *shortest*) period possible for the conclusion of this stage of the process. Once a proposal is adopted and becomes a Commission Regulation, it must be published in the *Official Journal*. On the basis of past practice relating to Commission Regulations amending the Combined Nomenclature[39], Brazil contends that most Regulations are published one day following their adoption and enter into force on the twentieth day following publication.

29. As an example of the time taken for this process, Brazil submits preparatory documents relating to Commission Regulation 1871/2003, which introduced long-term preservation as a criterion in heading 02.10.[40] Brazil observes that the time between the date on which the Customs Code Committee received the draft proposal (after interservice consultation) and the date that the Regulation entered into force was two months and two days. Considering the additional time needed for the earlier stages of drafting and interservice consultation, Brazil contends that five months and ten days is a sufficient period to ensure adoption of a Commission Regulation that would comply with the DSB's recommendations and rulings in this dispute.

[39]See Exhibit BRA-12 submitted by Brazil in this Arbitration.

[40]Exhibit BRA-13 submitted by Brazil in this Arbitration.

(c) Article 21.2 of the DSU

30. Brazil submits that, in determining the reasonable period of time, I should bear in mind the requirement in Article 21.2 of the DSU to pay "[p]articular attention ... to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement." In Brazil's view, this provision applies equally to the interests of developing countries as complaining as well as implementing Members.

31. Brazil highlights the effects that the challenged measures—Commission Regulation 1223/2002 and Commission Decision 2003/97/EC—have had on Brazil's interests. To this end, Brazil refers to lost sales in the Community market, observing that, based on export growth in the three years preceding the adoption of challenged measures, the volume of exports to the European Communities was 170,000 metric tons below what could have been expected in the absence of those measures, representing a loss of €300 million.

32. Brazil also submits that the poultry industry is a critical sector in the Brazilian economy, responsible for the creation of at least 180,000 jobs. The poultry industry, in particular several large firms, has been important in making investments and generating jobs in disadvantaged regions within Brazil. Certain poultry firms have also served their communities by providing social programs to address the needs of the poor. As a result, Brazil claims, this industry has been vital to the trade and social development of Brazil, thereby rendering particularly acute the impact of the European Communities' WTO-inconsistent measures in this dispute.

2. Thailand

33. Thailand requests that I determine the "reasonable period of time" to be six months from the date of adoption by the DSB of the Panel and Appellate Body Reports, that is, until 27 March 2006.

34. Thailand observes that the only measures in the terms of reference for this dispute were Commission Regulation 1223/2002 and Commission Decision 2003/97/EC. The European Communities, however, identifies in its written submission other measures that it claims must be brought into conformity during the course of implementation, namely, Additional Note 7 to heading 02.10 of the European Communities' Combined Nomenclature, the *Dinter* and *Gausepohl* judgments of the ECJ, as well as certain Explanatory Notes in Chapter 2 of the Combined Nomenclature. Thailand agrees that "it would provide a positive solution to this dispute" if the

European Communities modified these additional measures to reflect the recommendations and rulings of the DSB.[41]

(a) Ruling from the World Customs Organization

35. Thailand submits that the European Communities is not required to seek a decision from the WCO in order to implement the DSB's recommendations and rulings in this dispute. Thailand argues that the Panel and Appellate Body's interpretation of heading 02.10 of the European Communities' schedule was within their exclusive competence, as the European Communities' schedule is an integral part of the GATT 1994, which is a covered agreement. The Appellate Body explicitly identified the Harmonized System as context under Article 31(2) of the *Vienna Convention*. As such, the Harmonized System was only one of several elements used to interpret the scope of heading 02.10 *of the European Communities' schedule*. Moreover, Thailand asserts that although GATT schedules may be based on the Harmonized System, Members are permitted to include descriptions of products falling under specific tariff headings, which may then be used to interpret the scope of those tariff headings. The findings of the Appellate Body, therefore, were based on factors particular to the European Communities' schedule and did not delineate the scope of heading 02.10 of the Harmonized System itself. Thailand argues that this fact further highlights the erroneous assumption underlying the European Communities' decision to seek a ruling from the WCO, that is, that the findings of the Panel and the Appellate Body *modified* the scope of the headings and sub-headings of the Harmonized System.

36. Thailand adds that nothing in the *Harmonized System Convention* requires Contracting Parties to obtain authorization from the WCO when determining the terms and conditions of entry for particular goods. Even if the WCO were to determine that the term "salted" in heading 02.10 of the Harmonized System refers only to salting for preservation—as the European Communities contends—the European Communities would not be precluded from interpreting heading 02.10 of its schedule to cover *all* salted products, including those not salted for preservation. Indeed, Thailand observes, the European Communities did not obtain the WCO's authorization when enacting the original Additional Note 7 in 1994, which made no reference to preservation. Thailand therefore contends that there is no basis to seek a decision from the WCO to revert to that wording of Additional Note 7 that did properly permit the product at issue to be entered under heading 02.10 without the requirement of preservation.

[41]Thailand's submission, para. 12.

37. Thailand also argues that the European Communities' proposed recourse to the WCO rests on an erroneous understanding that a Member's obligations under Articles 17 and 21 of the DSU to implement DSB recommendations and rulings promptly, and to accept them unconditionally, may be subject to obligations under the *Harmonized System Convention*. Thailand contends that to accept the European Communities' position that it must first seek recourse to the WCO in order to implement the recommendations and rulings in this dispute would be to "make a ruling that would call into question the rulings of the Panel and the Appellate Body by subjecting them to a review by another international body."[42]

38. Thailand further considers misplaced the European Communities' reliance on the Appellate Body's decision in *EC – Computer Equipment*. In Thailand's view, the Appellate Body in that case addressed the relevance of decisions of the Harmonized System Committee in determining the existence of "subsequent practice" within the meaning of Article 31.3(b) of the *Vienna Convention*. No such decisions exist in this dispute and, in any event, whatever utility the decisions of the Harmonized System Committee of the WCO might have in assessing subsequent practice, they do not appear to be relevant now that the adjudicative phase of the dispute has been completed.

(b) Steps Under Community Law

39. Thailand argues that the only time-periods relevant for the determination of a reasonable period of time for implementation of the DSB's recommendations and rulings are those for the issuance of a new Commission Regulation amending Additional Note 7 to heading 02.10 of the European Communities' schedule. On this basis, Thailand calculates six months as the reasonable period of time for implementation in this dispute.

40. As an initial matter, Thailand emphasizes the failure of the European Communities to begin the process of implementation as soon as the Panel and Appellate Body Reports in this dispute were adopted by the DSB. Thailand submits that the first step taken by the European Communities towards implementation was its letter of 6 January 2006 to the WCO, requesting that this matter be placed on the agenda of the next Harmonized System Committee meeting. In Thailand's view, it may not be surprising that the European Communities has taken no steps towards implementation, based on its view that a decision from the WCO is a prerequisite to the commencement of the internal Community procedures for drafting a new Commission Regulation. Referring to the Award of the Arbitrator in *US – Section 110(5) Copyright Act*, Thailand contends that the European Communities' inaction to date should not justify a longer "reasonable period of time" for implementation.

[42]Thailand's submission, para. 36.

41. With respect to the time-frame set out by the European Communities for the passage of new legislation, Thailand submits that the European Communities failed to take into account new procedural rules, effective 1 January 2006, governing consultations between the Commission and the Customs Code Committee. These new procedures, detailed in Commission Decision 2005/960/EC, eliminate one of the steps described by the European Communities in its written submission, namely, the consultation with the Customs Code Committee before submitting the draft Regulation to the "formal interservice consultation".

42. Thailand recognizes the role of the Agriculture/Chemicals section of the Customs Code Committee in reviewing the draft Regulation. Assuming, as the European Communities submits, that the Agriculture/Chemicals section meets only four times per year, at intervals of roughly three months, Thailand asserts that the issuance of my Award before the end of February means that an opinion could be provided on draft legislation during the anticipated March 2006 meeting. Adding two weeks from this meeting for adoption of the legislation by the Commission, Thailand argues that the legislative process could be completed by 27 March 2006, that is, within six months from the date of adoption of the Panel and Appellate Body Reports in this dispute.

43. Thailand rejects the European Communities' contention that the absence of a ruling from the WCO will render implementation more complex. Thailand submits, however, that if I accept this assertion of the European Communities, then the additional time granted for such complexity be "no longer than two months at the very outset", bringing the total proposed time period to eight months.[43]

III. Reasonable Period of Time

44. This dispute relates to the tariff treatment by the European Communities of imports of frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2 to 3 per cent. It arises from requirements applied to imports of this product by the European Communities through its Combined Nomenclature. According to these requirements, only products that are sufficiently impregnated with salt so as to ensure preservation of meat may be entered under heading 02.10 of its Combined Nomenclature ("meat and edible meat offal, salted, in brine, dried or smoked"); in contrast, fresh, chilled, or frozen poultry that do not meet these requirements must instead be entered under heading 02.07 ("meat and edible offal, of the poultry of heading No. 0105, fresh, chilled or frozen").

45. These requirements were applied by virtue of Commission Regulation 1223/2002 and Commission Decision 2003/97/EC, which resulted in a reclassification of the product at issue from

[43]Thailand's submission, para. 54.

heading 02.10 to heading 02.07 of the Combined Nomenclature.[44] If entered under heading 02.07 of the Combined Nomenclature, the product at issue would be subject to a bound specific duty rate of 1024 ECU/T or 102.4€/100kg/net, as well as a special safeguard mechanism provided for in Article 5 of the *Agreement on Agriculture*. If entered under heading 02.10, the product at issue would be subject to a final bound duty rate of 15.4 per cent.[45] The Panel found that, if entered under heading 02.07, "there is clearly a possibility that the price of the products at issue [would] be sufficiently low so as to produce an *ad valorem* equivalent that exceeds that applicable for products covered by the concession contained in heading 02.10 of the [European Communities'] Schedule."[46] Subsequent to enacting the challenged measures, the European Communities also enacted Commission Regulation 1871/2003, which amended Additional Note 7 to heading 02.10 of the Combined Nomenclature so that the term "salted" in heading 02.10 "mean[s] meat and edible meat offal deeply and homogeneously impregnated with salt in all parts and having a total salt content of not less than 1.2% by weight, *provided it is the salting which ensures long-term preservation*."[47]

46. The Panel found that Commission Regulation 1223/2002 and Commission Decision 2003/97/EC are inconsistent with the European Communities' obligations under Articles II:1(a) and II:1(b) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").[48] On appeal, the Appellate Body reversed certain findings relating to the Panel's interpretative analysis under Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"), but nevertheless upheld the Panel's finding that Commission Regulation 1223/2002 and Commission Decision 2003/97/EC impose duties on the product at issue in excess of those provided for in the tariff commitment under heading 02.10 of the European Communities' schedule. Accordingly, the Appellate Body upheld the Panel's ultimate finding that Commission Regulation 1223/2002 and Commission Decision 2003/97/EC are inconsistent with the European Communities' obligations under Articles II:1(a) and II:1(b) of the GATT 1994. On the basis of these findings, the Panel and Appellate Body recommended that the DSB request the European Communities to bring its two measures—Commission Regulation 1223/2002 and Commission Decision 2003/97/EC—into conformity with its obligations under the GATT 1994.[49]

[44]See Appellate Body Report, paras. 142-143.

[45]Panel Reports, paras. 2.4 and 7.70.

[46]Panel Reports, para. 7.75.

[47]Article 1 of Commission Regulation 1871/2003. (emphasis added)

[48]Panel Reports, para. 8.1.

[49]Panel Reports, para. 8.2; Appellate Body Report, para. 348.

47. On 27 September 2005, the Dispute Settlement Body (the "DSB") of the World Trade Organization (the "WTO") adopted the Panel and Appellate Body Reports in this dispute.[50] On 18 October 2005, the European Communities informed the DSB of its intention to comply with the DSB's recommendations and rulings, but stated that it would require a reasonable period of time to do so.[51] Negotiations among the parties failed to produce a mutually agreed time period, and the parties asked me to serve as Arbitrator to determine the "reasonable period of time" to implement the recommendations and rulings of the DSB, pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").

48. Article 21.3 of the DSU provides, in part:

> If it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:
>
> ***
>
> (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. (footnotes omitted)

49. My role as arbitrator in this dispute is limited. My sole mandate under Article 21.3 of the DSU is to determine the "reasonable period of time" needed for implementation of the recommendations and rulings of the DSB in this dispute. Thus, in fulfilling this limited mandate, I acknowledge that the implementing Member has a measure of discretion in selecting the means of implementation that it deems most appropriate; in other words, with respect to the implementing measure, my task focuses on the *when*, not the *what*.[52] My concern is with time, not technique. Furthermore, I agree with previous arbitrators who have carried out like mandates under Article 21.3 that I should base my determination on the shortest period of time possible within the legal system of

[50]WT/DS269/10, WT/DS286/12.

[51]WT/DSB/M/199, para. 30.

[52]See Award of the Arbitrator, *Canada – Pharmaceutical Patents*, paras. 41-43; Award of the Arbitrator, *Chile – Price Band System*, para. 32; Award of the Arbitrator, *EC – Tariff Preferences*, para. 30; Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 26; Award of the Arbitrator, *US – Gambling*, para. 33; and Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 69.

the implementing Member[53], and that in doing so I should bear in mind that the implementing Member is expected to use whatever flexibility is available within its legal system in its efforts to fulfil its WTO obligations.[54] Such flexibility, however, need not necessarily include recourse to "extraordinary" procedures.[55] As is made clear by Article 21.3(c), the "particular circumstances" of this dispute may also affect my calculation of the reasonable period of time, and may make it "shorter or longer". All three parties to this dispute agree that these general principles should guide me in making my determination.

50. In this dispute, the European Communities proposes a two-step process for implementing the recommendations and rulings of the DSB. To comply with those recommendations and rulings, the European Communities suggests, first, that it must seek and receive a tariff classification decision from the Harmonized System Committee of the World Customs Organization (the "WCO"), which would require 18 months from the date the DSB adopted the Panel and Appellate Body Reports in this dispute. According to the European Communities, a WCO decision is necessary as a prerequisite to further implementation internally by the Commission because implementation of the DSB's recommendations and rulings will require the European Commission effectively to reverse certain judgments of the European Court of Justice (the "ECJ"). Therefore, the European Communities argues, only after receiving a decision from the WCO can it proceed to the second step of implementation, which would be to adopt a Commission Regulation amending Additional Note 7 to heading 02.10 of the European Communities' Combined Nomenclature, specifying that preservation is no longer a requirement for products entering under heading 02.10. The European Communities estimates that eight months would be required to complete this proposed second step of implementation. The European Communities adds that, while this Regulation is being enacted, other Regulations—amending explanatory notes or codifying classification decisions—may also be adopted as necessary, depending on the particulars of a WCO decision. The European Communities thus requests that I determine 26 months to be the reasonable period of time for this two-step implementation process. I will consider each of these proposed steps in greater detail below.

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[53]Award of the Arbitrator, *Chile – Price Band System*, para. 34; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *EC – Tariff Preferences*, para. 26; Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 25; and Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 61.

[54]Award of the Arbitrator, *Chile – Price Band System*, para. 39; Award of the Arbitrator, *EC – Tariff Preferences*, para. 36; Award of the Arbitrator, *US – Offset Act (Byrd Amendment*), para. 64.

[55]Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 42; Award of the Arbitrator, *Chile – Price Band System*, para. 51; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 74.

A. *Ruling from the World Customs Organization*

51. With respect to the first step of the European Communities' proposed means of implementation, I observe at the outset that the action envisaged—the classification decision of the Harmonized System Committee of the WCO—is *outside* the lawmaking procedures of the European Communities. In considering this proposed first step, I note, first of all, that disputes that give rise to WTO dispute settlement under the DSU focus exclusively on "measures taken" by a Member[56], and that, accordingly, a measure that is the subject of a challenge in WTO dispute settlement must be "attributable" to that Member.[57] Because measures so challenged originate in the decision-making organs of a WTO Member's own legal system, an arbitrator under Article 21.3(c) may reasonably expect that implementation would ordinarily be achieved by means entirely within the implementing Member's lawmaking procedures. In that ordinary situation, a Member's prerogative to select the means of implementation is particularly strong, and it is appropriate in that situation for an arbitrator to refrain from questioning whether another, perhaps shorter, means of implementation is available within that legal system.

52. The situation is not the same, however, where, as here, a Member seeks to implement recommendations and rulings of the DSB by decision-making processes *outside* its domestic legal order.[58] Recourse to such external processes will not ordinarily form part of the implementation of the recommendations and rulings of the DSB.[59] Accordingly, as I see it, the mere assertion by a Member of the need for recourse to such external decision-making processes as part of an implementation proposal is not entitled to the same deference as in the case of an implementation procedure that is entirely within that Member's domestic legal system. Instead, in my view, an implementing Member seeking to go outside its domestic decision-making processes bears the burden of establishing that this external element of its proposed implementation is necessary for, and

[56]Article 3.3 of the DSU.

[57]Appellate Body Report, *US – Gambling*, para. 121 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81).

[58]I recognize that international treaties are binding on the institutions of the European Communities and that certain treaties may have direct effect in the Community legal order. This does not change the fact that the institutions set up by those treaties and decision-making processes followed by these institutions are *outside* the framework of decision-making *within* the European Communities, and are thus not subject solely to the decision-making authority of the European Communities.

[59]I do not suggest that recourse to processes outside an implementing Member's legal system is never a relevant consideration when determining the reasonable period of time, only that such relevance may often not be obvious and thus will need to be established by the implementing Member in order for the arbitrator under Article 21.3(c) to take it into account. I see no need to state a general rule on this issue in making this award, and therefore do not do so.

therefore indispensable to, that Member's full and effective compliance with its obligations under the covered agreements by implementing the recommendations and rulings of the DSB.

53. Moreover, I note with some concern that, given the absence of any WCO decision at this time that addresses the clarification by the Panel and the Appellate Body of the European Communities' WTO tariff schedule, this proposed first step of implementation by the European Communities has the potential to create a perceived obstacle to the necessary implementation of the recommendations and rulings of the DSB in this dispute. As noted above, the DSB adopted the Panel and Appellate Body Reports, finding that the two measures at issue are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994. It did so on the basis that, by requiring the product at issue to be classified under heading 02.07 of the Combined Nomenclature, the European Communities has imposed tariffs on the product in question in amounts exceeding the amount guaranteed by heading 02.10 of the European Communities' WTO schedule of tariff concessions.

54. I recall that all parties agreed, in the proceedings before the Panel and before the Appellate Body, that the tariff treatment under heading 02.07 is *less favourable* than that under heading 02.10, and that if the product at issue is covered by heading 02.10 of the European Communities' Schedule rather than by heading 02.07, the European Communities would be acting inconsistently with its obligations under Article II of the GATT 1994.[60] The Panel and the Appellate Body did find that the product at issue is covered by the tariff commitment contained in heading 02.10.[61] At the oral hearing in this proceeding, I raised the possibility that a decision by the WCO could call for classification of the product at issue in a manner inconsistent with the European Communities' obligations under Article II of the GATT 1994, as found by the Panel and the Appellate Body in their Reports, and as adopted by the DSB. For example, the WCO might decide that the product at issue is properly classified, according to the Harmonized System, under heading 02.07 rather than heading 02.10. In the light of this possibility, I asked the European Communities during the oral hearing whether, if faced with a WCO ruling that contradicted the WTO rulings in this dispute, it would continue to take those actions necessary to implement the recommendations and rulings of the DSB in fulfilment of its WTO obligations. In response to my questions, the European Communities declined to commit absolutely to implementing the recommendations and rulings of the DSB irrespective of the content of a decision by the WCO. The European Communities stated instead that such a WCO ruling might

[60]Appellate Body Report, para. 146 (citing Panel Reports, para. 7.75).

[61]Appellate Body Report, para. 347(c)(i); Panel Reports, para. 8.1(a).

constitute "subsequent practice" that would change the state of the law for the purposes of possible later review by an Article 21.5 panel.[62]

55. It is axiomatic that alleged violations of the covered agreements must be redressed exclusively through the procedures set out in the DSU, providing for examination of such allegations by a panel and possibly the Appellate Body, and that, if violations are found and the relevant reports are adopted by the DSB, the respondent Member is obliged to implement promptly the recommendations and rulings of the DSB. These recommendations and rulings are binding on implementing Members, and give rise to an obligation to bring their WTO-inconsistent measures into conformity with their obligations under the covered agreements. This obligation must be fulfilled "prompt[ly] ... in order to ensure *effective* resolution of disputes to the benefit of all Members."[63] Arbitration under Article 21.3(c) furthers this objective by establishing a reasonable period of time within which such "prompt" compliance must take place. The recommendations and rulings of the DSB in this dispute will not be implemented by a classification decision by the WCO. Regardless of the outcome of such a WCO decision, the recommendations and rulings of the DSB in this dispute will be no closer to being implemented unless—and until—the European Communities takes action internally to implement them. The European Communities states that it will not take any action internally until it receives a WCO decision.[64] Thus, conceivably, a finding of the WCO on tariff classification in response to a request for such a finding by the European Communities could have the effect of prolonging this dispute rather than contributing to its resolution through implementation of the recommendations and rulings of the DSB. In fulfilling my obligations as arbitrator under the DSU, I am naturally reluctant to take into account, in my determination of the reasonable period of time, the time needed to obtain from another international organization a decision that may not contribute to—or may possibly even hinder—the implementation of the recommendations and rulings of the DSB.

56. Although Members generally have discretion to determine their means of implementation, this discretion is not without bounds.[65] Saying that selecting the means of implementing the recommendations and rulings of the DSB is the prerogative of the implementing Member is not at all the same as saying that "anything goes". To declare otherwise would be to allow implementing Members the discretion also to pursue implementation measures that needlessly and unduly extend the

[62]European Communities' responses to questioning at the oral hearing.

[63]Article 21.1 of the DSU. (emphasis added)

[64]European Communities' response to questioning at the oral hearing.

[65]Previous arbitrators agree. See Award of the Arbitrator, *EC – Hormones*, paras. 39-42; Award of the Arbitrator, *EC – Tariff Preferences*, para. 31; Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 69.

reasonable period of time needed for implementation. And this would be contrary to the objective of Article 21.3 of the DSU. Therefore, under these specific circumstances, I cannot accept recourse to the WCO as an element of the European Communities' proposed implementation that I must factor into my calculation of the reasonable period of time simply because the European Communities has proposed it.[66] Instead, the European Communities must demonstrate that this first step of implementation is a requirement under Community law. I cannot just take their word for it; the European Communities must establish that it is so.

57. Toward this end, the European Communities argues that two judgments of the ECJ, the *Dinter*[67] case of 1983 and the *Gausepohl*[68] case of 1993, have imposed a requirement that the salting of products entered under heading 02.10 of the Combined Nomenclature must be such as to ensure preservation. According to the European Communities, the Panel and Appellate Body Reports in this dispute found, contrary to these two rulings of the ECJ, that preservation is not a requirement of eligibility for products falling under heading 02.10. The European Communities points out, however, that the Commission cannot modify the scope of heading 02.10 in a manner inconsistent with an ECJ ruling—or, more specifically, the Commission cannot pass a Regulation amending Additional Note 7 to heading 02.10—without a classification decision from the WCO.[69] As a result, in the European Communities' view, the Commission must receive a classification decision from the WCO as a necessary first step toward implementation in this dispute. To do otherwise, the European Communities insists, would be contrary to its own law.[70]

58. It is clear to me from the submission by the European Communities that the European Communities' position rests on the perception of an alleged contradiction between the scope of heading 02.10 as understood by the ECJ in *Dinter* and *Gausepohl*, and the scope of that heading as understood by the Panel and Appellate Body in this dispute. As I understand the European

[66]In this respect, I note my disagreement with the European Communities' contention that a "particular circumstance" I should take into account here is the fact that "the scope [of the relevant WTO provisions in this dispute is] determined by the actions and decisions of … the WCO." (European Communities' submission, para. 35) As the Panel and the Appellate Body made clear in their Reports, the Harmonized System—which is negotiated under the auspices of the WCO—does not "determine" the scope of heading 02.10 of the European Communities' schedule of concessions, but rather, serves as *context* for the interpretation of the schedule. Both the Panel and the Appellate Body made it abundantly clear in their Reports that they were interpreting the European Communities' Schedule of Concessions, and not the Harmonized System. (Appellate Body Report, para. 199; Panel Reports, para. 7.189)

[67]European Court of Justice, Judgment, *Dinter v Hauptzollamt Köln-Deutz*, Case C-175/82, ECR [1983] 969 (Exhibit-EC-12 submitted by the European Communities to the Panel).

[68]European Court of Justice, Judgment, *Gausepohl-Fleisch GmbH v. Oberfinanzdirektion Hamburg*, Case C-33/92, ECR [1993] I-3047 (Exhibit EC-14 submitted by the European Communities to the Panel).

[69]European Communities' responses to questioning at the oral hearing.

[70]*Ibid*.

Communities' oral submissions, in the absence of such a contradiction, the European Commission could proceed to adopt a Regulation amending Additional Note 7 to heading 02.10 even without a WCO decision.[71]

59. In my limited role as arbitrator, I am bound not only by Article 21.3 of the DSU. I am bound also by the factual findings and the legal judgments that form the basis of the Panel and the Appellate Body Reports that have been adopted as recommendations and rulings by the DSB. So too are the parties to the dispute. To those I turn to assess this proposal by the European Communities as it relates to these two ECJ cases.

60. The Panel and the Appellate Body examined these two ECJ judgments in the course of interpreting heading 02.10 of the European Communities' schedule, and I consider their observations on those judgments especially relevant to my consideration of the European Communities' proposed implementation process here. The Panel stated that the ECJ, in *Dinter*, had analyzed heading 16.02 of the Combined Nomenclature, dealing with "seasoned meat", and that the "general comments" made by the ECJ with respect to Chapter 2 of the Combined Nomenclature were not relevant to the Panel's interpretation of heading 02.10 of the European Communities' schedule.[72] As a result, the Panel "[did] not consider the *Dinter* judgment" further in its interpretative analysis.[73] Although the ECJ, in *Gausepohl*, addressed heading 02.10, the Panel found "certain ambiguities concerning the meaning and effect of the *Gausepohl* judgment that are important for the purposes of the present case."[74] The Panel pointed, *inter alia*, to two aspects of the *Gausepohl* judgment: (1) the judgment focused on bovine meat, thereby leaving its applicability to other meats (including poultry) uncertain; and (2) the judgment is unclear as to whether the 1.2 per cent salt content required for preservation "is a minimum salt content below which meat can be assumed not to be salted for the purposes of heading 02.10 or, rather, is a minimum salt content above which meat will be salted for the purposes of heading 02.10."[75] Finally, the Panel found evidence of these ambiguities in the minutes of a meeting of the European Communities' Customs Code Committee.[76]

[71]This is consistent with the Commission's general practice of passing Regulations relating to classification or scope of the Combined Nomenclature, for which the Commission has historically not been required to consult the WCO. (Brazil's submission, paras. 109-111; European Communities' responses to questioning at the oral hearing)

[72]Panel Reports, para. 7.393.

[73]Panel Reports, para. 7.393.

[74]Panel Reports, para. 7.398.

[75]Panel Reports, para. 7.398.

[76]Panel Reports, para. 7.401.

61. For its part, the Appellate Body did not examine the substance of *Dinter*, stating that the date of that judgment (1983) "diminishe[d] its relevance" for understanding the scope of heading 02.10.[77] With respect to *Gausepohl*, the Appellate Body stated:

> [I]t is not clear whether the ECJ's *Gausepohl* judgment requires that, for purposes of heading 02.10, salting must ensure preservation … .
>
> [W]e are not persuaded that *Gausepohl* must be understood in the sense that the 1.2 per cent salt content is merely a minimum above which it is necessary to show—in addition—that salting ensures long-term preservation.[78] (footnote omitted)

62. Thus, neither the Panel nor the Appellate Body made definitive findings as to whether *Dinter* and/or *Gausepohl* require products entered under heading 02.10 to contain sufficient salt to preserve the meat being imported. But, to the extent that the Panel and the Appellate Body examined these judgments, it seems to me that they expressed considerable scepticism about such a reading of these judgments. And they did so despite the fact that the same arguments made here by the European Communities about these two ECJ judgments were made also by the European Communities during the proceedings before the Panel and the Appellate Body. In the light of such scepticism, and given that no definitive finding has been made by the Panel or the Appellate Body with respect to the scope of the *Dinter* and *Gausepohl* judgments, the European Communities, despite its considerable efforts in this proceeding, has not shown to my satisfaction that these judgments stand for what it claims, much less has it established any reason why I should accept a reading of these judgments that is markedly different from the reading suggested by the Panel and the Appellate Body.[79] Where the Panel and the Appellate Body have expressed one view on issues relating to the substance of this dispute, I am not free, in fulfilling my limited mandate as arbitrator, to express another. I am certainly not free in this limited role to contradict the reasoning of the Panel and Appellate Body that led to the recommendations and rulings that have been adopted by the DSB. The purpose of an Article 21.3 arbitration is not to question the recommendations and rulings of the DSB; it is to establish the

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[77]Appellate Body Report, para. 327.

[78]Appellate Body Report, paras. 335-336.

[79]I note in this regard that a previous arbitrator has similarly expressed reservations about basing findings on unsettled or unclear issues of municipal law where neither a panel nor the Appellate Body itself arrived at a view on those issues:

> In asking me to draw this distinction, ... Antigua is effectively asking me to make a ruling concerning the meaning and scope of application of United States municipal law. I do not consider that it forms part of my mandate to do so, given that the findings of the Panel and the Appellate Body make no such distinction.

(Award of the Arbitrator, *US – Gambling*, para. 40)

reasonable period of time a Member should have to implement them. The aim of implementation is implementation. Nothing less. And nothing more.

63. Because the European Communities has failed to establish its proffered interpretation of the *Dinter* and *Gausepohl* judgments[80], I see no basis to conclude that implementing the recommendations and rulings of the DSB in this dispute through a Commission Regulation amending Additional Note 7 to heading 02.10 would be inconsistent with those judgments. This "particular circumstance" advanced by the European Communities is the sole basis on which it attempts to justify the asserted need to have recourse to a classification decision from the WCO. Having found that this "particular circumstance" does not exist, and bearing in mind the concerns expressed above[81], I find no reason to account for the allowance of time for a WCO decision in my determination of the reasonable period of time in this dispute.

64. The European Communities is free, of course, to seek a decision from the WCO; after all, it is for the European Communities, as the implementing Member, to determine in the first instance what it needs to do as a consequence of the recommendations and rulings of the DSB in this dispute. It is for me, however, to fulfil my task under Article 21.3(c) of the DSU in determining the reasonable period of time that the European Communities will need to implement those recommendations and rulings; and I am not persuaded that the time it would take to obtain a decision from the WCO is needed to accomplish the task of implementation.

B. *Steps Under Community Law*

65. Having found that a WCO decision does not form an appropriate part of my determination of the reasonable period of time, I go on now to examine the second stage of implementation proposed by the European Communities, relating to the actions required for the proposed passage of a Commission Regulation amending Additional Note 7 to heading 02.10 of the Combined Nomenclature. I begin by considering certain points raised by Brazil and Thailand with respect to the overall process before turning to a closer examination of the steps involved in passage of the proposed Commission Regulation under Community law.

[80]Although arbitrators under Article 21.3(c) are not called upon in the normal course of their duties to pronounce on the meaning of municipal law, I am of the view, expressed above, that I am not permitted in the circumstances of this case simply to accept the European Communities' understanding of the relevant ECJ cases. This is so because this understanding is argued by the European Communities in an attempt to discharge its burden of persuading me that action outside the domestic decision-making process of the European Communities is necessary for implementation of the recommendations and rulings of the DSB in this dispute. (*Supra*, para. 56)

[81]*Supra*, paras. 51-55.

66. First, Brazil and Thailand emphasize that since the adoption of the Panel and Appellate Body Reports in this dispute on 27 September 2005, the European Communities has failed to take sufficient steps towards implementation. Citing previous arbitration awards, they contend that this inaction on the part of the European Communities should be reflected in a reduction of the period of time that I consider to be reasonable under Article 21.3(c) of the DSU.[82] The European Communities acknowledged during the oral hearing that, four months after the adoption of the recommendations and rulings of the DSB, it had not yet taken any concrete steps toward implementation by formulation of the proposed Regulation.[83] Based on the European Communities' submission, all that seems to have occurred thus far is internal discussions within the European Communities. Mere discussion is not implementation. There must be something more to evidence that a Member is moving toward implementation. I therefore agree with Brazil and Thailand that this failure to commence implementation of the DSB's recommendations and rulings is a factor that I should take into account in determining the reasonable period of time for implementation.

67. Second, Brazil characterizes the implementation process proposed under Community law as executive or administrative, and not as a legislative action.[84] The European Communities, however, asserts that the powers to be exercised by the Commission in this case are *legislative* powers delegated to the Commission by the Council.[85] I recognize that the Commission engages in a "law-making" function, and thereby acts in a manner similar to legislatures when enacting a Regulation amending Additional Note 7. In my view, however, this, alone, does not render the process *legislative* such that additional time may be required for implementation. Previous arbitrations have highlighted that implementation achieved through administrative processes generally requires less time than implementing legislation.[86] This distinction is premised on the fact that administrative action generally may be accomplished solely by one institution (often the Executive Branch) of the implementing Member, whereas legislative action generally requires the participation of additional

[82]Brazil's submission, paras. 157-163 (citing Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 46, and Award of the Arbitrator, *Chile – Price Band System*, para. 43); Thailand's submission, paras. 40-42 (citing Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 46).

[83]European Communities' response to questioning at the oral hearing. On 6 January 2006—more than three months after the adoption of the recommendations and rulings of the DSB—the European Communities did submit a letter to the WCO requesting that the classification of the product at issue be placed on the agenda of the March 2006 meeting of the Harmonized System Committee. As I noted above, however, I do not consider relevant for my determination of the reasonable period of time any actions relating to the European Communities' request for a ruling from the WCO. (*Supra*, para. 63)

[84]Brazil's submission, para. 58.

[85]European Communities' responses to questioning at the oral hearing.

[86]See, for example, Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 49; Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 34; Award of the Arbitrator, *Australia – Salmon*, para. 38; Award of the Arbitrator, *Canada – Patent Term*, para. 41; Award of the Arbitrator, *Chile – Price Band System*, para. 38.

institutions (typically at least the Legislative Branch—likely to have slower, more deliberative processes—possibly in conjunction with the Executive Branch as well).[87] The implementation steps proposed by the European Communities under Community law are expected to be accomplished exclusively by the Commission, without involvement by the Council or the European Parliament. I therefore do not consider these steps to be "legislative" in the sense in which I believe that term has come to be understood in the context of arbitrations under Article 21.3(c). Accordingly, I must take into account in my determination the *administrative* nature of the proposed implementation process.

68. All this settled, in determining the reasonable period of time the European Communities ought to have to fulfil its WTO obligations, I come now to the need to undertake detailed consideration of the steps required under Community law for passing a Commission Regulation to implement the recommendations and rulings of the DSB in this dispute. As discussed above, the European Communities submits that eight months is required to pass such a Regulation. Setting aside the specific circumstances of this case—in particular, the alleged need for the European Communities to secure a WCO decision before initiating Commission action—the European Communities notes that, in general, Regulations relating to the Combined Nomenclature must follow a "more complex" adoption procedure and will therefore warrant more than the eight months proposed by the European Communities.[88] In this regard, the European Communities points in particular to one additional consultation the Commission would have to have with the Customs Code Committee when drafting a Regulation in the absence of a WCO decision.[89] According to the European Communities, the minimum time required for enacting a Commission Regulation relating to the Combined Nomenclature, but not based on a WCO decision, is 185 working days. Assuming five working days per week, by my calculation, this is the equivalent of 259 calendar days, which is roughly between eight and nine months.

69. The parties agree that the first step in passing the Commission Regulation involves preparatory work within the Commission, including research, departmental analysis within the responsible Directorate-General, and translation of documents into the working languages of the

[87]See, for example, Award of the Arbitrator, *Chile – Price Band System*, para. 38:

> I agree with the observation of previous arbitrators that implementation through legislation is likely to require a longer time for implementation than administrative rulemaking or *other exclusively Executive action*. (emphasis added) (footnote omitted)

[88]European Communities' submission, para. 77.

[89]European Communities' responses to questioning at the oral hearing. The European Communities maintains that, in any event, the Commission is without authority to enact a Regulation in this case without a WCO ruling and that, therefore, any consideration of time-frames for enacting such a Regulation is hypothetical. Nevertheless, the European Communities provided me with the process and likely time-frame, in its view, for enacting a standard Regulation relating to the Combined Nomenclature.

Commission (English, French, and German). The European Communities submits that, although this step requires no minimum time period by law, a reasonable period of 15 working days is required for such groundwork.[90] Brazil and Thailand argue that, in the absence of specified time periods, the Commission must employ the flexibility in its system to complete its preparatory work as quickly as possible.[91]

70. The next step involves the first consultation with the Customs Code Committee to assist in identifying more precisely what course of action might be pursued to achieve the relevant objective—specifically, whether to adopt a classification regulation, explanatory note, or additional note. This consultation is not mandated by law, although the Rules of Procedure of the Customs Code Committee and Council Regulation 2658/87 appear to allow for such informal discussions.[92] The European Communities contends that, based on the requirement for the distribution of the agenda at least 14 *calendar* days in advance of the meeting[93], this step will take 10 working days to complete. The European Communities argues that 10 working days will similarly be required for the *second* consultation with the Customs Code Committee, which is also not legally mandated, but during which the Committee provides its first views on the draft Regulation.[94] Both of these consultations with the Customs Code Committee, according to the European Communities, reflect "standard practice", and are evidenced in the preparatory work of Commission Regulation 1871/2003, which initially introduced the long-term preservation criterion in Additional Note 7 to heading 02.10 of the Combined Nomenclature.[95]

71. Thailand submits that the requirement of 14 calendar days cited by the European Communities for the distribution of the agenda of the Customs Code Committee applies only when the Commission requests an *opinion* from the Committee, rather than when the Commission *consults* the Committee on a new Regulation.[96] Thailand further contends that new rules of procedure went

[90]European Communities' responses to questioning at the oral hearing.

[91]Brazil and Thailand's responses to questioning at the oral hearing.

[92]Rules of Procedure of the Customs Code Committee, Art. 3.2(c) (Exhibit THA-4 submitted by Thailand in this Arbitration); Council Regulation 2658/87, Art. 8 (Exhibit BRA-6 submitted by Brazil in this Arbitration).

[93]Rules of Procedure of the Customs Code Committee, Art. 4.1 (Exhibit THA-4 submitted by Thailand in this Arbitration).

[94]European Communities' responses to questioning at the oral hearing.

[95]European Communities' responses to questioning at the oral hearing; Exhibit EC-4 submitted by the European Communities in this Arbitration.

[96]Thailand's response to questioning at the oral hearing (citing Article 8 of Council Regulation 2658/87 (Exhibit BRA-6 submitted by Brazil in this Arbitration)).

into effect for the Commission on 1 January 2006[97], and that, under these procedures, the Commission is expected to consult with the Customs Code Committee only once, before the drafting of the new Regulation. According to Thailand, there is therefore no need to account for the second consultation with the Customs Code Committee *after* the Regulation has been drafted and before the interservice consultation.[98] The European Communities disagrees with Thailand, explaining that the Commission's consultation with the relevant management committee when adopting a new Regulation is not governed by the Commission's rules of procedure, but rather, by Council Regulation 2658/87. This Council Regulation, according to the European Communities, plainly allows for the aforementioned informal consultations with the Committee, and cannot be modified by a Commission Decision on its internal rules of procedure.[99]

72. Between the two consultations with the Customs Code Committee, the European Communities claims, the Commission will need 35 working days for further analysis and for composing the draft Regulation (in the light of the first consultation with the Customs Code Committee), followed by 15 working days for translation of the draft Regulation into the three working languages of the Commission. The European Communities acknowledges that these actions are not required by Regulation, but the European Communities asserts that they are an essential component of the process of enacting a new Regulation.[100] Brazil and Thailand observe that the time period for drafting of the Regulation is not stipulated by law, and that, given the relative simplicity of what is required to remove the effects of the WTO-inconsistent measures in this case, 35 days is not required for preparing the draft Regulation.[101]

73. After the second consultation with the Customs Code Committee, according to the European Communities, the draft Regulation will need to be revised before being sent to other departments within the Commission for additional consultation and consequent modifications, followed by translation into all the official languages of the European Communities. Furthermore, the European

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[97]The new procedures relied upon by Thailand are found in Commission Decision 2005/960/EC (Exhibit THA-1 submitted by Thailand in this Arbitration).

[98]Thailand's submission, para. 47 (citing Article 23.3 of Commission Decision 2005/960/EC); Thailand's response to questioning at the oral hearing. Article 23.3 of Commission Decision 2005/960/EC provides:

> Before a document is submitted to the Commission, the department responsible shall, in accordance with the implementing rules, consult the departments with a legitimate interest in the draft text in sufficient time.

(Exhibit THA-2 submitted by Thailand in this Arbitration)

[99]European Communities' response to questioning at the oral hearing.

[100]European Communities' responses to questioning at the oral hearing.

[101]Brazil's and Thailand's responses to questioning at the oral hearing.

Communities states, pursuant to the Commission's Manual of Operating Procedures, other departments must be provided at least 10 working days for interservice consultation on the draft Regulation.[102] The European Communities suggests that, to this minimum of 10 working days for interservice consultation, 10 working days must be added for revisions based on the second round of consultation with the Customs Code Committee, and 30 days must be added to cover translation and modifications to the draft regulation based on the results of the interservice consultation.

74. Brazil contends that the European Communities overstates the need for interservice consultations, particularly with respect to the Commission's Legal Service, because the Manual of Operating Procedures explicitly notes that the opinion of the Legal Service is not required where, as here, the Commission is exercising its *delegated* powers.[103] In response, the European Communities submits that Brazil misunderstands this statement in the Manual because the Legal Service's opinion is not required only where powers are delegated *within* the Commission, not where implementing powers are delegated from the Council, as is the case here.[104]

75. The next step in the process provides for the Agriculture/Chemical section of the Customs Code Committee to deliver a formal opinion on the draft Regulation, pursuant to Articles 9 and 10 of Council Regulation 2658/87.[105] The European Communities asserts that the Agriculture/Chemical section "meets only 4 times a year, at intervals of roughly three months (i.e. in March, late May/June, October and December)."[106] Furthermore, as with the two consultations with the Customs Code Committee, the Rules of Procedure require that the agenda and draft Regulation be distributed at least 14 calendar days before the meeting.[107] The European Communities asks me to take into account 10 working days to receive the opinion of the Customs Code Committee.[108]

76. Thailand argues that the Committee's Rules of Procedure provide the Chair with the right to convene a Customs Code Committee meeting whenever the Chair deems appropriate, and thus, an opinion could be provided even if a meeting of the Agriculture/Chemical section were not scheduled

[102]Exhibit EC-6 submitted by the European Communities in this Arbitration.

[103]Letter from Brazil to the Arbitrator, dated 31 January 2006, p. 2 (quoting Commission's Manual of Operating Procedures (Exhibit EC-6 submitted by the European Communities in this Arbitration)).

[104]Letter from the European Communities to the Arbitrator, dated 1 February 2006, p. 1.

[105]European Communities' submission, para. 76; European Communities' response to questioning at the oral hearing.

[106]European Communities' submission, para. 76.

[107]Rules of Procedure of the Customs Code Committee, Art. 4.1 (Exhibit THA-4 submitted by Thailand in this Arbitration).

[108]European Communities' responses to questioning at the oral hearing.

for another three months.[109] In any event, according to Thailand, given that this Award is to be released on 20 February 2006, the Agriculture/Chemical section meeting in March 2006 could provide an opinion on the Commission's draft Regulation at that meeting.[110]

77. The final step of the process before publication is what the European Communities refers to as the "habilitation procedure", which I understand to be a procedure whereby the Commission, as a collective body, may delegate certain tasks (including adoption of the final Regulation) to one of the Commission Members, which may also be sub-delegated to lower officials within the Commission.[111] Although no legal time-frames are provided for the habilitation procedure, the European Communities submits that, based on past practice, this step will require 10 working days. Brazil and Thailand suggest that, where there is no minimum time period prescribed by law, as in the case of the habilitation procedure, the amount of time proposed by the European Communities is excessive.[112]

78. Lastly, the European Communities considers that publication of the Regulation in the *Official Journal* and the entry into force of the Regulation will require an additional 30 working days[113], based in part on the legal requirement that, absent specification in the Regulation, it will enter into force on the twentieth calendar day following its publication.[114] Brazil rejects the need for 30 days for this phase of the process. On the basis of its review of fifty Commission Regulations relating to classification or amending the Combined Nomenclature, Brazil contends that "nearly all Commission Regulations" are published one day following adoption and enter into force on the twentieth day thereafter, resulting in a total of 21 days rather than 30.[115]

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[109]Thailand's submission, para. 51 (citing Customs Code Committee's Rules of Procedure, TAXUD/741/2001 (Exhibit THA-4 submitted by Thailand in this Arbitration)).

[110]Thailand's submission, para. 52.

[111]European Communities' response to questioning at the oral hearing. The European Communities contends that the "habilitation procedure" is reflected in Article 13 of the Commission's Rules of Procedure, titled "Decisions taken by empowerment procedure". (European Communities' response to questioning at the oral hearing, citing Commission Decision 2005/960/EC (Exhibit THA-2 submitted by Thailand in this Arbitration))

[112]Brazil's and Thailand's responses to questioning at the oral hearing.

[113]European Communities' response to questioning at the oral hearing.

[114]Article 254(2) of the Treaty Establishing the European Community provides:

> Regulations of the Council and of the Commission, as well as directives of those institutions which are addressed to all Member States, shall be published in the Official Journal of the European Union. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication.

[115]Brazil's submission, para. 73 (citing its analysis of fifty Commission Regulations, contained in Exhibit BRA-12 submitted by Brazil in this Arbitration).

79. Certain observations may be made with respect to these Community procedures. First, not all of the actions identified by the European Communities are required under Community law when passing a Commission Regulation. In some instances, this may suggest that those actions not required by law are to be given less weight in my determination of the reasonable period of time.[116] In other instances, however, the fact that a certain action is not mandated does not mean that such action is irrelevant to my determination.[117] In this respect, I note, in particular, that certain procedures and time-frames, while not mandated, are based on standard practice as the European Communities has substantiated with relevant evidence.[118] While WTO Members will, unquestionably, always want to ensure that they are complying fully with all of their WTO obligations by implementing adverse WTO rulings as quickly as possible in their own legal systems, ordinarily their standard practices in those systems should suffice.

80. Second, certain of the time periods mentioned above are estimates provided by the European Communities, but are not minimum periods required by law. I agree with previous arbitrators that, in such situations, the implementing Member should be expected to use the flexibility reasonably available within its system to ensure prompt compliance with its WTO obligations.[119] Third, where time periods are asserted for a particular proposed step, but are not supported by evidence, I have considered the views put forward by the parties, and have arrived at an understanding of what could be considered a reasonable amount of time for the completion of that step. More specifically, in certain instances, I have accepted the time claimed to be necessary by the European Communities, but have discounted that time for steps that, in my view, could reasonably be completed sooner, bearing in mind that implementation should occur in the shortest period of time possible within the legal system of the implementing Member. These overall considerations guide my determination of the reasonable period of time.

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[116]Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 51.

[117]See Award of the Arbitrator, *Chile – Price Band System*, para. 42:

> The absence of a requirement under Chile's laws to engage in pre-legislative consultations is not sufficient, in my view, to dismiss the relevance of such consultations for purposes of this Article 21.3(c) arbitration. … Although not mandated by law, consultations within government agencies as well as with the affected sectors of society are typically a concomitant of lawmaking in contemporary polities, and such consultations should be taken into account when fixing a "reasonable period of time" for implementation. (footnote omitted)

[118]Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 54; Award of the Arbitrator, *EC – Tariff Preferences*, para. 42.

[119]Award of the Arbitrator, *Canada – Patent Term*, paras. 63 and 64; Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 77; Award of the Arbitrator, *EC – Tariff Preferences*, para. 36.

C. *Article 21.2 of the DSU*

81. I turn briefly now to Brazil's request that, in determining the reasonable period of time, I pay "particular attention" to its interests as a developing country Member, pursuant to Article 21.2 of the DSU.[120] In support of this request, Brazil submits evidence relating to market share, revenue, employment dependent on this industry, and the role of this industry in promoting social programs within Brazil, arguing that adverse impacts on these factors warrant particular attention.[121]

82. Article 21.2 of the DSU states:

> Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

Brazil has shown to my satisfaction that Brazil's interests are indeed affected by the measures of the European Communities that are the subject of this dispute. Furthermore, Brazil is correct that Article 21.2, on its face, makes no distinction in cases where developing country Members are complaining rather than implementing Members in a particular dispute.[122] However, as I have already observed, my determination of the reasonable period of time results from my understanding of the *shortest period of time possible* in the Community legal order for implementing the proposed Commission Regulation amending Additional Note 7 to heading 02.10.[123] Having arrived at the shortest period of time possible, I consider that the reasonable period of time for implementation is not additionally affected by the fact that Brazil, as a complaining Member in this dispute, is a developing country.[124]

[120]Brazil's submission, paras. 164-173. Thailand did not request that particular attention be paid to its interests, even though it also is a developing country Member. (Thailand's response to questioning at the oral hearing) Accordingly, it advanced no argument, and provided no supporting evidence, in relation to the instruction contained in Article 21.2 of the DSU.

[121]See *supra*, paras. 31-32.

[122]Award of the Arbitrator, *US – Gambling*, para. 59; Award of the Arbitrator, *EC – Export Subsidies on Sugar*, para. 99.

[123]*Supra*, paras. 49 and 80.

[124]See Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 52.

IV. The Award

83. As a final point, I recall that the European Communities requests *eight months* for enacting a Commission Regulation following a WCO decision, arguing that "[w]ithout a WCO determination any internal Community procedure will inevitably become more complex."[125] Having concluded that the European Communities failed to establish the need for recourse to the WCO, I have nevertheless taken this request for eight months by the European Communities into account in my award, along with the other considerations I have already discussed.

84. In the light of the considerations outlined above, I determine that the "reasonable period of time" for the European Communities to implement the recommendations and rulings of the DSB in this dispute is nine months from 27 September 2005, which was the date on which the DSB adopted the Panel and Appellate Body Reports. The reasonable period of time will therefore expire on 27 June 2006.

Signed in the original at Washington, DC this 14th day of February 2006 by:

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James Bacchus

Arbitrator

[125]European Communities' submission, para. 77.