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EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF FROZEN BONELESS CHICKEN CUTS

Complaint by Brazil

Report of the Panel

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Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
Australia – Salmon	Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R, DSR 1998:VIII, 3407
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
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 – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
India – Quantitative Restrictions	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Turkey – Textiles	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*.WT/DS285/R, circulated 10 November 2004
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

LIST OF ABBREVIATIONS

BTI	Binding Tariff Information
BTN	Brussels Tariff Nomenclature
CCCN	Customs Cooperation Council Nomenclature
CN	European Communities' Combined Nomenclature
DSB	Dispute Settlement Body
DSU	Understanding on the Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
EC Decision 2003/97/EC	Commission Decision 2003/97/EC of 31 January 2003
EC Regulation No. 535/94	Commission Regulation (EC) No. 535/1994
EC Regulation No. 3115/94	Commission Regulation (EC) No. 3115/1994
EC Regulation No. 1223/2002	Commission Regulation (EC) No. 1223/2002
EC Regulation No. 1871/2003	Commission Regulation (EC) No. 1871/2003
EC Regulation No. 1789/2003	Commission Regulation (EC) No. 1789/2003
EC Regulation No. 2344/2003	Commission Regulation (EC) No. 2344/2003
ECJ	European Court of Justice
EC Schedule	EC Schedule LXXX
EEC Regulation No. 2658/87	Council Regulation (EEC) No. 2658/87
HS	Harmonized Commodity Description and Coding System
General Rules	General Rules for the interpretation of the HS
GN	Geneva Nomenclature
OJ	Official Journal of the European Communities
WCO	World Customs Organization

I. INTRODUCTION

1.1 On 11 October 2002, Brazil requested consultations with the European Communities pursuant to Article 4 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) (WT/DS269/1). The request concerned an EC Commission Regulation that Brazil alleged provided a new description of the products at issue under the EC's Combined Nomenclature (CN) Code 0207.14.10 namely, EC Commission Regulation No. 1223/2002 (EC Regulation No. 1223/2002), which Brazil describe in its request for consultations as "frozen, boneless cuts of poultry impregnated with salt in all parts, with a salt content by weight of 1.2%".

1.2 Consultations were held between Brazil and the European Communities on 5 December 2002 and 19 March 2003 but did not lead to a resolution of the dispute. As a result, in a communication dated 19 September 2003[1], Brazil requested the establishment of a panel. Accordingly, the Dispute Settlement Body (DSB) at its meeting of 7 November 2003 established the Panel with standard terms of reference.

1.3 On 25 March 2003, Thailand requested consultations with the European Communities pursuant to Article 4 of the DSU and Article XXII of the GATT 1994 (WT/DS286/1) regarding the "customs reclassification set out in the EC Regulation No. 1223/2002 of 8 July 2002". Thailand states in its request for consultations that "frozen boneless chicken cuts impregnated with salt in all parts, with a salt content by weight of 1.2% to 1.9% are reclassified as frozen boneless chicken cuts under code 0207.14.10 of the EC's combined nomenclature (CN)" under EC Regulation No. 1223/2002.

1.4 Consultations were held between Thailand and the European Communities on 21 May 2003 but did not lead to a resolution of the dispute. As a result, in a communication dated 27 October 2003[2], Thailand requested the establishment of a panel. Accordingly, at its meeting of 21 November 2003, the DSB established the Panel with standard terms of reference. At that meeting, it was agreed that, as provided for in Article 9.1 of the DSU in respect of multiple complainants, the Panel established on 7 November 2003 to examine the complaint by Brazil would also examine Thailand's complaint (WT/DSB/M/158).

1.5 The terms of reference for the Panel are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Brazil in document WT/DS269/3 and Thailand in document WT/DS286/5, the matter referred to the DSB by Brazil and Thailand in those documents, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 On 17 June 2004, Brazil and Thailand requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. That paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the

[1] WT/DS269/3 contained in Annex E.
[2] WT/DS286/5 contained in Annex E.

composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.7 Accordingly, on 28 June 2004, the Director-General composed the Panel as follows:

Chairman: Mr Hugh McPhail

Members: Ms Elizabeth Chelliah
Mr Manzoor Ahmad

1.8 Brazil (in respect of Thailand's complaint), China, Thailand (in respect of Brazil's complaint) and the United States reserved their third-party rights to participate in the Panel's proceedings. Chile and Colombia withdrew as third parties prior to the Panel's first substantive meeting with the parties.

1.9 The Panel held the first substantive meeting with the parties on 28 and 29 September 2004. The session with the third parties took place on 29 September 2004. The Panel's second substantive meeting with the parties was held on 17 and 18 November 2004.

1.10 On 23 December 2004, the Panel issued the Descriptive Part of its Panel Report.

II. FACTUAL ASPECTS

2.1 This dispute concerns the question of whether a number of EC measures pertaining to the classification of certain salted chicken cuts result in treatment for those chicken cuts that is less favourable than that provided for in EC Schedule LXXX (the EC Schedule) in violation of Article II of the GATT 1994[3].

A. EC SCHEDULE LXXX

2.2 EC Schedule LXXX was the subject of negotiations during the Uruguay Round between 1986 and 1994. The nomenclature used in the EC Schedule followed the 1992 version of the Harmonized Commodity Description and Coding System (HS). The European Communities currently respects Schedule CXL, which is identical to Schedule LXXX in all respects that are relevant to this case.

2.3 Reproduced below are the two concessions (tariff lines 0207.41.10 and 0210.90.20) contained in the EC Schedule to which reference has been made in this dispute:

0207	Meat and edible offal, of the poultry of heading No. 0105, fresh, chilled or frozen:
0207.41	-- Of fowls of the species *Gallus domesticus*:
	--- Cuts:
0207.41.10	---- Boneless

[3] The specific measures in question are dealt with in paragraph 7.16 *et seq*.

02.10	Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal:
0210.90	- Other, including edible flours and meals of meat or meat offal:
	-- Meat:
0210.90.20	--- Other

2.4 Products falling under the tariff line 0207.41.10 are subject to a bound specific duty rate of 1024 ECU/T or 102.4€/100kg/net. In addition, those products may be subject to a special safeguard mechanism provided for in Article 5 of the Agreement on Agriculture. Products falling under the tariff line 0210.90.20 are subject to a final bound duty rate of 15.4 per cent.

B. THE EUROPEAN COMMUNITIES' COMBINED NOMENCLATURE

2.5 The European Communities' CN was established by a Council Regulation, namely EEC Council Regulation No. 2658/87 of 23 July 1987 (EEC Regulation No. 2658/87).[4] Pursuant to Article 1(2) of that Regulation, the CN comprises: (a) the HS nomenclature; (b) EC subdivisions to that nomenclature, referred to as "CN subheadings"; and (c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings. Therefore, each subheading in the CN has an eight-digit code number with the first six digits representing the corresponding digits in the HS and the last two digits identifying CN subheadings. Additionally, a ninth digit is reserved for the use of national statistical subdivisions and a tenth and eleventh digit for an EC integrated tariff, known as the "Taric". The CN consists of 21 sections, covering 99 chapters. The CN is contained in Annex I of EEC Regulation No. 2658/87.

2.6 EEC Regulation No. 2658/87 bestows certain powers to adopt measures in respect of the CN. In particular, pursuant to Article 9, the EC Commission has power to adopt measures, *inter alia*, relating to:

- the classification of goods;
- explanatory notes;
- amendments to the CN to take account of changes in requirements relating to statistics or to commercial policy;
- amendments to the CN and adjustments to duties in accordance with decisions adopted by the EC Council or the EC Commission;
- amendments to the CN intended to adapt it to take account of technological or commercial developments or aimed at the alignment or clarification of texts;
- amendments to the CN resulting from changes to the HS nomenclature; and,
- questions relating to the application, functioning and management of the HS to be discussed within the Customs Cooperation Council [now the World Customs Organization (WCO)], as well as their implementation by the EC.

[4] OJ L 256, 7.9.1987, p.1.

2.7 The CN is supplemented by EC Council Regulation No. 2913/1992 establishing the Community Customs Code[5], which is, in turn, supplemented by EC Commission Regulation No. 2454/1993 laying down provisions for the implementation of EC Council Regulation No. 2913/1992.[6] Article 12 of the Community Customs Code establishes the possibility for economic operators to request "binding tariff information" (BTI) from the EC member States' customs authorities.

2.8 The European Communities is a customs union. It has a common customs tariff between EC member States and third countries. The EC member State administrations are responsible for all operations relating to the implementation on a day-to-day basis of the CN. Economic operators can challenge classification decisions in the courts of member States. Where such challenges take place, the courts of member States can, and in specific circumstances set out in the EC Treaty, are obliged, to refer the matter to the European Court of Justice (ECJ).

C. HARMONIZED SYSTEM

2.9 The Harmonized Commodity Description and Coding System, generally referred to as the "Harmonized System" or simply the "HS", is a multipurpose international product nomenclature developed by the World Customs Organization (WCO). It comprises about 5,000 commodity groups, each identified by a 6-digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. The system is used by more than 190 countries and economies as a basis for their customs tariffs and for the collection of international trade statistics.[7] The HS is governed by the International Convention on the Harmonized Commodity Description and Coding System (the HS Convention).

2.10 The HS originates from the "Geneva Nomenclature" (GN), which came into existence on 1 July 1937 in the form of the 1937 Draft Customs Nomenclature of the League of Nations. The GN was replaced in 1959 by the Brussels Convention on Nomenclature for the Classification of Goods in Customs Tariffs (BTN)[8], which was subsequently renamed as the Customs Co-operation Council Nomenclature in 1974 (CCCN). The CCCN was replaced by the HS in 1988.

2.11 The HS is administered by the HS Committee, which was established under the auspices of the WCO. The HS Committee is composed of representatives from each of the HS contracting parties. The HS Committee may propose amendments to the HS and may prepare explanatory notes, classification opinions, or provide other advice to be used as guidance in the interpretation of the HS.[9]

2.12 The EC became a contracting party to the HS on 22 September 1987, Brazil on 8 November 1988 and Thailand on 16 December 1992. The HS entered into force for the European Communities on 1 January 1988, for Brazil on 1 January 1989 and for Thailand on 1 January 1993.[10]

2.13 The HS has been amended three times since 1988 in order to take account of changes in technology or in patterns of international trade. The first amendment occurred in 1992, the second in 1996 and the last in 2002. Like those of many other participants, the EC Schedule followed the 1992 version of the HS, that being the version in force during the final stages of the Uruguay Round negotiations.

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[5] OJ L 302, 19.10.1992, p.1.
[6] OJ L 253, 11.10.1993, p.1.
[7] Preamble to the HS Convention.
[8] The BTN came into force on 11 September 1959, following the adoption on 1 July 1955 of a Protocol of Amendment establishing a revised version of the Nomenclature.
[9] Articles 6 and 7 of the HS Convention.
[10] Position regarding Contracting Parties (on 30 June 2003) International Convention on the HS, Document NG0087E1 of 6 October 2003.

2.14 Article 1 of the HS Convention states that the HS "means the Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading Notes and the General Rules for the interpretation of the Harmonized System, set out in the Annex to this Convention." The HS Convention contains six General Rules for the interpretation of the HS (General Rules).

2.15 The main obligations of contracting parties to the HS Convention are set out in Article 3 of the Convention, which reads as follows:

> "1. Subject to the exceptions enumerated in Article 4:
>
> (a) Each Contracting Party undertakes, except as provided in subparagraph (c) of this paragraph, that from the date on which this Convention enters into force in respect of it, its Customs tariff and statistical nomenclatures shall be in conformity with the Harmonized System. It thus undertakes that, in respect of its Customs tariff and statistical nomenclatures:
>
> (i) it shall use all the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes;
>
> (ii) it shall apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter and Subheading Notes, and shall not modify the scope of the Sections, Chapters, headings or subheadings of the Harmonized System; and
>
> (iii) it shall follow the numerical sequence of the Harmonized System;
>
> (b) Each Contracting Party shall also make publicly available its import and export trade statistics in conformity with the six-digit codes of the Harmonized System, or, on the initiative of the Contracting Party, beyond that level, to the extent that publication is not precluded for exceptional reasons such as commercial confidentiality or national security;
>
> (c) Nothing in this Article shall require a Contracting Party to use the subheadings of the Harmonized System in its Customs tariff nomenclature provided that it meets the obligations at (a) (i), (a) (ii) and (a) (iii) above in a combined tariff/statistical nomenclature.
>
> 2. In complying with the undertakings at paragraph 1 (a) of this Article, each Contracting Party may make such textual adaptations as may be necessary to give effect to the Harmonized System in its domestic law.
>
> 3. Nothing in this Article shall prevent a Contracting Party from establishing, in its Customs tariff or statistical nomenclatures, subdivisions classifying goods beyond the level of the Harmonized System, provided that any such subdivision is added and coded at a level beyond that of the six-digit numerical code set out in the Annex to this Convention."

2.16 Chapter 2 of the HS, being the Chapter primarily at issue in this dispute, is contained in Annex D.

D. EC REGULATIONS AND DECISIONS

2.17 The measures identified in Brazil's and Thailand's respective Panel requests are EC Regulation No. 1223/2002 and EC Commission Decision 2003/97/EC of 31 January 2003 (EC Decision 2003/97/EC). Relevant excerpts of these two measures, as well as of several other EC Regulations to which reference was made subsequently in the course of these proceedings, are set out below. The various EC legal instruments are dealt with in chronological order.

1. EEC Regulation No. 2658/87[11]

2.18 As noted in paragraph 2.5 above, the Council Regulation, EEC Regulation No. 2658/87 established a goods nomenclature called the CN, which is contained in Annex I of EEC Regulation No. 2658/87.

2.19 Article 12 of EEC Regulation No. 2658/87 provides that:

> "The Commission shall adopt each year by means of a Regulation a complete version of the combined nomenclature together with the corresponding autonomous conventional rates of duty of the Common Customs Tariff, as it results from measures adopted by the Council or by the Commission. The said Regulation shall be published not later than 31 October in the *Official Journal of the European Communities* and it shall apply from 1 January of the following year."

2.20 Section I of the CN contain rules for the interpretation of the CN. Rule 1 states that:

> "The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes ..."

2. EC Regulation No. 535/1994[12]

2.21 An EC Commission Regulation, Commission Regulation (EC) No. 535/1994 (EC Regulation No. 535/94), was adopted on 9 March 1994 and was published in the Official Journal of the European Communities on 11 March 1994. EC Regulation No. 535/94, which amended Annex I to EEC Regulation No. 2658/87 containing the CN, introduced Additional Note 8 to Chapter 2 of the CN.

2.22 The preamble to EC Regulation No. 535/94 states that:

> "Whereas, to ensure uniform application of the Combined Nomenclature, provisions should be laid down for the classification of salted meat and edible meat offal falling within CN code heading 0210, in order to distinguish them from fresh, chilled or frozen meat and edible meat offal; whereas a total salt content of 1,2% or more by weight appears an appropriate criterion for distinguishing between these two types of products;

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[11] Council Regulation (EEC) No. 2658/87 of 23 July 1987, on the tariff and statistical nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Communities No. L 256, 7 September 1987, p. 1.

[12] Commission Regulation (EC) No. 535/94, of 9 March 1994, amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Communities No. L 68, 11 March 1994, p.15.

Whereas an additional note to this effect should be inserted in Chapter 2 of the Combined Nomenclature; whereas Annex I to Regulation (EEC) No. 2658/87 should therefore be amended ...;"

2.23 Article 1 of EC Regulation No. 535/94 provides that:

"The following additional note shall be inserted in Chapter 2 of the Combined Nomenclature annexed to Regulation (EEC) No 2658/87:

> For the purposes of heading No 0210, the term 'salted' means meat or edible meat offal which has been deeply and homogenously impregnated with salt in all parts, having a total salt content no less than 1.2% by weight."

2.24 EC Regulation No 535/94 entered into force on 1 April 1994.

3. EC Regulation No. 3115/1994[13]

2.25 An EC Commission Regulation, Commission Regulation (EC) No. 3115/1994 (EC Regulation No. 3115/94), was adopted on 20 December 1994 and was published in the Official Journal of the European Communities on 31 December 1994. EC Regulation No. 3115/94 amended Annexes I and II to EEC Regulation No. 2658/87 in order to take into account, *inter alia*, changes relating to statistics or commercial policy resulting from the Uruguay Round.

2.26 More precisely, the preamble to EC Regulation No. 3115/94 states that:

"Whereas it is necessary to amend the combined nomenclature to take account of:

– changes in requirements relating to statistics or commercial policy, in particular by virtue of Council Decision bringing into force simultaneously the acts implementing the results of the Uruguay Round of multilateral trade negotiations and Council Regulation concerning certain measures resulting from the conclusion of negotiations under Article XXIV:6 and other measures necessary for simplification purposes;

– the need to align or clarify texts;

Whereas Article 12 of Regulation (EEC) No. 2658/87 provides for the Commission to adopt each year by means of a regulation, to apply from 1 January of the following year, a complete version of the combined nomenclature together with the corresponding autonomous and conventional rates of duty of the Common Customs Tariff, as it results from measures adopted by the Council or by the Commission;

..."

2.27 Article 3 of EC Regulation No. 3115/94 provides that:

"This Regulation shall enter into force on 1 January 1995.

This Regulation shall be binding in its entirety and directly applicable in all Member States. ...

[13] Commission Regulation (EC) No. 3115/94 of 20 December 1994, amending Annexes I and II to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the common customs tariff, published in the Official Journal of the European Communities No. L 345, 31 December 1994.

> Incorporated in Annex I to this Regulation are amendments resulting from the adoption of the following measures:
>
> ...
>
> – Commission Regulation (EC) No. 535/94 of 9 March 1994 (OJ No L 68, 11.3.1994, p. 15);
>
> ..."

2.28 Additional Note 8 to Chapter 2 of the CN, introduced through EC Regulation No. 535/94 and subsequently incorporated into the CN for 1995 in EC Regulation No. 3115/94, was renumbered in 1995 as Additional Note 7 to Chapter 2 of the CN.[14]

4. EC Regulation No. 1223/2002[15]

2.29 An EC Commission Regulation, EC Regulation No. 1223/2002, was adopted on 8 July 2002 and was published in the Official Journal of the European Communities on 9 July 2002. EC Regulation No. 1223/2002 concerns the classification of certain goods in the CN. Recital (1) of EC Regulation No. 1223/2002 states that:

> "In order to ensure the uniform application of the Combined Nomenclature annexed to Regulation (EEC) No. 2658/87, it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation".

2.30 Article 1 of EC Regulation No. 1223/2002 provides that:

> "The goods described in column 1 of the table set out in the Annex are classified within the Combined Nomenclature under the CN code indicated in column 2 of that table."

[14] See Recital (2) of Commission Regulation (EC) No. 1871/2003 of 23 October 2003, amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Communities No. L 275, 25 October 2003, p. 5.

[15] Commission Regulation (EC) No. 1223/2002 of 8 July 2002, concerning the classification of certain goods in the Combined Nomenclature, published in the Official Journal of the European Communities No. L 179, 9 July 2002, p. 8.

2.31 The Annex to EC Regulation No. 1223/2002 is reproduced below:

ANNEX

Description of Goods	CN Code	Reasons
(1)	**(2)**	**(3)**
(1) Boneless chicken cuts, frozen and impregnated with salt in all parts. They have a salt content by weight of 1.2% to 1.9%. The product is deep-frozen and has to be stored at a temperature of lower than - 18°C to ensure a shelf-life of at least one year.	0207 14 10	Classification is determined by the provisions of the General Rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 0207, 0207 14 and 0207 14 10. The product is chicken meat frozen for long-term conservation. The addition of salt does not alter the character of the product as frozen meat of heading 0207.

Source: Annex to EC Regulation No. 1223/2002.

5. EC Decision 2003/97/EC [16]

2.32 On 12 February 2003, the EC Commission published EC Decision 2003/97/EC concerning the validity of certain BTIs issued by the Federal Republic of Germany. More particularly, Article 1 of the Decision, which is addressed to the Federal Republic of Germany[17], requires the withdrawal of 66 BTI notices issued by the German customs authority classifying products under heading 02.10 of the CN.[18]

2.33 Recital (3) of EC Decision 2003/97/EC state that, after publication of EC Regulation No. 1223/2002, all BTIs previously issued by EC member States classifying the products covered by that Regulation with a salt content between 1.2% and 1.9% as "salted meat" under heading 02.10 of the CN ceased to be valid.[19] Recital (5) explains that, based on EC Regulation No. 1223/2002, some member States later issued BTIs classifying frozen products of the same kind as those covered by that Regulation, but with a salt content of between 1.9% and 3% by weight of salt, under heading 02.10 of the CN.[20] Recital (7) indicates that products consisting of boneless chicken cuts, which have been frozen for long-term conservation and have a salt content of 1.9% to 3%, are similar to the products covered by EC Regulation No. 1223/2002. It also states that the addition of salt in such quantities is not such as to alter the products' character as frozen poultry meat of heading 02.07 of the CN. Recital (8) states that, in order to safeguard equality between operators, which would be endangered if like cases were not treated alike and to ensure uniform application of the CN, the Federal Republic Germany is required to withdraw the BTIs issued on frozen poultry meat containing between 1.9% and 3% by weight of salt.[21]

[16] Commission Decision 2003/97/EC of 31 January 2003, concerning the validity of certain binding tariff information (BTI) issued by the Federal Republic of Germany, published in the Official Journal of the European Communities No. L 36, 12 February 2003, p. 40.

[17] Article 2 of Commission Decision.

[18] Article 1 and Annex.

[19] Recital (3).

[20] Recital (5).

[21] Recital (8).

6. EC Regulation No. 1871/2003[22]

2.34 An EC Commission Regulation, Commission Regulation (EC) No. 1871/2003 (EC Regulation No. 1871/2003), was adopted on 23 October 2003 and was published in the Official Journal of the European Communities on 25 October 2003. EC Regulation No. 1871/2003 amended Annex I to EEC Regulation No. 2658/87. In particular, EC Regulation No. 1871/2003 amended Additional Note 7 to Chapter 2 of the CN.

2.35 Recital (3) of EC Regulation No. 1871/2003 states that:

> "[T]he classification in Chapter 2 of the Combined Nomenclature depends essentially on the process employed to ensure long-term preservation of a given product. The General Harmonized System explanatory note to Chapter 2 describes the structure of that chapter. Chapter 2 covers uncooked meat and meat offal which are fresh or chilled or have undergone one of the various processes required for long-term preservation, i.e., uncooked meat which are frozen or salted, in brine, dried or smoked."[23]

2.36 Recital (4) notes that:

> "According to the said explanatory note, fresh meat remains classified as such even if it has been packed with salt as a temporary preserving agent during transport. This reasoning applies equally to frozen meat, otherwise any meat to which salt has been added would be considered as salted meat of heading 0210. For the purposes of heading 0210, salting must be sufficient to ensure long-term preservation for purposes other than transportation. In this connection, it should be noted that the other processes listed in heading 0210, i.e. in brine, drying or smoking, are intended to ensure long-term preservation rather than to act as a temporary preserving agent for transport."[24]

2.37 Recital (5) states that the EC Commission considered it "appropriate to clarify and confirm further that salting, within the meaning of heading 0210, is a process used to ensure long-term preservation".[25] It did so by means of Article 1 of EC Regulation No. 1871/2003, which provides that Additional Note 7 to Chapter 2 of the Combined Nomenclature is replaced by the following:

> "For the purposes of heading 0210, the terms 'meat and edible meat offal, salted, in brine' mean 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."

7. EC Regulation No. 1789/2003[26]

2.38 An EC Commission Regulation, Commission Regulation (EC) No. 1789/2003 (EC Regulation No. 1789/2003), was adopted on 11 September 2003 and was published in the Official Journal of the European Communities on 30 October 2003. EC Regulation No. 1789/2003 amended

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[22] Commission Regulation (EC) No. 1871/2003 of 23 October 2003, amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Communities No. L 275, 25 October 2003, p. 5.

[23] Recital (3) of EC Regulation No. 1871/2003.

[24] Recital (4) of EC Regulation No. 1871/2003.

[25] Recital (5) of EC Regulation No. 1871/2003.

[26] Commission Regulation (EC) No. 1789/2003 of 11 September 2003, amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, published in the Official Journal of the European Communities No. L 281, 30 October 2003, p. 1.

Annex I to EEC Regulation No. 2658/87 by replacing Annex I to EEC Regulation No. 2658/87 with the Annex to EC Regulation No. 1789/2003 (the 2004 CN).

2.39 In Annex I of EC Regulation No. 1789/2003, Additional Note 7 to Chapter 2 stated that:

> "For the purposes of heading 0210, the terms 'meat and edible meat offal, salted, in brine' mean meat and edible meat offal deeply and homogeneously impregnated with salt in all parts, having a total salt content of not less than 1.2% by weight."

8. EC Regulation No. 2344/2003[27]

2.40 An EC Commission Regulation, Commission Regulation (EC) No. 2344/2003 (EC Regulation No. 2344/2003), was adopted on 30 December 2003 and was published in the Official Journal of the European Communities on 31 December 2003. EC Regulation No. 2344/2003 amended Annex I to EC Regulation No. 2658/87. EC Regulation No. 2344/2003 was adopted to ensure that the CN to be applied as of 1 January 2004 as contained in EC Regulation No. 1789/2003 included, *inter alia*, the amendment made by EC Regulation No. 1871/2003.[28]

2.41 Thus, the Annex to EC Regulation No. 2344/2003 amended the Annex to EC Regulation No. 1789/2003, with respect to Additional Note 7 of Chapter 2 of the CN, as follows:

> "1. Additional note 7 of Chapter 2 of the Combined Nomenclature shall be replaced by the following:
>
> > 7. For the purposes of heading 0210, the terms 'meat and edible meat offal, salted or in brine' mean meat and edible meat offal deeply and homogeneously impregnated with salt in all parts and having a total salt content by weight of 1.2% or more, provided that it is the salting which ensures the long-term preservation."

III. PARTIES' REQUESTS FOR FINDINGS, RECOMMENDATIONS AND SUGGESTIONS

A. BRAZIL[29]

3.1 Brazil requests the Panel to:

(a) find that EC Regulation No. 1223/2002 and EC Decision 2003/97/EC are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994;

(b) recommend that the DSB request the European Communities to bring these measures into conformity with Articles II:1(a) and II:1(b) of the GATT 1994;

(c) use its right to make suggestions on ways in which the European Communities could implement the Panel's recommendations as provided in Article 19.1 of the DSU; and

(d) suggest that, in light of the nullification and impairment of the benefits accruing to Brazil under the EC Schedule in respect of its commerce of salted chicken meat to the

[27] Commission Regulation (EC) No. 2344/2003 of 30 December 2003, amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff, published in the Official Journal of the European Communities No. L 346, 31 December 2003, p. 38.

[28] Recital (3) of EC Regulation No. 2344/2003.

[29] Brazil's first written submission, para. 192.

European Communities, that the European Communities immediately repeal EC Regulation No. 1223/2002 and EC Decision 2003/97/EC.

B. THAILAND[30]

3.2 Thailand requests the Panel to:

(a) find that the European Communities is acting inconsistently with its obligations under Article II:1(b) and II:1(a) of the GATT 1994 by according "less favourable treatment" to the chicken product in question than that provided for in the EC Schedule; and

(b) recommend, in accordance with Article 19.1 of the DSU, that the DSB request the European Communities to bring the measure at issue into conformity with the GATT 1994.

C. EUROPEAN COMMUNITIES[31]

3.3 The European Communities requests the Panel to:

(a) reject Brazil's and Thailand's claims;

(b) find that the treatment accorded by the European Communities to frozen boneless chicken cuts with a salt content between 1.2% and 3% by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC respects the bindings contained in the EC Schedule; and

(c) find that the treatment accorded by the European Communities to frozen boneless chicken cuts with a salt content between 1.2% and 3% by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC involves no infringement of Articles II:1(a) and (b) of the GATT 1994.

IV. ARGUMENTS OF THE PARTIES

4.1 Paragraph 12 of the Panel's Working Procedures, which were adopted on 7 July 2004, provides for the submission by the parties of executive summaries of the facts and arguments presented to the Panel in writing and orally. These summaries were to be used to assist the Panel in drafting the factual and arguments section of the Panel's Report.

4.2 In a letter dated 7 October 2004, the European Communities requested the Panel "to make a simple reference in the descriptive part to the facts and arguments as summarized by the Panel in the findings section of its report", thereby dispensing with the need for the parties to prepare executive summaries. Brazil accepted the request, noting at the same time that this should not constitute a precedent for future cases. Thailand was of the view that there was no need to change the Working Procedures at that stage of the Panel's proceedings.

4.3 Taking into account the parties' views on the matter, on 13 October 2004, the Panel informed the parties that it had decided the following:

(a) Submission of executive summaries by the parties would be on a voluntary basis;

[30] Thailand's first written submission, paras. 157-158.
[31] EC's first written submission, para. 211.

(b) As advised to the parties at the first substantive meeting (28 29 September 2004), the Panel's intention was to reproduce the executive summaries of the parties and third parties in the descriptive part of its Report. This would remain the Panel's intention in case such submissions were received. In the alternative case, a reference would be made in the descriptive part to the facts and arguments as summarized by the Panel in the findings section of its Report; and

(c) As also indicated at the first substantive meeting, parties' and third parties' replies to the Panel's questions as well as to each other's questions would be attached to the Report in an annex.

4.4 Thailand is the only party to this dispute that submitted an executive summary. Therefore, in accordance with the Panel's decision set out in the preceding paragraph, Thailand's executive summary has been reproduced in Annex A. The arguments made by all the parties are reflected in the findings section of the Panel's Report.

4.5 The parties' written answers to questions posed by the Panel and by each other have been reproduced in Annex C. Written answers by the WCO to questions posed by the Panel have also been reproduced in Annex C. In addition, the parties' comments on the parties' and the WCO's replies to the Panel's questions following the second substantive meeting have been reproduced in Annex C. The parties' exhibits have been listed in Annex F but have not been reproduced in this Report due to the confidential nature of a number of those exhibits.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of China, as contained in its executive summary, have been reproduced in Annex B. On 7 October 2004, the United States requested that the US third party oral statement made at the first substantive meeting be considered as the US executive summary contemplated by paragraph 12 of the Working Procedures. The US oral statement has, therefore, also been reproduced in Annex B.

5.2 Written answers by the third parties to questions posed by the Panel have been reproduced in Annex C.

VI. INTERIM REVIEW

6.1 The Panel's Interim Report was issued to the parties on 17 February 2005. Pursuant to Article 15.2 of the DSU and paragraph 16 of the Panel's Working Procedures, the parties were given until 3 March 2005 to provide their comments on the Interim Report. The European Communities' comments were provided on 24 February 2005 and Brazil's and Thailand's comments were provided on 3 March 2005. None of the parties requested a meeting to review part(s) of the Panel's Report. On 10 March 2005, the parties submitted further written comments on the comments that had been provided by the parties on 24 February and 3 March.

6.2 Pursuant to Article 15.3 of the DSU, this section of the Panel Report contains the Panel's response to the comments made by the parties in relation to the Interim Report.

A. PARTIES' ARGUMENTS

6.3 All of the parties to this dispute requested certain changes to the representation of their respective arguments in the findings section of the Interim Report. The Panel accepted these changes to the extent that they did not result in repetition of arguments that had already been represented in the Report and to the extent that they were consistent with what the parties stated in the various submissions they made to the Panel during the course of the Panel proceedings.

6.4 Brazil also suggested an addition to paragraph 3.1(d) of the Interim Report, which contains the parties' requests for findings, recommendations and suggestions. The Panel declined to include the suggested change because, in the Panel's view, the proposed text contains argumentation that does not add to what is already contained in paragraph 3.1(d) and the summary of Brazil's arguments elsewhere in the Report.

B. CLERICAL AND EDITORIAL CHANGES

6.5 Brazil suggested certain changes to correct clerical errors contained in the Interim Report. All these suggested changes were accepted by the Panel. The Panel also accepted Brazil's suggestion to reproduce in Annex C the parties' comments on the parties' written answers to questions posed by the Panel following the second substantive meeting and the parties' comments on the WCO's replies to the Panel's questions following the second substantive meeting. The Panel also made some additional minor clerical and editorial changes.

C. MEASURES AT ISSUE

6.6 In its comments on the Interim Report, Brazil confirmed the arguments it had made previously to the effect that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 should be included in the Panel's terms of reference. Brazil also put forward additional arguments and requested the Panel to reconsider its analysis and conclusion to exclude those measures from its terms of reference in light of its additional arguments. In its comments on Brazil's comments, the European Communities submitted that the Panel should not accept Brazil's additional arguments because they amounted to an attempt to relitigate legal and factual issues, which the Panel had already decided. In the Panel's view, the additional arguments do not alter the conclusion we reached in our Interim Report that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 are outside our terms of reference for the reasons explained below.

6.7 First, Brazil submits that it could not reasonably be expected to have anticipated the enactment of EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 at the time it submitted its request for establishment of a panel. Brazil explains that, since the measures the Panel considered to be within its terms of reference were not amendments to the CN, when drafting its Panel request, there was no reason for Brazil to anticipate that additional measures related to the ones identified – that is, EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 – would be enacted. Brazil argues that, therefore, it cannot be expected to have included a reference to those measures in its request for establishment of a panel.

6.8 The Panel notes that a fundamental rationale for the requirements contained in Article 6.2 of the DSU concerning the contents of a request for establishment of a panel[32] is to ensure that a responding Member is provided adequate notice of the measure(s) being challenged so that it is able to properly defend itself. In *US – Carbon Steel*, the Appelate Body stated that:

> "... the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case.[33] When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for

[32] Article 6.2 of the DSU provides that: "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."

[33] *(original footnote)* Appellate Body Report, *Brazil – Dessicated Coconut*, at 186. See also, Appellate Body Report, *EC – Bananas III*, para. 142.

> establishment of a panel 'to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.'"[3435] (emphasis in original)

6.9 In light of the foregoing, even if Brazil could not reasonably have anticipated the enactment of EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 at the time it made its request for establishment of a panel, we do not consider that the due process objective underlying Article 6.2 of the DSU can be compromised in this case. Brazil itself indicated in its interim review comments that it was mindful of the due process concern associated with adjustment of pleadings during dispute settlement proceedings. As pointed out in the Panel's Interim Report, complaining parties in other WTO cases have chosen to use broad, generic and/or inclusive language in their requests for establishment of a panel so as to cover measures that they may not have necessarily expected or anticipated at the time they filed their request for establishment of a panel while at the same time meeting their due process obligations under Article 6.2 of the DSU. Brazil did not do so in this case.

6.10 Secondly, Brazil refers to the Appellate Body's decision in *Chile – Price Band System* and suggests that, on the basis of that decision, EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 should be included in the Panel's terms of reference because they clarify measures specifically identified in its request for establishment of a panel. The European Communities responds that the purpose of EC Regulation No. 1871/2003 was to clarify heading 02.10 and not EC Regulation No. 1223/2002.

6.11 The Appellate Body's comments in *Chile – Price Band System* upon which Brazil relies are set out below:

> "... We understand the Amendment as having clarified the legislation that established Chile's price band system. However, the Amendment does not change the price band system into a measure *different* from the price band system that was in force before the Amendment. Rather, as we have pointed out, Article 2 of Law No. 19.772 simply amends Article 12 of Law No. 18.525 by *adding* a final paragraph to that provision. ...[36]
>
> We understand that, like the safeguard measure in the *Argentina – Footwear (EC)* case, Chile's price band system remains essentially the same after the enactment of Law 19.772. The measure is not, in its essence, any different because of that Amendment. Therefore, we conclude that the measure before us in this appeal includes Law 19.772, because that law amends Chile's price band system without *changing its essence*."[37] (emphasis in original)

6.12 We note that the above comments were made in the context of a request for establishment of a panel that expressly referred to amendments to the law in question in that case – namely, Law No. 18.525. Indeed, the Appellate Body stated that:

> "[W]e note that Argentina's request for the establishment of a panel refers to the measure in issue as the price band system 'under Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, *as well as the regulations and complementary provisions and/or amendments*' (emphasis added). Such *amendments*, in our view, include Law 19.772. The broad scope of the Panel request suggests that Argentina intended the request to cover the measure even as

[34] *(original footnote)* Appellate Body Report, *EC – Bananas III*, para. 142.
[35] Appellate Body Report, *US – Carbon Steel*, para. 126.
[36] Appellate Body Report, *Chile – Price Band System*, para. 137.
[37] Appellate Body Report, *Chile – Price Band System*, para. 139.

> amended. Thus, we conclude that Law 19.772 falls within the Panel's terms of reference."[38] (emphasis in original)

6.13 As pointed out in our Interim Report, Brazil's request for establishment of a panel contrasts with the one at issue in *Chile – Price Band System*. Unlike the request for establishment of a panel in the latter case, the identification of the measures at issue in Brazil's request for establishment of a panel is specific and narrow and does not appear to anticipate inclusion of any measures in addition to those specifically identified, namely EC Regulation No. 1223/2002 and EC Decision 2003/97/EC. Therefore, we do not consider that the Appellate Body's comments in *Chile – Price Band System* that have been relied upon by Brazil are apposite for this case.

6.14 Thirdly, Brazil argues that the Panel's decision not to include EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 in its terms of reference may not secure a positive solution to the dispute and that the Panel's findings may not be sufficiently precise to allow for prompt compliance. In this regard, the Panel notes that Article 3.7 of the DSU states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". We understand that the term "dispute" in Article 3.7 is the dispute as defined by the request for establishment of a panel. As we have previously noted, Brazil's request for establishment of a panel only identifies EC Regulation No. 1223/2002 and EC Decision 2003/97/EC. In accordance with Article 3.7 of the DSU, our Report seeks to secure a positive solution to Brazil's claims regarding those measures identified in Brazil's request for establishment of a panel and we consider that our recommendations regarding those measures are precise enough so as to ensure prompt compliance.

6.15 The Panel recalls that, in its Interim Report, the Panel concluded that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 are outside our terms of reference. We confirm that conclusion here. We recall that, nevertheless, in our Interim Report, we stated that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 provided useful context for the consideration of measures that are within our terms of reference, namely EC Regulation No. 1223/2002 and EC Decision 2003/97/EC. In fact, we used the former measures in our assessment of whether the latter measures are in violation of Article II of the GATT 1994. We reaffirm the conclusion we reached in the Interim Report that the substantive effect of EC Regulation No. 1223/2002 and EC Decision 2003/97/EC is the same as the substantive effect of EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 as far as frozen boneless chicken cuts that have been impregnated with salt are concerned.

D. PRODUCTS AT ISSUE

6.16 Brazil contests the Panel's conclusion in the Interim Report that the products at issue are frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% – 3%. Brazil points, *inter alia*, to its description of the products at issue in its request for establishment of a panel and argues that the products at issue are, rather, frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% *or more*. The European Communities submits that the measures at issue concern chicken with a salt content of 1.2% – 3%.

6.17 The Panel notes at the outset that the products at issue in this dispute are the products within the Panel's terms of reference. In other words, they are the specific products affected by the findings and recommendations made by us in this Report. We recall that Article 6.2 of the DSU sets out the requirements for requests for establishment of a panel, which, in turn, form the basis of a panel's terms of reference. Pursuant to Article 6.2, a complainant is required to identify the specific "measures at issue". Article 6.2 does not stipulate that a complainant must describe in its request for establishment of a panel the products that are within a panel's terms of reference in a particular dispute. Brazil's and Thailand's requests for establishment of a panel clearly identify certain measures – namely, EC

[38] Appellate Body Report, *Chile – Price Band System*, para. 135.

Regulation No. 1223/2002 and EC Decision 2003/97/EC – and it is these measures that define our terms of reference for this dispute.

6.18 Even though Brazil may have referred to frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% *or more*, in its request for establishment of a panel, as noted, our terms of reference are defined by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC. Since these measures only relate to frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% – 3%, the Panel concludes that those are the products within our terms of reference for the purposes of this case.

E. SEPARATE PANEL REPORTS

6.19 By letter to the Panel dated 5 July 2004, the European Communities requested the Panel to issue separate Reports with respect to the complaints made respectively by Brazil and by Thailand. However, in light of the fact that a single Panel had been established to examine both Brazil's and Thailand's complaints in this dispute, the fact that Brazil's and Thailand's claims are identical and the fact that both complainants endorsed their respective arguments during the course of these proceedings[39], at the conclusion of the second substantive meeting with the parties, the Panel indicated its intention to issue a single Panel Report in relation to the complaints made by both Brazil and by Thailand, unless advised otherwise. None of the parties indicated their objection at that stage of the Panel's proceedings. Accordingly, on 17 February 2005, the Panel issued a single Interim Report to the parties.

6.20 In its comments on the Interim Report, the European Communities made reference to its letter to the Panel dated 5 July 2004 and stated that it would be obliged if separate Reports could be issued. In their comments on the European Communities' comments on the Interim Report, neither Brazil nor Thailand objected to this request but, noting that the complainants' endorsed each other's arguments during these proceedings, they submit that the separate Reports should contain the complete arguments made by both complainants.

6.21 The Panel acknowledges that the European Communities reserved its right to separate Panel Reports under Article 9.2 of the DSU in July 2004, shortly after this Panel was composed. Further, the complainants have not objected to the European Communities' request. Therefore, the Panel has decided to issue two separate Panel reports – one for the complaint made by Brazil against the European Communities and the other for the complaint made by Thailand against the European Communities. However, as noted previously, Brazil and Thailand endorsed their respective arguments in these proceedings. Further, at the European Communities' request, the parties' arguments are contained in the findings section of the Panel's Report. Accordingly, the Panel notes that the only material difference between the separate Panel reports in respect of Brazil's and Thailand's complaints will be the cover page and the conclusions; the descriptive part and the findings will be common to both Reports.

VII. FINDINGS

A. SUMMARY OF THE MAIN ISSUE FOR THE PANEL'S DETERMINATION

7.1 The fundamental issue for the Panel's determination in this case is whether certain EC measures result in treatment for certain products that is less favourable than that provided for in EC Schedule LXXX (the EC Schedule) in violation of Article II:1(a) and/or Article II:1(b) of the GATT 1994. More particularly, the Panel is required to determine whether those measures result in the

[39] Brazil endorsed the arguments put forward by Thailand in Brazil's second written submission, para. 95 and Thailand endorsed the arguments put forward by Brazil in Thailand's oral statement at the first substantive meeting, para. 55.

imposition of duties and conditions on such products that are in excess of those provided for in the EC Schedule.

7.2 The EC Schedule provides for a tariff of 102.4€/100kg/net for products covered by subheading 0207.14.10 and allows the European Communities to use special safeguard measures under Article 5 of the Agreement on Agriculture in respect of such products. The EC Schedule provides for a tariff of 15.4% *ad valorem* for products covered by subheading 0210.90.20 and there is no reservation for the use of special safeguard measures under Article 5 of the Agreement on Agriculture in respect of such products.

7.3 Brazil and Thailand (the complainants) submit that less favourable treatment has been accorded to frozen boneless salted chicken cuts in violation of Article II:1(a) and Article II:1(b) of the GATT 1994 because, through the relevant EC measures, the European Communities changed its customs classification so that those products, which had previously been classified under subheading 0210.90.20 and were subject to an *ad valorem* tariff of 15.4%, are now classified under subheading 0207.14.10 and are subject to a tariff of 102.4€/100kg/net as well as being potentially subject to special safeguard measures pursuant to Article 5 of the Agreement on Agriculture.

B. BACKGROUND FOR THE PANEL'S ANALYSIS

7.4 By way of background for the Panel's analysis, the Panel sets out its understanding of the interrelationship between the EC Schedule, the European Communities' Combined Nomenclature (CN) and the Harmonized Commodity Description and Coding System (HS)[40].

1. Relationship between the EC Schedule and the European Communities' Combined Nomenclature

7.5 The schedules of WTO Members are currently annexed to the GATT 1994. Through these schedules, Members commit to bind tariff levels on various goods. Reductions in tariff levels have occurred at the multilateral level since 1947 through successive rounds of tariff negotiations. EC Schedule LXXX was the subject of negotiations during the Uruguay Round between 1986 and 1994.

7.6 Article II:7 of the GATT 1994 provides that the schedules annexed to the GATT 1994 are made an integral part of the GATT 1994. The Appellate Body in *EC – Computer Equipment* clarified that Article II:7 means that the concessions provided for in such schedules are part of the terms of the treaty, namely the GATT 1994.[41] Article II:2 of the WTO Agreement provides that the Agreements contained in the Annexes to the WTO Agreement, which includes the GATT 1994, are integral parts of the WTO Agreement. Therefore, on the basis of Article II:7 of the GATT 1994 and Article II:2 of the WTO Agreement, concessions contained in the EC Schedule are treaty terms of the GATT 1994 and the WTO Agreement.

7.7 Article XVI:4 of the WTO Agreement provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". Article XVI:4 means that, for the purposes of this dispute, the European Communities is obliged to ensure that its domestic legislation is consistent with the relevant concessions contained in the EC Schedule.

7.8 The CN contains the European Communities' domestic tariff nomenclature, which, as explained in further detail below, was established through the enactment of EEC Regulation No. 2658/87. The Panel will need to determine whether the treatment of the products at issue in the CN is less favourable than that provided for in the EC Schedule for the purposes of assessing the

[40] The HS is described below in para. 7.9 *et seq*.
[41] Appellate Body Report, *EC – Computer Equipment*, para. 84.

complainants' claim that the European Communities has violated Article II:1(a) and/or Article II:1(b) of the GATT 1994.

2. Relationship between the European Communities' Combined Nomenclature and the Harmonized System

7.9 The Harmonized Commodity Description and Coding System, generally referred to as the "Harmonized System" or simply the "HS", is a multipurpose international product nomenclature developed by the World Customs Organization (WCO). It comprises about 5,000 commodity groups, each identified by a 6-digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. The system is used by more than 190 countries and economies as a basis for their customs tariffs and for the collection of international trade statistics. The HS is governed by the International Convention on the Harmonized Commodity Description and Coding System (the HS Convention).

7.10 Article 3.1 of the HS Convention requires each contracting party to ensure that its laws are in conformity with the HS. In particular, HS contracting parties are required to use the headings and subheadings of the HS without addition or modification, together with the HS numerical codes[42] and to apply the General Rules for the interpretation of the HS (General Rules) and all the section, chapter and subheading notes.[43] Moreover, HS contracting parties are required to ensure that they follow the numerical sequence of the HS in their respective domestic tariff nomenclatures.[44]

7.11 The European Communities is a signatory to the HS Convention. Therefore, pursuant to Article 3.1 of the HS Convention, the European Communities is obliged to use the HS headings and subheadings at the 6-digit level. The European Communities does, however, have flexibility to add headings and subheadings beyond the 6-digit level.

7.12 The European Communities implemented its obligations under the HS Convention through the enactment of EEC Regulation No. 2658/87, which, as mentioned above in paragraph 7.8, established the CN. Article 1 of EEC Regulation No. 2658/87 states that the CN comprises: (a) the HS nomenclature; (b) EC subdivisions/headings to that nomenclature; and (c) preliminary provisions, additional sections or chapter notes and footnotes relating to subheadings. In addition to the HS headings at the 6-digit level, the CN contains at least an additional two digits for each heading, which identify CN subheadings. The six General Rules contained in the HS form the basis of the general rules for the interpretation of the CN.

C. THE PANEL'S TERMS OF REFERENCE

1. Defining the scope of the Panel's terms of reference

7.13 The Panel commences its substantive analysis with a discussion of its terms of reference. Such a discussion is necessary given that the parties have advanced conflicting arguments regarding the scope of the Panel's terms of reference.

7.14 The Panel recalls that its terms of reference are based upon Article 7 of the DSU and are set out in WT/DS269/4/Rev.1 and WT/DS286/6/Rev.1, which provide in relevant part that the Panel's terms of reference are:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Brazil in document WT/DS269/3 and Thailand in document WT/DS286/5, the

[42] Article 3.1(a)(i) of the HS Convention.
[43] Article 3.1(a)(ii) of the HS Convention.
[44] Article 3.1(a)(iii) of the HS Convention.

> matter referred to the DSB by Brazil and Thailand in those documents, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

7.15 Therefore, the Panel's terms of reference are defined by the requests for establishment of a panel filed respectively by Brazil and Thailand (Panel requests). These requests are contained in Annex E to this Report.

2. Measures

7.16 The first issue for our determination is what are the specific measures within our terms of reference? We will commence our analysis with a consideration of the measures that have been specifically identified in the complainants' Panel requests. We will subsequently consider a number of measures that have not been specifically identified in the complainants' Panel requests but which have been referred to by the parties in the course of the Panel proceedings.

(a) Measures specifically identified in the Panel requests

7.17 Brazil's Panel request states in relevant part that:

> "The specific measures at issue are Commission Regulation (EC) No. 1223/2002, published in the Official Journal of the EC on 9 July 2002, concerning the classification of certain goods in the Combined Nomenclature (CN), and the EC Commission Decision, published in the Official Journal of the EC on 12 February 2003, concerning the validity of certain binding tariff information (BTI) issued by the Federal Republic of Germany."[45]

7.18 Thailand's Panel request states in relevant part that:

> "The measure at issue is the classification of frozen boneless salted chicken cuts as provided in the EC Regulation No.1223/2002 of 8 July 2002 ('Regulation 1223/2002') published in the Official Journal of the EC on 9 July 2002 concerning the classification of certain goods in the Combined Nomenclature (CN) and elaborated in the EC Commission Decision ('Decision') of 31 January 2003 published in the Official Journal of the EC on 12 February 2003 concerning the validity of certain binding tariff information ('BTI') issued by the Federal Republic of Germany."[46]

7.19 Brazil's and Thailand's Panel requests specifically refer to two measures, namely, EC Regulation No. 1223/2002 and EC Decision 2003/97/EC. The parties do not dispute that these measures are within the Panel's terms of reference.

(b) Measures not specifically identified in the Panel requests

(i) Arguments of the parties

7.20 **Brazil** argues that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 are within the Panel's terms of reference even though they were not mentioned in Brazil's Panel request and that, in order to secure a positive solution to the dispute, as is required by Article 3.7 of the DSU, they should also be brought into conformity if found to be in violation of the WTO Agreement.[47] Brazil notes that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 were issued after

[45] WT/DS269/3.
[46] WT/DS286/5.
[47] Brazil's reply to Panel question No. 1.

the establishment of the Panel and that, therefore, these Regulations could not have been mentioned in Brazil's Panel request.[48]

7.21 According to Brazil, EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 are measures that are "closely related" or "subsidiary" to the ones specifically identified in Brazil's Panel request so much so that they may be considered as "part of the application" of those measures.[49] In particular, Brazil argues that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 were enacted as a result of changes in classification and tariff treatment brought about by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC. Brazil submits that, since EC Regulation No. 1223/2002 and EC Decision 2003/97/EC modified or provided a new interpretation of the scope and definition of products falling under subheading 0207.14.10 of the CN so as to include "other salted meat" of subheading 0210.90.20, the European Communities was required to adjust the then existing definition of "salted meat" of heading 02.10 to avoid conflict with the new interpretation of the definition and scope of subheading 0207.14.10. Brazil submits that the European Communities did this through EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003.[50]

7.22 **Thailand** submits that the European Communities first introduced the principle of long-term conservation for the classification of boneless chicken cuts under subheading 0207.14.10 in EC Regulation No. 1223/2002. According to Thailand, EC Decision 2003/97/EC maintained the same reasoning provided in EC Regulation No. 1223/2002, namely that, because the boneless chicken cuts "have been frozen for the purposes of long-term preservation", they must be classified under subheading 0207.14.10.[51] Thailand submits that the European Communities' position that the long-term preservation of "chicken cuts" must determine its classification was confirmed and further expanded to "all meats" under heading 02.10 by EC Regulation No. 1871/2003, which was then incorporated into the CN by EC Regulation No. 2344/2003. Thailand submits that, therefore, even though EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 were not specifically mentioned in Thailand's Panel request, they must, nevertheless, be considered as part of the challenged measures before the Panel. According to Thailand, EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 are based on the same principle as that set out in EC Regulation No. 1223/2002 and EC Decision 2003/97/EC, namely, that the criterion of long-term preservation must determine the classification of the product. Thailand cites *Argentina – Footwear (EC)* to submit that the measures are "closely related." Thailand considers that, if the Panel finds that the customs classification of frozen boneless chicken cuts as provided in EC Regulation No. 1223/2002 and EC Decision 2003/97/EC is inconsistent with the European Communities' obligations under Article II of the GATT 1994, then it should also find that EC Regulation No. 1871/2002 and EC Regulation No. 2344/2003 – which are based on the same criterion of long-term preservation for the classification of a product – should also be held to be WTO-inconsistent.[52]

7.23 The **European Communities** responds that neither EC Regulation No. 1871/2003 nor EC Regulation No. 2344/2003 are within the scope of the Panel's terms of reference.[53] The European Communities submits that the complainants' Panel requests only identified two EC measures – namely, EC Regulation No. 1223/2002 and EC Decision 2003/97/EC – and that these requests delimit the Panel's jurisdiction.[54] The European Communities argues that there are no substantive grounds to justify widening the scope of the Panel's terms of reference, particularly given that the issue of the Panel's terms of reference was not addressed in the complainants' first written submissions, nor in

[48] Brazil's reply to Panel question No. 11.
[49] Brazil's oral statement at the second substantive meeting, para. 5.
[50] Brazil's reply to Panel question No. 1.
[51] Thailand's second written submission, para. 6.
[52] Thailand's second written submission, paras. 9-11.
[53] EC's reply to Panel question No. 20(a).
[54] EC's second written submission, para. 15.

their oral statements to the Panel during the first substantive meeting.[55] The European Communities submits that the inclusion of acts other than EC Regulation No. 1223/2002 and EC Decision 2003/97/EC in the Panel's terms of reference would infringe the European Communities' due process rights as well as those of third parties.[56]

7.24 In response, **Brazil** submits that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 are so closely related to the measures referred to in the complainants' Panel requests that the European Communities must be found to have received adequate notice of them. Brazil also submits that the content and relevance of EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 were highlighted by Brazil throughout these proceedings.[57]

(ii) Analysis by the Panel

7.25 As noted above in paragraph 7.19, the complainants' Panel requests specifically refer to two measures – namely, EC Regulation No. 1223/2002 and EC Decision 2003/97/EC. However, the complainants also discussed a number of other measures in their first written submissions, including EC Regulation No. 1871/2003 and EC Regulation No. 2344/2002. In an effort to determine what significance should be attached, if any, to those measures, the Panel requested the complainants to indicate whether or not they were seeking to specifically challenge those measures in these proceedings.[58] Both complainants confirmed that that was their wish and that, further, those measures fall within the Panel's terms of reference. The European Communities disputes that those measures are within our terms of reference.

7.26 The Panel notes that, in *Chile – Price Band System*, the Appellate Body stated that:

> "[G]enerally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'. If the terms of reference in a dispute are broad enough to include amendments to a measure – as they are in this case – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute."[59]

7.27 In other words, the Appellate Body stated that, in order for a panel's terms of reference to include amendments to measures included in a panel request, the following conditions must be met: (a) the terms of reference must be broad enough; and (b) such inclusion is necessary to secure a positive solution to the dispute. While these conditions were enunciated by the Appellate Body with respect to *amendments* to the measure that had been specifically identified in the relevant panel request, we do not see any reason why they should not be equally applicable to measures that do not constitute amendments. Indeed, it is the Panel's view that, if an amendment may be included in a panel's terms of reference only if the terms of the panel request are broad enough, it would seem that the case for application of this requirement is as strong, if not stronger, in respect of measures for

[55] EC's second written submission, para. 19.

[56] EC's second written submission, para. 20; EC's oral statement at the second substantive meeting, para. 4.

[57] In particular, Brazil points to its first written submission, paras. 36, 37, 38, 39, 99, 126, 135, 142 and 143; Brazil's oral statement at the first substantive meeting, para. 37; Brazil's replies to Panel question Nos. 1 and 11; Brazil's second written submission, paras. 52-59 and 87-90.

[58] Panel question No. 11.

[59] Appellate Body Report, *Chile – Price Band System*, para. 144.

which a relationship with measures specifically identified in the panel request is less apparent, as in the present case, in order to preserve a responding Member's due process rights.[60]

7.28 Turning now to the question of whether the complainants' Panel requests are broad enough to include EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003, we refer to the specific terms of Brazil's and Thailand's Panel requests, relevant excerpts of which are set out above in paragraphs 7.17 and 7.18 respectively. We consider that those terms contrast with the terms of the panel requests at issue in a number of previous cases where the various panels included in their terms of reference measures that had not been specifically identified in the panel requests. The relevant aspects of the panel requests in each of those cases were broadly worded, referring to the challenged measures in generic terms and/or using inclusive language.[61] In comparison, Brazil's and Thailand's Panel requests are much more narrowly drafted and, in our view, are not broad enough to include EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003.

7.29 In particular, the identification of the measures at issue in Brazil's Panel request is specific and narrow and does not appear to anticipate inclusion of any measures in addition to those specifically identified, namely EC Regulation No. 1223/2002 and EC Decision 2003/97/EC.

7.30 Thailand's Panel request also specifically refers to those measures. However, in contrast to Brazil's Panel request, Thailand's reference to those measures is made in the context of its challenge of a measure, which Thailand labels as "the classification of frozen boneless salted chicken cuts". The Panel posed a question to Thailand in an attempt to clarify what Thailand meant by the reference to "classification" in its Panel request.[62] Even though Thailand did not respond to the Panel's question, the Panel considers that the reference to "the classification of frozen boneless salted chicken cuts" in Thailand's Panel request could only be interpreted in one of three ways. Firstly, it could be interpreted as meaning that Thailand was seeking to challenge the European Communities' tariff classification in respect of a particular shipment or particular shipments of frozen boneless salted chicken cuts. Secondly, it could be interpreted as meaning that Thailand was seeking to challenge the European Communities' customs classification practice with regard to frozen boneless salted chicken cuts in general whether under EC Regulation No. 1223/2002 and EC Decision 2003/97/EC or under any other measure that might affect such practice, such as EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003. Thirdly, the reference to "classification" in Thailand's Panel request could

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[60] Such rights were affirmed by the Appellate Body in *US – Carbon Steel*. Appellate Body Report, *US – Carbon Steel*, para. 126.

[61] For example, in *Chile – Price Band System*, the panel request referred to "Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, as well as the *regulations and complementary provisions and/or amendments*" (emphasis added). In *EC – Bananas III*, the panel request referred to "a *regime* for the importation, sale and distribution of bananas established by Regulation 404/93 (OJ L47 of 25 February 1993, p. 1), and *subsequent EC legislation, regulations and administrative measures, including* those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime" (emphasis added). The panel request in *Argentina – Textiles and Apparel* referred to "1. Resolutions 304/95, 305/95, 103/96, 299/96, Decree 998/95 *and other measures which impose specific duties on various textile, apparel or footwear* items in excess of the bound rate of 35 per cent ad valorem provided in Argentina'a [*sic*] Schedule LXIV; 2. Decrees 2277/94, 389/95 *and other measures which impose a statistical tax of 3 per cent ad valorem*, effective March 1995, on imports from all sources other than MERCOSUR countries; and 3. Resolutions 622/95, 26/96, 850/96 *and other measures which were imposed without proper notification and a meaningful opportunity to comment* being afforded and which impose unnecessary obstacles to trade, such as requirements relating to affidavits of product components mandating that, among other things, footwear, textile and apparel items be labelled with the number of the corresponding affidavit of product components assigned by the Undersecretariat of Foreign Trade" (emphasis added). In *Australia – Salmon*, the panel request referred to "the Australian Government's *measures* prohibiting the importation of fresh, chilled or frozen salmon ... *include* Quarantine Proclamation 86A, dated 19 February 1975, and *any amendments or modifications to it*" (emphasis added).

[62] Panel question No. 6.

be interpreted as adding nothing to the specific reference to EC Regulation No. 1223/2002 and EC Decision 2003/97/EC.

7.31 In our view, even if Thailand intended to challenge the European Communities' tariff classification in respect of a particular shipment or particular shipments of frozen boneless salted chicken cuts, this intention is not supported by the terms of Thailand's Panel request. In particular, we note that the reference to "the classification of frozen boneless salted chicken cuts" in Thailand's Panel request is immediately followed by "*as provided* in the EC Regulation No. 1223/2002 ... and elaborated in the EC Commission Decision ("Decision") of 31 January 2003" (emphasis added). In our view, EC Regulation No. 1223/2002 and EC Decision 2003/97/EC cannot be interpreted as relating to one or more specific shipments of frozen boneless salted chicken cuts.[63] In addition, even if Thailand intended to challenge the European Communities' customs classification practice with regard to frozen boneless salted chicken cuts in general whether under EC Regulation No. 1223/2002 and EC Decision 2003/97/EC or under any other measure that might affect such practice, such as EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003, it is our view that this intention is not supported by the terms of Thailand's Panel request either. We consider that the specific reference to EC Regulation No. 1223/2002 and EC Decision 2003/97/EC following the more general reference to "classification" without additional language in Thailand's Panel request to indicate that any measure that could affect such practice was also included in the Panel's terms of reference militates against such an interpretation. Therefore, in our view, the reference to "the classification of frozen boneless salted chicken cuts" in Thailand's Panel request adds nothing to the specific reference to EC Regulation No. 1223/2002 and EC Decision 2003/97/EC.

7.32 The Panel concludes that the terms of the complainants' respective Panel requests are not broad enough to include EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003. Accordingly, we consider that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 are outside the Panel's terms of reference. However, in our view, this does not mean that the content and effect of EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 cannot provide us with useful context for our consideration of the measures that are within our terms of reference.

3. Products

7.33 The next issue for our determination is what are the specific products within our terms of reference?

(a) Arguments of the parties

7.34 **Brazil** and **Thailand** argue that the products at issue – that is, those that have been accorded less favourable treatment for the purposes of Article II of the GATT 1994 – are frozen boneless salted chicken cuts that have been deeply and homogeneously impregnated with salt in all parts with a total salt content of not less than 1.2% by weight.[64]

7.35 The **European Communities** submits that this dispute concerns frozen boneless chicken cuts to which salt has been added resulting in a salt content by weight of 1.2% – 3%.[65] The European Communities submits that Brazil's and Thailand's Panel requests confirm that the complainants are concerned with meat having a salt content of greater than 1.2% but not more than 3%.[66]

[63] We explain our interpretation of these measures in more detail below in paragraph 7.38 *et seq.*
[64] Brazil's reply to Panel question No. 10; Thailand's second written submission, para. 12.
[65] EC's first written submission, para. 17.
[66] EC's first written submission, para. 18; EC's reply to Panel question No. 22.

(b) Analysis by the Panel

7.36 The Panel considers that, in this case, the measures within our terms of reference determine the products that are within our terms of reference. Since we have concluded that our terms of reference are restricted to EC Regulation No. 1223/2002 and EC Decision 2003/97/EC, it follows that the products covered by our terms of reference are frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% – 3%.[67]

4. Summary and conclusions regarding the Panel's terms of reference

7.37 The Panel concludes that the measures within our terms of reference are EC Regulation No. 1223/2002 and EC Decision 2003/97/EC. Hereafter, we refer to these measures collectively as the "measures at issue". The Panel also concludes that the products included in our terms of reference are those covered by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC – namely, frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% – 3%. Hereafter, we refer to these products as the "products at issue".

D. INTERPRETATION OF THE EFFECT OF THE MEASURES AT ISSUE

(i) EC Regulation No. 1223/2002

7.38 The parties do not appear to dispute the content and effect of EC Regulation No. 1223/2002. In particular, EC Regulation No. 1223/2002 concerns the classification of frozen boneless chicken cuts that have been impregnated with salt in all parts, with a salt content by weight of 1.2% – 1.9%. In particular, recital (3), Article 1 and the Annex of the EC Regulation No. 1223/2002 make it clear that such chicken cuts are to be classified under subheading 0207.14.10 of the European Communities' CN.[68] In addition, Article 2 effectively provides that BTIs[69] for products covered by the Regulation ceased to be valid following the expiration of a period of three months after the entry into force of the Regulation.

(ii) EC Decision 2003/97/EC

Arguments of the parties

7.39 **Thailand** argues that EC Decision 2003/97/EC elaborates upon EC Regulation No. 1223/2002 because the former measure uses the same reasoning to revoke BTIs for frozen boneless chicken cuts with a salt content of 1.9% – 3% as that used in the latter for the classification of frozen boneless chicken cuts with a salt content of 1.2% – 1.9%. Thailand submits that, therefore, the legal effect of EC Decision 2003/97/EC is that frozen boneless chicken cuts with a salt content of 1.9% – 3% must also be classified under subheading 0207.14.10 of the CN.[70]

[67] In this regard, we note that, in paragraph 7.47 below, we conclude that the measures within our terms of reference have the practical effect of classifying frozen boneless chicken cuts that have been deeply and homogenously impregnated with salt, with a salt content of 1.2% - 3%, under subheading 0207.14.10 of the European Communities' CN.

[68] Article 1 and the Annex of EC Regulation No. 1223/2002 are set out respectively in paragraphs 2.30 and 2.31 above. Recital (3) states that "[p]ursuant to the said general rules, the goods described in column 1 of the table set out in the Annex to this Regulation should be classified under the CN code indicated in column 2, by virtue of the reasons set out in column 3".

[69] BTI notices provide economic operators with binding tariff information including, *inter alia*, information regarding the classification of the goods in question: "EC Customs Classification Rules: Should Ice Cream Melt?", *Michigan Journal of International Law*, (1994), Vol. 15, No. 4 contained in Exhibit THA-18, page 1264.

[70] Thailand's second written submission, para. 6.

7.40 The **European Communities** submits that Article 1 of EC Decision 2003/97/EC limits the legal effect of that Decision to the revocation of BTIs listed in the Annex thereto.[71] According to the European Communities, the recitals in an EC Commission Decision, including EC Decision 2003/97/EC, have no legal effect. The European Communities submits that such recitals only provide the reasons for which a particular decision has been adopted.[72]

Analysis by the Panel

7.41 Thailand has submitted that the legal effect of EC Decision 2003/97/EC is to classify frozen boneless chicken cuts impregnated with salt, with a salt content of 1.9% – 3%, under subheading 0207.14.10 of the CN, in addition to frozen boneless chicken cuts impregnated with salt with a salt content of 1.2% – 1.9%, the latter of which are classified under subheading 0207.14.10 pursuant to EC Regulation No. 1223/2002.[73]

7.42 The Panel notes that EC Decision 2003/97/EC contains two legally operative Articles – namely, Article 1 and Article 2. These Articles provide that:

"*Article 1*

> The binding tariff information notices listed in column 1 of the table annexed issued by the customs authorities shown in column 2 for the tariff classification shown in column 3 must be withdrawn at the earliest possible date, and in any case not later than 10 days from the notification of this decision.

Article 2

> This Decision is addressed to the Federal Republic of Germany."

7.43 Articles 1 and 2 of EC Decision 2003/97/EC indicate to the Panel that the sole legal effect of the Decision is to mandate Germany to revoke 66 BTIs issued by German customs authorities, which are referred to in the table annexed to the Decision. The BTIs covered by EC Decision 2003/97/EC classified frozen boneless chicken cuts impregnated with salt, with a salt content of 1.9% - 3%, under heading 02.10 of the CN.[74]

7.44 The Panel notes that the recitals to EC Decision 2003/97/EC refer to similarities that are said to exist between, on the one hand, frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% - 1.9%, and, on the other hand, frozen boneless chicken cuts impregnated with salt, with a salt content of 1.9% - 3%. In particular, recital (7) states that "[p]roducts also consisting of boneless chicken cuts which have been frozen for long-term conservation and have a salt content of 1.9% - 3% are similar to the products covered by Regulation 1223/2002. The addition of salt in such quantities is not such as to alter the products' character as frozen poultry meat of heading 0207". Recital (8) goes on to state that "[i]n order to safeguard equality between operators, which would be endangered if like cases were not treated alike, and to ensure uniform application of the CN, the BTIs issued by Germany on frozen poultry meat, containing 1.9% - 3% salt, listed in the annex, must be withdrawn".

7.45 The Panel understands that recitals to an EC Decision, including the recitals to EC Decision 2003/97/EC, have no legal effect other than to ensure that the provisions of the Decision that do have

[71] EC's reply to Panel question No. 19(a).
[72] EC's reply to Panel question No. 19(c).
[73] Thailand's second written submission, para. 6.
[74] While it is not entirely clear from the text of EC Decision 2003/97/EC that the BTIs affected by that Decision concern frozen boneless chicken cuts impregnated with salt, with a salt content of 1.9% - 3%, the European Communities has indicated that that is the case: EC's first written submission, paras. 96-98.

legal effect, are interpreted and applied in a manner that is in keeping with the spirit of the law and to provide reasons for which the Decision has been adopted, as has been submitted by the European Communities.[75]

7.46 To the extent that all frozen boneless chicken cuts impregnated with salt, with a salt content of 1.9% - 3%, are covered by the BTIs that have been revoked pursuant to that Decision, we understand from Articles 1 and 2 of the Decision when read together with the relevant recitals that, as a matter of practice, EC Decision 2003/97/EC prohibits classification of such products under heading 02.10 of the CN. We also understand that such products are, as a matter of fact, classified by the European Communities under subheading 0207.14.10 of the CN.[76] Therefore, the Panel understands that, as a factual matter, as a result of EC Decision 2003/97/EC, frozen boneless chicken cuts impregnated with salt, with a salt content of 1.9% - 3%, will be classified under subheading 0207.14.10 of the CN.

(iii) Summary and conclusions regarding the effect of the measures at issue

7.47 In summary, it is the Panel's view that the measures at issue have the practical effect of classifying frozen boneless chicken cuts that have been deeply and homogenously impregnated with salt, with a salt content of 1.2% – 3%, under subheading 0207.14.10 of the European Communities' CN. We note that this view is confirmed by a statement made by the European Communities to the effect that the products covered by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC fall under heading 02.07 of the EC Schedule.[77]

E. CHARACTERIZATION OF PANEL'S TASK IN THIS CASE

1. Arguments of the parties

7.48 **Brazil** and **Thailand** submit that they decided to bring the present dispute to the WTO, and not the WCO, because they understand this to be a case of less favourable tariff treatment, within the meaning of Article II of the GATT 1994, and not a reclassification case *per se*.[78] More particularly, Thailand submits that the issue in this dispute is not whether the products at issue fall within heading 02.10 of the HS, which issue the WCO may be competent to assess. Rather, the issue is whether the products at issue fall within the terms of heading 02.10 of the EC Schedule as the European Communities understood the heading in 1994, a matter which Thailand submits the WCO is not competent to assess. Brazil adds that, in assessing whether the European Communities has violated Article II of the GATT 1994, the Panel must examine the EC Schedule according to the rules of treaty interpretation found in the *Vienna Convention*. Brazil submits that, while the HS and its Explanatory Notes are relevant context and that WCO decisions may be relevant as subsequent practice in the interpretation of the EC Schedule, they are only part of the interpretative exercise the Panel must undertake.[79] Thailand further submits that any decision by the WCO would not be determinative of the rights and obligations of Members in terms of tariff treatment.[80] Brazil adds that decisions by the HS Committee of the WCO, including those that arise from dispute settlement, are not binding and

[75] The Panel notes that, pursuant to Article 11 of the DSU (which is set out in full in para. 7.55 below), we are required to undertake an "objective" assessment of the matter before us. In our view, since the European Communities is in the best position to interpret the meaning and effect of its own laws, we accept its argument that the recitals in an EC Commission Decision, including EC Decision 2003/97/EC, have no legal effect: EC's reply to Panel question No. 19(c).

[76] EC's reply to Panel question No. 25.

[77] EC's reply to Panel question No. 25.

[78] Brazil's reply to Panel question No. 9; Thailand's second written submission, para. 17.

[79] Brazil's comments on the WCO's replies to the Panel's questions to the WCO dated 2 December 2004; Thailand's comments on the WCO's replies to the Panel's questions to the WCO dated 2 December 2004.

[80] Thailand's second written submission, para. 18.

there are no effective mechanisms that guarantee implementation or enforcement of decisions in that forum.[81]

7.49 Thailand also argues that Article 3.2 of the DSU makes clear that the WTO's dispute settlement system is the forum to resolve disputes between WTO Members concerning their rights and obligations under the covered agreements.[82] Thailand argues that, furthermore, Article 23 of the DSU provides that, when Members seek redress of a violation of obligations under the covered agreements, they must have recourse to and abide by the rules and procedures of the WTO dispute settlement system.[83] Brazil adds that, since the WTO is a Member-driven organization, it does not have the power, or mandate, to act on behalf of its Members; nor has any WTO representative or body been empowered to solve a dispute concerning two or more WTO Members outside the scope of the WTO. Brazil and Thailand submit that, while the Panel has the right to seek information and technical advice from any individual or body which it deems appropriate, as provided under Article 13.1 of the DSU, it does not have the right to abdicate its function under Article 11 of the DSU, which is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. Brazil argues that, accordingly, it is the Panel's task, rather than the task of the HS Committee, to make an objective assessment of the matter before it, including the assessment of the facts of the case and the applicability of, and conformity with, the covered agreements.[84]

7.50 The **European Communities** submits that both complainants refused the European Communities' suggestion, made at the consultation stage, to take this dispute to the WCO to the extent that it concerns matters of classification.[85] The European Communities argues that, given the respective institutional frameworks of the WTO and the WCO, it is important that the nature of WTO dispute proceedings should remain distinct from decision-making in the context of the WCO.[86] The European Communities argues that, nevertheless, the task facing the Panel in this case is different from that which the WCO would face were the matter to come before that body. The European Communities explains that the WCO would use the procedures of the HS Committee to determine under which heading the products at issue fall. The European Communities submits that, in contrast, the Panel does not need to make a positive ruling of this kind. Rather, it simply has to determine whether the complainants have discharged their burden of proving that the European Communities failed to accord to the product at issue the treatment agreed under its Schedule by not providing it the tariff treatment envisioned under heading 02.10.[87]

7.51 In response, **Brazil** argues that, just prior to making its request for consultations at the WTO, it sought guidance and clarification from the WCO with respect to the meaning of headings 02.07 and 02.10, in view of the matter at issue in this case. Brazil submits that, at that time, the WCO did not provide any clarification with respect to the interpretation of these headings but, rather, simply directed Brazil to the WCO dispute settlement provision found in the HS Convention.[88]

2. Comments by the World Customs Organization

7.52 At the conclusion of the Panel's first substantive meeting with the parties, the Panel indicated its intention to seek information from the WCO pursuant to Article 13.1 of the DSU.[89] The parties

[81] Brazil's reply to Panel question No. 9.
[82] Thailand's second written submission, para. 19.
[83] Thailand's second written submission, para. 20.
[84] Brazil's comments on the WCO's replies to the Panel's questions to the WCO dated 2 December 2004; Thailand's comments on the WCO's replies to the Panel's questions to the WCO dated 2 December 2004.
[85] EC's reply to Panel question No. 74.
[86] EC's oral statement at the second substantive meeting, para. 13.
[87] EC's oral statement at the second substantive meeting, para. 12.
[88] Brazil's reply to Panel question No. 9 referring to Exhibit BRA-28.
[89] Article 13.1 of the DSU, entitled "Right to Seek Information", provides that: "Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate.

were invited to make comments in this regard. The Panel sought such information from the WCO through questions posed in letters from the Panel dated 30 September 2004 and 19 November 2004. The responses to those letters are contained in Annex C to this Report.

7.53 By way of general comment in its replies to the Panel's letter of 19 November 2004, the WCO states that it appears that the present dispute concerns a classification question involving several contracting parties to the HS Convention. The WCO refers to Article 10 of the HS Convention, which stipulates that "any dispute between Contracting Parties concerning the interpretation or application of this Convention shall, so far as possible, be settled by negotiation between them" and "any dispute which is not so settled shall be referred by the Parties to the dispute to the Harmonized System Committee which shall thereupon consider the dispute and make recommendations for its settlement." The WCO suggests that the settlement procedures contained in the HS Convention should be followed by the parties to this dispute before the Panel makes its decision.[90]

3. Analysis by the Panel

7.54 The Panel recalls that it is called upon in this dispute to determine whether or not the measures at issue violate Article II:1(a) and Article II:1(b) of the GATT 1994. In the process of making such a determination, we will need to determine whether the measures at issue result in treatment that is less favourable than that provided for in the EC Schedule and whether the imposition of duties and conditions on the products at issue is in excess of the duties and conditions provided for in the EC Schedule. As explained in greater detail below[91], this task involves the interpretation of a treaty term of the WTO Agreement and the GATT 1994, namely the WTO concession contained in heading 02.10 of the EC Schedule.[92]

7.55 The Panel notes that it is bound by Article 11 of the DSU. Article 11 provides that:

> "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."

7.56 We understand that, once seized of a matter, Article 11 prevents a panel from abdicating its responsibility to the DSB. In other words, in the context of the present case, we lack the authority to refer the dispute before us to the WCO or to any other body.[93]

However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information."

[90] WCO's general comments in its replies to the Panel's questions to the WCO dated 2 December 2004.

[91] See paragraph 7.87 *et seq* below.

[92] We recall that in para. 7.6 above, we concluded that concessions contained in the EC Schedule are treaty terms of the GATT 1994 and the WTO Agreement.

[93] The Panel notes that, in *India – Quantitative Restrictions*, the panel submitted to the IMF a number of questions regarding India's balance-of-payments situation. The panel gave considerable weight to the views expressed by the IMF in its reply to these questions. India claimed on appeal that the panel improperly delegated to the IMF its duty to make an objective assessment of the matter and, therefore, acted inconsistently with Article 11 of the DSU. The Appellate Body stated that: "[N]othing in the Panel Report supports India's

7.57 In addition, we note that all the parties to this dispute, including the respondent, appear to consider that this case is appropriately adjudicated by us.[94] In this regard, we note that Article 23.1 of the DSU provides that:

> "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."

7.58 In the Panel's view, Article 23.1 supports the view that, in the context of this dispute, which involves the question of whether the measures at issue result in treatment that is less favourable than that provided for in the EC Schedule in contravention of Article II of the GATT 1994, the complainants have a right to recourse to the WTO dispute settlement mechanism.

7.59 The Panel is mindful of the respective jurisdiction and competence of the WCO and the WTO and, in fact, we specifically raised this issue with the parties during the course of these proceedings.[95] Nevertheless, we consider that we have been mandated by the DSB in this dispute to determine whether the European Communities has violated Article II of the GATT 1994 with respect to the products at issue. As mentioned above in paragraph 7.54, in so doing, we will need to interpret the WTO concession contained in heading 02.10 of the EC Schedule.

F. ARTICLE II OF THE GATT 1994

1. Main claims of the parties

(a) Parties' claims

7.60 **Brazil** and **Thailand** claim that, through EC Regulation No. 1223/2002 and EC Decision 2003/97/EC, the European Communities is acting inconsistently with its obligations under Article II:1(a) and Article II:1(b) of the GATT 1994 by according less favourable treatment to the products at issue than that provided for in the EC Schedule.[96]

7.61 The **European Communities** claims that the treatment accorded by the European Communities to frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% – 3%, under EC Regulation No. 1223/2002 and EC Decision 2003/97/EC respects the bindings contained in the EC Schedule and involves no infringement of Article II:1(a) and Article II:1(b) of the GATT 1994.[97]

(b) Analysis by the Panel

7.62 Article II:1 of the GATT 1994 provides that:

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argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions." Appellate Body Report, *India – Quantitative Restrictions*, para. 149. We understand the Appellate Body's comments in that case to support the view expressed by us in paragraph 7.56.

[94] See, for example, Brazil's comments on the WCO's replies to the Panel's questions to the WCO dated 2 December 2004; Thailand's comments on the WCO's replies to the Panel's questions to the WCO dated 2 December 2004; EC's oral statement at the second substantive meeting, para. 12.

[95] See Panel question No. 9.

[96] Brazil's first written submission, para. 192; Thailand's first written submission paras. 157-158.

[97] EC's first written submission, para. 211.

> "(a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."

7.63 The Appellate Body in *Argentina – Textiles and Apparel* elaborated upon the meaning and scope of Article II of the GATT 1994:

> "The terms of Article II:1(a) require that a Member 'accord to the commerce of the other Members treatment no less favourable than that provided for' in that Member's Schedule…. Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule."[98]

7.64 As for the relationship between subparagraphs (a) and (b) of Article II of the GATT 1994, the Appellate Body in *Argentina – Textiles and Apparel* stated that:

> "In accordance with the general rules of treaty interpretation set out in Article 31 of the *Vienna Convention*, Article II:1(b), first sentence, must be read in its context and in light of the object and purpose of the GATT 1994. Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members 'treatment no less favourable than that provided for' in its Schedule. It is evident to us that the application of customs duties *in excess of* those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes 'less favourable' treatment under the provisions of Article II:1(a) … ."[99]

7.65 In light of the foregoing, in determining whether or not the measures at issue are inconsistent with Article II:1(a) and Article II:1(b) of the GATT 1994, we will need to ascertain: (a) the treatment accorded to the products at issue under the EC Schedule; (b) the treatment accorded to the products at issue under the measures at issue; and (c) whether the measures at issue result in less favourable treatment of the products at issue than that provided for in the EC Schedule and, more particularly, whether those measures result in the imposition of duties and conditions on the products at issue in excess of those provided for in the EC Schedule.

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[98] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.
[99] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

2. Treatment of the products at issue

(a) Arguments of the parties

7.66 **Brazil** and **Thailand** submit that less favourable treatment has been accorded to the products at issue in this case in violation of Article II of the GATT 1994 because the European Communities changed its customs classification so that frozen salted chicken that had previously been classified under subheading 0210.90.20 and subject to an *ad valorem* tariff of 15.4% is now classified as frozen chicken under subheading 0207.14.10 and is subject to a tariff of 102.4€/100kg/net as well as being potentially subject to special safeguard measures pursuant to Article 5 of the Agreement on Agriculture. They argue that the application of a specific rate of 102.4€/100kg/net leads to a tariff rate in excess of the bound rate for salted chicken provided for in the EC Schedule and constitutes "treatment less favourable" within the meaning of Article II of the GATT 1994.[100] Thailand submits that the European Communities has not disputed the validity of price data demonstrating that the *ad valorem* equivalent of the specific duty of 102.4€/100kg/net for the products at issue following the introduction of the measures at issue exceeds 15.4%.[101] Furthermore, Thailand submits that the European Communities has not established a mechanism to ensure that, in respect of the new description of the products at issue, the specific duty of 102.4€/100 kg/net would not exceed the 15.4% *ad valorem* bound rate previously applied to that product.[102] Thailand submits that, therefore, the measures at issue have resulted in treatment less favourable than that provided for in the EC Schedule.[103] Brazil and Thailand argue, in addition, that the fact that the same product is now potentially subject to the application of a special safeguard measure under the Agreement on Agriculture is also "treatment less favourable" than that provided for in the EC Schedule for "salted" meat.[104]

7.67 The **European Communities** submits that the products covered by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC fall under heading 02.07 of the EC Schedule and are subject to a duty of 102.4€ per 100 kilogram.[105] The European Communities notes that, in addition, these products may be subject to the special safeguard mechanism provided for in Article 5 of the Agreement on Agriculture. The European Communities also notes that it has a tariff rate quota covering this tariff line of 15,500 tonnes from which Brazil and Thailand benefit, among others. The European Communities notes that the in-quota rate is zero.[106] The European Communities acknowledges that, currently, it has no mechanism in place that would subject the products covered by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC to a duty not exceeding 15.4% *ad valorem*. However, the European Communities submits that it is not necessary to have such a mechanism in place because the products at issue are not entitled to benefit from the European Communities' concession of a 15.4% *ad valorem* rate under subheading 0210.90.20 of the EC Schedule.[107]

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[100] Brazil's first written submission, paras. 9, 54 and 59; Thailand's first written submission, paras. 19-20, 54, 58 and 155.

[101] Indeed, in its reply to Panel question No. 95, the EC confirmed that it did not dispute the pricing data provided by the complainants.

[102] Thailand's first written submission, para. 12.

[103] Brazil's first written submission, paras. 9, 54 and 59; Thailand's first written submission, paras. 19-20, 54, 58 and 155.

[104] Brazil's first written submission, paras. 9, 54 and 59; Thailand's first written submission, paras. 19-20, 54.

[105] EC's reply to Panel question No. 25.

[106] EC's reply to Panel question No. 94.

[107] EC's reply to Panel question No. 25.

(b) Analysis by the Panel

(i) Treatment in the EC Schedule

7.68 As noted above in paragraph 7.65, the first matter for the Panel's determination is the treatment accorded to the products at issue under the EC Schedule. Of relevance to this dispute is the treatment granted in the EC Schedule for subheading 0207.14.10 and for subheading 0210.90.20. Excerpts of these subheadings from the EC Schedule are set out below:

Tariff item number	Description of products	Final bound rate of duty	Special safeguard
0207	Meat and edible offal, of the poultry of heading No. 0105, fresh, chilled or frozen:		
(…)			
	- Poultry cuts and offal other than livers, frozen:		
0207.41	-- Of fowls of the species Gallus domesticus:		
	--- Cuts:		
0207.41.10	---- Boneless	1024 ECU/T	SSG
(…)			

Tariff item number	Description of products	Final bound rate of duty	Special safeguard
0210	Meat and edible meat offal, salted, in brine, dried, smoked; edible flours and meals of meat or meat offal		
(…)			
0210.90	- Other, including edible flours and meals of meat or meat offal:		
	-- Meat:		
(…)			
0210.90.20	--- Other	15.4%	--
(…)			

7.69 The Panel notes as a preliminary matter that most of the argumentation that has been advanced by the parties in this case relates to the 4-digit level of the headings in question – that is, concerning headings 02.07 and 02.10 rather than, respectively, subheadings 0207.41.10 and 0210.90.20. As explained in more detail below in paragraphs 7.84 *et seq*, this focus is associated with the fact that the current dispute appears to turn on the meaning of the term "salted", a reference to which is found at the 4-digit level in heading 02.10.

7.70 It is clear to the Panel from the excerpts of the EC Schedule set out above in paragraph 7.68 that products falling within the scope of subheading 0207.41.10 are subject to a bound specific duty rate of 1024 ECU/T (i.e. 102.4€/100kg/net). In addition, such products may be subject to a special safeguard measure provided for in Article 5 of the Agreement on Agriculture. Products falling under subheading 0210.90.20 are subject to a final bound duty rate of 15.4% *ad valorem*.

(ii) Treatment under the measures at issue

7.71 The Panel indicated above in paragraph 7.65 that the second matter for our determination is the treatment accorded to the products at issue under the measures at issue. We found above in paragraph 7.47 that EC Regulation No. 1223/2002 and EC Decision 2003/97/EC have the effect of classifying frozen boneless chicken cuts that have been deeply and homogenously impregnated with salt, with a salt content of 1.2% – 3%, under subheading 0207.14.10 of the European Communities'

CN. In addition, the European Communities has informed us that the products at issue – that is, those covered by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC – are subject to a duty of 102.4€ per 100 kilogram.[108] In light of the foregoing, it is clear that the measures at issue treat the products at issue as if they fall under heading 02.07 of the European Communities' CN.[109]

(iii) Less favourable treatment

7.72 As noted above in paragraph 7.65, the third matter for our determination is whether the measures at issue result in less favourable treatment of the products at issue than that provided for in the EC Schedule and, more particularly, whether those measures result in the imposition of duties and conditions on the products at issue in excess of those provided for in the EC Schedule.

7.73 Regarding the question of what may constitute less favourable treatment for the purposes of Article II of the GATT 1994, the Appellate Body in *Argentina – Textiles and Apparel* stated that:

> "A tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to impose a duty that is less than that provided for in its Schedule. The principal obligation in the first sentence of Article II:1(b) ... requires a Member to refrain from imposing ordinary customs duties *in excess of* those provided for in that Member's Schedule."[110]

In other words, if duty is levied on a product in excess of that provided for in a Member's schedule, "less favourable treatment" will exist within the meaning of Article II of the GATT 1994.

7.74 The Panel notes that the imposition of a specific duty on a product in cases where the relevant Member's schedule provides for an *ad valorem* duty or *vice versa* will not necessarily lead to a violation of Article II of the GATT 1994. In *Argentina – Textiles and Apparel*, the Appellate Body stated that "the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule." [111]

7.75 In this case, the Panel recalls that, under the measures at issue, the products at issue are treated as if they fall under heading 02.07 of the CN. In our view, there is clearly a possibility that the price of the products at issue will 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 EC Schedule. Indeed, pricing data before the Panel indicate that the duty levied on the products at issue can and has in the past exceeded 15.4% *ad valorem*, being the bound duty rate for products covered by heading 02.10.[112] The European Communities has indicated that it does not dispute such pricing

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[108] EC's reply to Panel question No. 25.

[109] In this regard, we note that the European Communities has stated that the products covered by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC fall under heading 02.07 of the EC Schedule: EC's reply to Panel question No. 25.

[110] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 46.

[111] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 55. That case concerned Argentina's commitment to bind imports of textiles, apparel and footwear at an *ad valorem* rate of 35%. However, following the conclusion of the Uruguay Round, imports of textiles and apparel into Argentina were subject to either an *ad valorem* tax of 35% or a minimum specific duty, whichever was the higher. The panel found that, because Argentina bound an *ad valorem* duty of 35%, it could not then apply a specific minimum duty. As noted above in paragraph 7.74, the Appellate Body did not agree with the panel in this respect.

[112] In paragraph 57 of its first written submission, Brazil submits that, on the basis of average annual prices of salted chicken meat exported from Brazil to the EC from 1998 - 2002, the equivalent *ad valorem* rate of duty imposed on such meat ranged from 42.17% to 58.4%. In paragraph 11 of its first written submission, Thailand submits that, on the basis of the average annual price of salted chicken exported from Thailand to the

data.[113] Further, the European Communities has acknowledged that, currently, it has no mechanism in place that would subject the products covered by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC to a duty not exceeding 15.4% *ad valorem*.[114] In light of the foregoing, if we conclude that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule rather than the concession contained in heading 02.07, there is no question that the treatment accorded to those products under the measures at issue is less favourable than that provided for in the EC Schedule.

3. Burden of proof

7.76 In order for the Panel to determine whether, in fact, the products at issue have been accorded less favourable treatment in violation of Article II of the GATT 1994, it is the Panel's view that it is necessary to first determine what must be proved by the complainants to justify their claims under Article II.

7.77 The Panel notes that, in *US – Wool Shirts and Blouses*, the Appellate Body stated that:

> "[I]t is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.
>
> In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."[115]

7.78 The complainants' fundamental claim in this dispute is that the products at issue fall within the scope of the concession contained in heading 02.10 of the EC Schedule whereas, under the measures at issue, they are currently classified as if they fall within the scope of the concession contained in heading 02.07 of the EC Schedule.[116] In light of the rules governing the burden of proof, it is our view that the complainants bear the burden to prove that the products at issue are, in fact, covered by the concession contained in heading 02.10 of the EC Schedule.

4. Summary and conclusions regarding the interpretation of Article II of the GATT 1994

7.79 The key issue for the Panel's determination in this dispute is whether the measures at issue result in less favourable treatment of the products at issue and, more particularly, whether those measures result in the imposition of duties and conditions on the products at issue in excess of those provided for in the EC Schedule. As noted previously, the complainants' fundamental claim is that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule

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EC from 1997-2002, the equivalent *ad valorem* rate imposed on such chicken was 43%. Thailand also submits that, following the entry into force of EC Regulation No. 1223/2002 on 29 July 2002, on the basis of the annual price of salted chicken exported from Thailand, the *ad valorem* equivalent rate of duty was 51.2% in 2002 and 58.9% in 2003: Thailand's first written submission, paras. 150-151. See also Exhibit THA-2.

[113] EC's reply to Panel question No. 95.

[114] EC's reply to Panel question No. 25.

[115] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14 (DSR 1997:I, 323 at 325).

[116] See, for example, Brazil's second written submission, para. 1 and Thailand's first written submission, para. 66. We recall that we determined above in paragraph 7.47 that the measures at issue have the effect of classifying frozen boneless chicken cuts that have been deeply and homogenously impregnated with salt, with a salt content of 1.2%-3%, under subheading 0207.14.10 of the European Communities' CN.

whereas they are currently treated as if they are covered by the concession contained in heading 02.07 of the EC Schedule pursuant to the measures at issue. Therefore, the Panel considers that the complainants bear the burden to prove that the products at issue are, in fact, covered by the concession contained in heading 02.10 of the EC Schedule. If the Panel concludes that the products at issue are so covered, there is no question that the treatment accorded to those products under the measures at issue is less favourable than that provided for in the EC Schedule because undisputed pricing data indicate that the duty levied on the products at issue can and has exceeded 15.4% *ad valorem*, being the bound duty rate for products covered by the concession contained in heading 02.10.

7.80 We turn now to the relevant aspects of the EC Schedule, which we must interpret in order to determine whether the terms of the concession contained in heading 02.10 of that Schedule cover the products at issue.

G. INTERPRETATION OF THE EC SCHEDULE

1. The essence of the interpretative issue

(a) Arguments of the parties

7.81 The **European Communities** denies that the products at issue are covered by heading 02.10 of the EC Schedule.[117] The European Communities explains that it is not arguing that, because the products at issue are frozen, and heading 02.07 of the EC Schedule covers "frozen" chicken, therefore they should be included under that heading regardless of whether they had been preserved by salting. The European Communities clarifies that, rather, the products at issue are not "salted" because, in order to qualify under heading 02.10, through salting, the product must have undergone a process in order to place it in a state of preservation.[118] According to the European Communities, the key element of heading 02.10 is the notion of preservation.[119] In addition, the European Communities submits that, in order to be preserved with salt, meat should be deeply and homogenously impregnated with a level of salt sufficient to ensure long-term preservation.[120] The European Communities also argues that, with regard to heading 02.10, the principle of long-term preservation is well-entrenched and was confirmed as early as 1983 in the ECJ *Dinter* judgement.[121]

7.82 **Thailand** submits that the European Communities' argument that only meat products salted for the purpose of long-term preservation are "salted" within the meaning of heading 02.10 of its Schedule implies a novel approach to customs classification. To determine the customs classification of a product, it would no longer be sufficient to examine the physical characteristics of the product presented to customs; it would also be necessary to examine for what purpose the product was given its physical characteristics. Thailand submits that the European Communities' novel approach cannot be implied into the term "salted". Thailand also argues that such an approach is completely foreign to the HS and deviates from the normal practice of customs classification of Members. According to Thailand, such an approach would, if introduced into WTO law, create great uncertainty in the determination of the scope of the tariff concessions.[122]

7.83 **Brazil** submits that, in assessing the meaning, scope and content of the EC tariff concession at issue, the Panel should bear in mind that interpretative principles according to which the Panel is called upon to interpret the EC Schedule "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended". Brazil

[117] EC's oral statement at the second substantive meeting, para. 14.
[118] EC's oral statement at the second substantive meeting, para. 16.
[119] EC's second written submission, para. 23.
[120] EC's reply to Panel question No. 88.
[121] EC's reply to Panel question No. 109. The *Dinter* judgement is discussed in more detail below in paragraph 7.372 *et seq*.
[122] Thailand's oral statement at the first substantive meeting, para. 5.

argues that, in this case, the principles of interpretation cannot attribute to heading 02.10 of the EC Schedule the non-existent term or unintended concept of preservation.[123]

(b) Analysis by the Panel

7.84 The Panel recalls that, in paragraph 7.47 above, we concluded that the measures at issue – EC Regulation No. 1223/2002 and EC Decision 2003/97/EC – have the practical effect of classifying frozen boneless chicken cuts that have been deeply and homogenously impregnated with salt, with a salt content of 1.2% – 3%, under subheading 0207.14.10 of the European Communities' CN. Both measures state that the products covered by those measures (i.e. the products at issue) are "frozen for *long-term conservation*".[124]

7.85 With respect to heading 02.10, the European Communities has submitted that, in its regime, that heading is characterized by the notion of preservation.[125] The European Communities argues more particularly that, in order for a product to be salted for the purposes of heading 02.10, the salt must be sufficient to ensure "long-term preservation".[126] The Panel notes that the principle of "long-term preservation" is referred to in EC Regulation No. 1871/2003[127] and EC Regulation No. 2344/2003.[128]

7.86 The European Communities has confirmed that the substantive effect of the measures at issue is the same as the substantive effect of EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003, at least as far as frozen boneless chicken cuts that have been impregnated with salt are concerned.[129] In our understanding, these measures, like EC Regulation No. 1223/2002 and EC

[123] Brazil's oral statement at the first substantive meeting, para. 22 citing Appellate Body Report, *India – Patents (US)*, para. 45 and Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 98.

[124] See, in particular, column 3 of the Annex of EC Regulation No. 1223/2002 set out above in paragraph 2.31 and recital (7) of EC Decision 2003/97/EC set out above in paragraph 2.33.

[125] EC's second written submission, para. 23.

[126] EC's reply to Panel question No. 88.

[127] Article 1 of EC Regulation No. 1871/2003 provides that: "Additional note 7 to Chapter 2 of the Combined Nomenclature annexed as Annex I to Regulation (EEC) No 2658/87 is replaced by the following: 'For the purposes of heading 0210, the terms "meat and edible meat offal, salted, in brine" mean 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.'"

[128] According to the European Communities, EC Regulation No. 2344/2003 makes certain changes to the CN in order to incorporate changes proposed to the CN after 11 September 2003, being the date when the annual revision to the CN for 2004 was introduced. (The annual revision to the CN for 2004 was contained in EC Regulation No. 1789/2003, which was adopted on 11 September 2003 and was published on 30 October 2003.) The European Communities submits that EC Regulation 1871/2003 of 23 October 2003 was one such change (EC's replies to Panel question Nos. 20(a) and 33), which appears to be supported by the text of EC Regulation No. 2344/2003. In accordance with the amendment proposed in EC Regulation No. 1871/2003, EC Regulation No. 2344/2003 amends Additional Note 7 to Chapter 2 of the CN as follows: "For the purposes of heading 0210, the terms 'meat and edible meat offal, salted or in brine' mean meat and edible meat offal deeply and homogeneously impregnated with salt in all parts and having a total salt content by weight 1.2% or more, provided that it is the salting which ensures the long-term preservation.": EC Regulation No. 2344/2003, Annex, para. 1.

[129] In particular, the European Communities indicated that frozen chicken cuts that have been deeply and homogeneously impregnated with salt, with a salt content of 1.2% or more would be classified under subheading 0210.90.20 of the European Communities' CN pursuant to EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 provided that the goods were salted for preservation: EC's reply to Panel question No. 20 (b). To compare the substantive effect of EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 with the measures at issue, the Panel notes that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 relate to all "meat and edible meat offal" covered by heading 02.10 of the CN. The Panel recalls its conclusion in paragraph 7.47 above that EC Regulation No. 1223/2002 and EC Decision 2003/97/EC concern the classification of "boneless chicken cuts, frozen and impregnated with salt in all parts" under heading 02.07 of the CN. While, on their face, the two sets of measures appear quite different as regards the products

Decision 2003/97/EC, have the effect of treating frozen boneless chicken cuts that have been impregnated with salt, with a salt content of 1.2% – 3%, as if they are covered by the concession contained in heading 02.07 of the EC Schedule rather than the concession contained in heading 02.10 of the EC Schedule, unless the salt ensures "long-term preservation" of those chicken cuts. Therefore, the critical question for us in interpreting the EC Schedule in this case is whether the term "salted" in the concession contained in heading 02.10 covers the products at issue which, in turn, will entail a determination of whether that concession includes the requirement that salting is for preservation and, more particularly, is for long-term preservation.[130]

7.87 The answer to this question will clearly be governed by the results of the Panel's interpretation of the tariff concession at issue, namely, the concession contained in heading 02.10 of the EC Schedule. As noted above in paragraph 7.6, in view of Article II:7 of the GATT 1994 and Article II:2 of the WTO Agreement, the concessions contained in the EC Schedule are treaty terms of the GATT 1994 and the WTO Agreement. In other words, the content of the EC Schedule must be considered treaty language.

7.88 Article 3.2 of the DSU provides that:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

The Panel notes that Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (*Vienna Convention*) contain "customary rules of interpretation of public international law" within the meaning of Article 3.2 of the DSU.[131] These Articles comprise the legal framework within which this interpretative exercise must take place.

7.89 Article 31 of the *Vienna Convention* provides that:

> "General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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and headings of the CN to which they relate, it is clear to us that both sets of measures have the effect of classifying frozen boneless chicken cuts that have been impregnated with salt, with a salt content of 1.2%-3%, under heading 02.07 rather than heading 02.10, unless the salt ensures long-term preservation of those chicken cuts. Therefore, the Panel sees no relevant difference between, on the one hand, EC Regulation No. 1223/2002 and EC Decision 2003/97/EC and, on the other hand, EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 as far as they concern the classification of the products at issue.

[130] In this regard, we note that, in response to a question from the Panel, the European Communities submits that "[w]hereas EC law on classification contains the term 'long-term preservation', the word 'preservation' is not to be found in HS heading 02.10. Rather, the EC has shown that heading 02.10 has at its heart a concept which the EC in these proceedings has termed 'preservation' but which it might have as easily have referred to as 'long-term preservation'. ... 'Long-term preservation' is the phrase that the EC has used to represent the preservation criterion that is inherent in heading 02.10, whether in the Harmonised System, or the EC's Schedule, or the EC's Combined Nomenclature." EC's reply to Panel question No. 118.

[131] See, for example, Appellate Body Report, *US – Gasoline*, p. 17 (DSR 1996: I, 3 at 16); Appellate Body Report, *India – Patents (US)*, para. 45; Appellate Body Report, *US – Shrimp*, para. 114.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

7.90 Article 32 provides that:

"Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

7.91 Reliance upon Articles 31 and 32 of the *Vienna Convention* to interpret WTO treaty provisions is supported by jurisprudence of the Appellate Body and panels under the GATT 1994, the Agreement on Agriculture and the Agreement on Government Procurement. For example, in *EC – Computer Equipment*, the Appellate Body set out interpretative rules concerning tariff concessions contained in a WTO Member's GATT schedule:

"Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention."[132]

[132] Appellate Body Report, *EC – Computer Equipment*, para. 84.

7.92 In *US – Shrimp*, the Appellate Body referred to a hierarchy between the various elements contained in Article 31 of the *Vienna Convention*:

> "A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties [sic] to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."[133]

In other words, the Appellate Body indicated that the object and purpose should be considered after the treaty interpreter has determined the meaning of the words constituting the treaty obligation in question when read in their context.

7.93 In addition, the Appellate Body has stated that one of the corollaries of the general rule of interpretation in Article 31 is that "interpretation [of a treaty] must give meaning and effect to all the terms of a treaty."[134] Therefore, an interpreter may not adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

7.94 The Panel also understands that the primary purpose of treaty interpretation is to identify the common intention of the parties and that the rules contained in Articles 31 and 32 of the *Vienna Convention* have been developed to help assessing, in objective terms, what was or what could have been the common intention of the parties to a treaty. We are aware that the various steps provided for in Articles 31 and 32 are meant to be viewed as one integrated rule of interpretation rather than as a series of separate tests and that, accordingly, the various criteria contained in those Articles are not to be applied in isolation of each other. However, for the sake of clarity, we consider it appropriate to explain our conclusions step by step under Article 31 beginning with an analysis of the ordinary meaning of the concession contained in heading 02.10 and then reviewing the ordinary meaning of that concession in its context and, finally, in light of the object and purpose. We will turn to Article 32 to confirm the meaning of the concession contained in heading 02.10 under Article 31 if the meaning of the concession under Article 31 does not yield a clear meaning or leads to a result that is manifestly absurd or unreasonable.

2. Time-frame for interpretation

(a) Arguments of the parties

7.95 **Brazil** and **Thailand** submit that the relevant point in time at which the meaning of headings in the EC Schedule should be assessed is 15 April 1994, when the GATT Contracting Parties signed the Final Act of the Uruguay Round and when Members' schedules were annexed to the Marrakesh Protocol. Brazil argues that, in principle, 15 April 1994 was the last opportunity a Contracting Party had to refuse or accept adherence to the Protocol.[135] Thailand also notes that, in *US – Shrimp*, the Appellate Body stated that the relevant time for the interpretation of the treaty at issue was 1994, being the time when Members assumed their obligations under the WTO Agreement.[136]

7.96 The **European Communities** argues that the Panel is tasked to assess the meaning of its concessions pursuant to Article 31 of the *Vienna Convention* as of the date of Panel establishment according to Articles 3.2 and 11 of the DSU.[137] The European Communities submits that, insofar as

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[133] Appellate Body Report, *US – Shrimp*, para. 114.
[134] Appellate Body Report, *US – Gasoline*, p. 23.
[135] Brazil's reply to Panel question No. 56; Thailand's reply to Panel question No. 56.
[136] Thailand's reply to Panel question No. 56.
[137] EC's replies to Panel question Nos. 56 and 87.

EC law is relevant to determining the scope of the EC Schedule under Article 32 of the *Vienna Convention* as part of the circumstances of its conclusion, the common intention of the parties as expressed in the WTO Modalities for the Establishment of Specific Binding Commitments under the Reform Programme (Modalities Agreement) indicates that the commencement of the Uruguay Round negotiations, i.e. 1 September 1986, should be used as the relevant date when such law should be considered.[138]

7.97 In response, **Thailand** argues that, while the determination of whether there is a violation of the European Communities' obligations must be made on the basis of the situation existing at the date of the establishment of the Panel, a treaty interpreter is required to assess the scope of the tariff commitment the European Communities made for heading 02.10 when it concluded the WTO Agreement on 15 April 1994 in order to ascertain the European Communities' WTO obligations.[139] Thailand submits that 15 April 1994 is the relevant date for examining the scope of the headings in a Member's schedule because that is the date that the then Contracting Parties signified their consent to be bound by the WTO Agreement and the time their schedules were annexed thereto.[140] With respect to the European Communities' arguments regarding the time for assessment of EC law, Thailand submits that Article 32 of the *Vienna Convention* does not make any reference to legislation or court judgements in a Member's jurisdiction applicable as of the date of the launch of negotiations or at the time of the conclusion of the negotiations. According to Thailand, Article 32 of the *Vienna Convention* only makes reference to the circumstances surrounding the conclusion of the treaty.[141] Thailand also submits that the Modalities Agreement merely requires that products subject to ordinary customs duties be bound at the level applied as of 1 September 1986. Thailand argues that this does not have any implications for the scope of the tariff concession in question.[142]

(b) Analysis by the Panel

7.98 The Panel recalls that the complainants argue that the meaning of concessions contained in the EC Schedule should be assessed as at 15 April 1994. The European Communities submits that, for the purposes of the Panel's analysis under Article 31 of the *Vienna Convention*, the meaning of tariff headings in the EC Schedule should be assessed as at the date of Panel establishment whereas, for the purposes of the Panel's analysis of EC law as part of the circumstances of the conclusion of the EC Schedule under Article 32 of the *Vienna Convention*, 1 September 1986 is the date for assessment of the meaning of concessions contained in the EC Schedule.[143]

7.99 The *Vienna Convention* does not expressly stipulate the time at which or period during which the common intentions of the parties are to be assessed when interpreting a treaty term. However, the Panel notes that the various sources to which a treaty interpreter may have regard under Articles 31 and 32 of the *Vienna Convention* are, in general terms, identified by reference to when they were created, finalized and/or existed as compared to when the treaty being interpreted was concluded. The Panel infers from this that the relevant time for assessment under Articles 31 and 32 of the *Vienna Convention* depends upon the source for treaty interpretation being referred to. In our view, the "ordinary meaning" is to be assessed at the time of *conclusion* of the treaty in question, being the time

[138] EC's second written submission, para. 97 *et seq;* EC's oral statement at the second substantive meeting, para. 72; EC's reply to Panel question No. 87. See also the European Communities' arguments set out in paragraph 7.337 below. The Modalities Agreement is contained in Exhibit EC-9.

[139] Thailand's comments on the EC's reply to Panel question No. 87.

[140] Thailand's second written submission, para. 77.

[141] Thailand's oral statement at the second substantive meeting, para. 29; Thailand's comments on the EC's reply to Panel question No. 87.

[142] Thailand's second written submission, para. 76.

[143] In this regard, the European Communities' arguments are set out in further detail in paragraph 7.337 below.

which is at the focus of both Articles 31 and 32 of the *Vienna Convention*.[144] Regarding "context" under Article 31(2), Article 31(2)(a) refers to "any agreement relating to the treaty which was made between all the parties in connection with the *conclusion of the treaty*" and Article 31(2)(b) refers to "any instrument which was made by one or more parties in connection with the *conclusion of the treaty*...". The terms of Article 31(2) suggest that sources considered under that Article must have been created, finalized and/or existed *contemporaneously* with the conclusion of the treaty. Article 31(3)(a) refers to "any *subsequent* agreement" and Article 31(3)(b) refers to "any *subsequent* practice". The terms of Article 31(3) suggest that sources considered under that Article must have been created, finalised and/or existed *following* conclusion of the treaty. Article 32 refers to "the *preparatory work of the treaty* and the *circumstances of its conclusion*", suggesting that such sources considered under Article 32 must have been created, finalized and/or existed in *preparation of or in the lead up to* the conclusion of the treaty.

7.100 With respect to the date or period during which the "conclusion" of the treaty at issue in this case (i.e. the EC Schedule) took place, the Panel notes that the Uruguay Round negotiations concluded on 15 December 1993. Indeed, the minutes of the Thirty Sixth Meeting of The Trade Negotiations Committee of 15 December 1993 expressly state that: "The Trade Negotiations Committee [at the meeting of 15 December 1993] formally adopted the Final Act of the Uruguay Round Negotiations in document MTN/FA".[145] The verification process of the results of those negotiations took place from 15 February until 25 March of 1994. On 15 April 1994, the Final Act was signed and it was at that time that schedules, the subject of negotiations during the Uruguay Round, were annexed to the Marrakesh Protocol.[146] The Final Act came into force on 1 January 1995.[147]

7.101 In our view, the process of authentication or verification of treaties forms an important part of the conclusion process. In particular, it allows signatories to verify and ensure that the common intentions have been properly reflected in the terms of the relevant treaty.[148] If we were to find that

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[144] The Panel notes that this view appears to be supported by a number of leading international law commentators. Ian Sinclair states that: "The ordinary meaning of a treaty provision should in principle be the meaning which would be attributed to it at the time of the conclusion of the treaty ... termed the 'principle of contemporaneity' requiring that 'the terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded'": Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984) p. 124 quoting Fitzmaurice in 33 *BYIL* (1957), p. 212. Mustafa Yasseen states that "Unless the treaty reveals a different intention, the ordinary meaning must be that of the time of conclusion of the treaty.": Mustafa Yasseen, "L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités" in *Recueil des Cours de l'Académie de Droit International*, (1974) Vol. III, p. 26, para. 7. The Panel is aware that there is WTO jurisprudence to suggest that an "evolutionary" approach to treaty interpretation is required in some cases to take account of changing factual circumstances. In particular, in the case of *US – Shrimp*, in interpreting Article XX(g) of the GATT 1994, the Appellate Body stated that: "From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary'." Appellate Body Report, *US – Shrimp*, para. 130. However, none of the parties to this dispute have advocated such an "evolutionary" approach for the EC concession in question.

[145] MTN.TNC/40 contained in Exhibit EC-28.

[146] The Marrakesh Protocol is contained in Exhibit BRA-5.

[147] W/Let/1.

[148] In their book on public international law, Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet state that: "The adoption of the text of the treaty marks the end of the drafting stage. From an intellectual standpoint, adoption can be broken down into two distinct operations: deciding on the text – i.e. the negotiations have come to an end and the negotiators consider that they have produced a text which, on the face of it, appears acceptable – and authentication, a procedure which consists in declaring that the text that has been drafted corresponds to the intention of the negotiators and that they consider it definitive. In principle, authenticated text is no longer subject to amendment." Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit International Public*, Librairie Générale de Droit et de Jurisprudence, 3rd edition (1987) p. 124.

GATT schedules were concluded before the verification process took place, this would undermine the important role that the verification process is aimed at playing in the conclusion process. Therefore, in the context of the present case, given that there was a possibility for verification and modification of schedules during the verification period to ensure that they reflected the negotiated results and, therefore, the common intentions of WTO Members, the Panel finds that the EC Schedule was concluded following expiration of the verification process. More specifically, we consider that the EC Schedule was "concluded" when the Final Act was signed and when the Uruguay Round schedules were annexed to the Marrakesh Protocol on 15 April 1994.[149]

7.102 Therefore, we will ascertain the ordinary meaning of the concession contained in heading 02.10 of the EC Schedule as at 15 April 1994. This date will also serve as the reference point for our consideration under Articles 31 and 32 of the *Vienna Convention* of other sources for the interpretation of the concession contained in heading 02.10 of the EC Schedule.

7.103 Regarding the European Communities' argument that the date for interpretation of the EC Schedule is the date of establishment of the Panel under Article 31 of the *Vienna Convention*, we note that the European Communities refers to Article 3.2[150] and Article 11[151] of the DSU. However, we find no support in either of those Articles for the view that the date for interpretation of a WTO treaty obligation should be the date of establishment of a panel. With respect to the EC's argument that the date for interpretation of EC law as part of the "circumstances of the conclusion" of the EC Schedule under Article 32 of the *Vienna Convention* is 1 September 1986[152], we understand the European Communities to mean that events, acts or other instruments that may be considered as "circumstances of conclusion" under Article 32 of the *Vienna Convention* must be considered as at 1 September 1986. This argument concerns the temporal scope of the meaning of the term "circumstances of conclusion" under Article 32 of the *Vienna Convention* and is dealt with below in paragraphs 7.342 *et seq*.

3. Application of the *Vienna Convention* to the EC Schedule

(a) Ordinary meaning: Article 31(1) of the *Vienna Convention*

7.104 The Panel recalls that the concession we are required to interpret for the purposes of this dispute – namely, the concession contained in subheading 0210.90.20 of the EC Schedule – provides as follows:

> "Meat and edible meat offal, salted, in brine, dried, smoked; edible flours and meals of meat or meat offal
>
> - Other, including edible flours and meals of meat or meat offal:
>
> -- Meat:

[149] We note that this conclusion appears to be supported by a statement made by the Appellate Body in *US – Shrimp* to the effect that it was in 1994 (and, therefore, not in 1993) that the intentions of signatories to the WTO Agreement had to be ascertained to determine the meaning to be ascribed to Article XX(g) of the GATT 1994. Appellate Body Report, *US – Shrimp*, para. 129.

[150] Article 3.2 of the DSU provides that: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

[151] Article 11 of the DSU is set out in para. 7.55 above.

[152] In relation to this point, the European Communities' arguments are set out in further detail in paragraph 7.337 below

--- Other"

7.105 The Panel notes that our starting point in determining the ordinary meaning of the concession contained in heading 02.10 of the EC Schedule is to ascertain the meaning of the terms contained in that concession. While dictionaries are the primary source for determination of the ordinary meaning of treaty terms, we consider it necessary in this case to test the appropriateness of those dictionary definitions against the factual context in which the concession in question exists and is being applied.[153] To be clear, when we refer to *factual* context, this is distinct from *legal* context within the meaning of Article 31(2) of the *Vienna Convention*. The factual context could include, for example, aspects associated with the physical characteristics of the products at issue and those that are known to be covered by the concession in question in this dispute. The purpose for taking these aspects into account is to test any claim of ordinary meaning by the parties against the relevant factual setting to ensure that the ordinary meaning that is being considered corresponds to the reality of the factual context at the relevant point in time.

(i) Ordinary meaning to be determined of which term(s)?

Arguments of the parties

7.106 **Brazil** and **Thailand** submit that the ordinary meaning of all the terms in heading 02.10 must be assessed because what is under examination by the Panel is the scope and meaning of the tariff concession of heading 02.10 in the EC Schedule. Nevertheless, Brazil and Thailand do not consider that the result of the interpretative exercise will differ depending upon whether the terms other than "salted" in heading 02.10 are assessed as part of the "ordinary meaning" under Article 31(1) of the *Vienna Convention* or as "context" under Article 31(2).[154]

7.107 The **European Communities** takes the view that the terms other than "salted" in heading 02.10 should be treated as "context" under Article 31(2) of the *Vienna Convention* because it is the term "salted" that is directly at issue in this case.[155]

Analysis by the Panel

7.108 Since it is the meaning of the term "salted" in the concession contained in heading 02.10 of the EC Schedule that is in issue in this dispute, the Panel will seek to ascertain the ordinary meaning of that term. The Panel will consider the remaining relevant terms in that concession – namely, "in brine", "dried" and "smoked" – as context under Article 31(2) of the *Vienna Convention*. In this regard, we note that the complainants do not consider that the result of the interpretative exercise will differ depending upon whether the terms other than "salted" in heading 02.10 are assessed as part of the ordinary meaning under Article 31(1) of the *Vienna Convention* or as context under Article 31(2).[156]

(ii) Ordinary meaning of the term "salted" in subheading 0210.90.20 of the EC Schedule

Arguments of the parties

7.109 **Brazil** and **Thailand** refer to a number of dictionary definitions of the term "salted¨ in an effort to shed light on the ordinary meaning of that term. On the basis of these dictionary definitions,

[153] We find support for the view that the factual context should be taken into consideration in the writings of a leading international law commentator, who states that "[t]he true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonably flow from that text.": Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984) p. 121.

[154] Brazil's reply to Panel question No. 66; Thailand's reply to Panel question No. 66.

[155] EC's reply to Panel question No. 66.

[156] Brazil's reply to Panel question No. 66; Thailand's reply to Panel question No. 66.

Brazil concludes that the term "salted" is associated with food to indicate the content of salt, the taste and smell, the treatment or whether or not the food has been preserved.[157] Brazil and Thailand argue that, in essence, the term "salted" refers to meat that contains or is impregnated with salt.[158] Brazil also submits that the ordinary meaning of the term "salting" indicates that it is a process that prepares meat for different purposes[159] and that what distinguishes meat of heading 02.10 from meat of other headings of Chapter 2 of the EC Schedule is not the process of preservation employed but, rather, the process of preparation.[160] Thailand further submits that it does not consider that the purpose for which a product undergoes the process of salting is relevant to determine the ordinary meaning of the term "salted". Thailand argues that, since the salting of a meat product may be carried out for different purposes, the ordinary meaning of salted must be the description that refers neutrally to the most basic feature of the term – that is, that the product contains salt.[161] Brazil and Thailand also argue that nothing in the ordinary meaning of the term "salted" suggests that it is exclusively a process used to ensure (long-term) preservation. They submit that to interpret the term "salted" as a process to ensure (long-term) preservation is to give that term an overly narrow interpretation that is not consistent with the ordinary meaning of the term under heading 02.10 of the EC Schedule.[162] On the basis of the various dictionary definitions referred to by Brazil and Thailand, they conclude that the term "salted" does not have a single meaning and that, therefore, one cannot conclude from the ordinary meaning of the term that salting only relates to preservation, much less to long-term preservation. They submit that, therefore, it is necessary to assess the other means of interpretation under the *Vienna Convention* in order to arrive at the correct interpretation.[163]

7.110 The **European Communities** also refers to a number of dictionary definitions of the term "salted" and concludes that the question of whether the term "salted" means that a product has been preserved by salt or has had its flavour altered by the addition of salt must be resolved through an analysis of the "context".[164] With respect to the type of salt encompassed by the ordinary meaning of the term "salted", the European Communities submits that it is relatively uncommon for common salt alone to be used for the preservation of products that are commercially traded.[165] More specifically, the European Communities observes that it knows of no meat that is preserved by the use of common salt alone.[166]

7.111 The various dictionary definitions of "salted" relied upon by the parties in the context of their discussion of the ordinary meaning of the concession in question are contained in the table set out immediately below.[167]

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[157] Brazil's first written submission, para. 73.

[158] Brazil's second written submission, paras. 19 and 20; Brazil's oral statement at the second substantive meeting. para. 19; Thailand's first written submission, para. 82.

[159] Brazil's oral statement at the first substantive meeting, para. 30.

[160] Brazil's oral statement at the first substantive meeting, para. 44.

[161] Thailand's second written submission, para. 21.

[162] Brazil's first written submission, para. 100; Thailand's first written submission, para. 82.

[163] Brazil's oral statement at the first substantive meeting, para. 30; Thailand's oral statement at the first substantive meeting, para. 12.

[164] EC's first written submission, para. 122.

[165] EC's reply to Panel question No. 64.

[166] EC's reply to Panel question No. 97.

[167] Brazil's first written submission, para. 72; Brazil's second written submission, para. 19; Thailand's first written submission, para. 68; EC's first written submission, para. 115. We note that the EC also made general references to the Larousse Gastronomique Encyclopaedia (excerpts of which are contained in Exhibit EC-3) and to Arnold Bender's Dictionary of Nutrition and Food Technology (excerpts of which are contained in Exhibit EC-16).

	Brazil	Thailand	EC
Dictionaries Relied Upon	Concise Oxford Dictionary (1995), American Heritage College Dictionary (1993) & Merriam Webster's Collegiate Dictionary (1993)	Concise Oxford Dictionary (1995)	New Shorter Oxford English Dictionary (1996)
	-Impregnated with, containing or tasting of salt; cured or preserved or seasoned with salt; containing or filled with salt; having a salty taste or smell; preserved in salt or a salt solution -To cure or preserve with salt or brine; season with salt; to add, treat season, or sprinkle with salt; or to cure or preserve by treating with salt or a salt solution -To treat with a solution of salt or a mixture of salts -To treat, provide, or season with common salt	-Impregnated with, containing or tasting of salt	-Treated with or stored in salt as a preservative; cured or preserved with salt or salt water (brine) -Seasoned with salt -Treated with chemical salts

Analysis by the Panel

7.112 The Panel notes that the verb "to salt" is defined as follows in the various dictionaries to which the Panel has made reference:

Dictionaries Relied Upon	Concise Oxford Dictionary (1999)	Webster's New Encyclopaedic Dictionary (1993)	New Shorter Oxford English Dictionary (1993)
	-Season or to preserve with salt -Make piquant or more interesting	-To treat, flavour or supply with salt -To preserve (food) with salt -To add flavour or zest	-Treat with or store in salt as a preservative; cure or preserve (esp. meat or fish) with salt or salt water (brine) -Season with salt -Flavour as with salt, make biting, piquant, or less bland

7.113 The dictionary definitions of the verb "to salt" referred to by the parties and by the Panel indicate to us that this term encompasses a range of meanings, including to season, to add salt, to

flavour with salt, to treat, to cure or to preserve.[168] The dictionary definitions also suggest that the ordinary meaning of the term "salted" is not necessarily limited to salting with common salt (NaCl).

7.114 Regarding the question of whether salting concerns "preparation" processes as submitted by the complainants or, rather, "preservation" processes as submitted by the European Communities, we note that "to preserve" is defined, *inter alia*, as "to keep from or prevent decay or decomposition" or as "to treat or prepare food for future use by boiling with sugar, salting, pickling or canning".[169] The term "to prepare" is defined, *inter alia*, as "to put together or make by combining various elements or ingredients" or "to make ready for use or consideration; make (food) ready for cooking or eating".[170] In the Panel's view, the dictionary definitions of the term "salted" indicate that salting includes "preservation" processes given the express reference to "preservation" in those definitions. Further, it is our view that "salting" also includes "preparation" processes given that, for example, seasoning and flavouring with salt, both of which are referred to in the dictionary definitions for the term "salted", fall within the scope of the definition of "preparation" processes.

7.115 We see no reference in the dictionary definitions for the verb "to salt" to the amount of salt that must be added in order for a product to qualify as "salted". With respect to the reference to "preservation" in the various dictionary definitions for "salted", we note that there is no reference to the length of time for which a product must be preserved in order for that product to qualify as "salted".

7.116 On the basis of the dictionary definitions referred to by the parties and by the Panel, the Panel concludes that the ordinary meaning of the term "salted" includes to season, to add salt, to flavour with salt, to treat, to cure or to preserve. In our view, the ordinary meaning is broader than "preservation". The ordinary meaning of the term "salted" is not necessarily limited to salting with common salt (NaCl).

(iii) Factual context for the consideration of the ordinary meaning

7.117 As noted above in paragraph 7.105, to complete our analysis of the ordinary meaning of the concession contained in heading 02.10 of the EC Schedule, the Panel will also consider the factual context for the term "salted" to test the appropriateness of our conclusions regarding the ordinary meaning of that term.[171]

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[168] We note that, in a response to a question from the Panel, the WCO stated that, with regard to lexicographic definitions for the products at issue in this case, the Concise Oxford Dictionary (2001) describes the term "salted" as to "season or preserve with salt": WCO's reply to Panel question No. 1 to the WCO.

[169] More specifically, the term "preserve" is defined as "prepare (fruit, meat, etc.) by boiling with sugar, salting, or pickling to prevent decomposition or fermentation; treat (esp. food) to prevent these processes; prepare (food) for future use, as by canning or salting; to prevent (organic bodies) from decaying or spoiling" (*American Heritage College Dictionary*, 1993, p. 1082); "maintain in its original or existing state; treat (food) to prevent its decomposition" (*Concise Oxford Dictionary*, 1999, p. 1131); "to keep from decomposition; to prepare (as by canning or pickling) for future use" (*Webster's New Encyclopaedic Dictionary*, 1993, p.797); "keep from decay; prepare (fruit, met, etc.) by boiling with sugar, salting or pickling to prevent decomposition or fermentation; treat (esp. food) to prevent these processes" (*The New Shorter Oxford English Dictionary*, 1993, p. 2342).

[170] More specifically, the term "to prepare" is defined as "to put together or make by combining various elements or ingredients" (*American Heritage College Dictionary*, 1993, p. 1080.); "to make ready for use or consideration; make (food) ready for cooking or eating" (*Concise Oxford Dictionary*, 1999, p. 1129); "to make or get ready; to put together" (*Webster's New Encyclopaedic Dictionary*, 1993, p. 796); and "make ready (food, a meal) for eating; cook or assemble in eatable form and serve" (*The New Shorter Oxford English Dictionary*, 1993, p. 2337).

[171] The Panel notes that, since it is tasked to ascertain the ordinary meaning of heading 02.10 of the EC Schedule at the time the Schedule was concluded – i.e. on 15 April 1994 – we will not consider factual context that clearly did not exist at that point in time.

Arguments of the parties

Products covered by the concession contained in heading 02.10

7.118 The **European Communities** points to the products listed in Exhibit EC-5 and submits that those products together with bacon are representative examples of products covered by heading 02.10. The European Communities submits that, in respect of the various meats indicated in Exhibit EC-5 and in respect of bacon, salting with common salt does not provide the sole basis for preservation. In this regard, the European Communities notes that it knows of no meat that is preserved by the use of common salt alone.[172] The European Communities further submits that all existing practice suggests that products covered by heading 02.10 must be prepared in such a way that places the meat in a recognizably different state, normally one identified by a specific name.[173] The European Communities explains that by "recognizably different", it means meat that is obviously different from raw meat in appearance and texture. The European Communities submits that a customs officer examining the goods would have no difficulty recognizing them for what they are.[174] The European Communities argues that, while the meats classifiable under heading 02.10 share this characteristic (for example, they all have special names like "bacon" or "Parma ham"), frozen chicken cuts with added salt do not constitute a product that is instantly recognizable in the same way. Nor do they have a distinguishing name.[175]

7.119 **Thailand** submits that Exhibit EC-5 is entitled a "*Non-Exhaustive* List of Traditional *European* salted and dried/smoked meat products." Thailand argues that this would imply that there are other products not contained in this list that could, nevertheless, fall under heading 02.10.[176] Further, Thailand argues that the basis for the European Communities' assertion that the criterion of preparation must result in the prepared meat being given a different name in order to be classified under heading 02.10 is unclear.[177]

7.120 **Brazil** points to a list from the WCO on-line database of products traditionally traded under the 1996 version of subheading 0210.90 of the HS.[178] Brazil and Thailand submit that none of the listed salted meats have general or specific names.[179] Brazil also notes that the list includes products that do not meet the European Communities' criterion that the preparation must place meat in a "recognizably different state", such as salted edible offal of reindeer, salted meat of beavers, salted frogs' legs, salted meat of pigeons and salted meat of hares. Brazil and Thailand also note that that list includes "salted meat of chicken" and "salted meat of poultry".[180]

Flavour, texture, other physical properties

7.121 **Brazil** and **Thailand** submit that salt has the following effects on meat: (a) the meat retains more water (i.e. drip losses are reduced), which serves to improve the quality and texture of the meat; (b) the salt dissolves proteins, which contributes to the binding of meat particles in order to emulsify the fat, reduce moisture loss during cooking and make meat juicier; (c) the meat possesses a distinct, salty flavour that limits the end-use of the product because of health concerns and consumer taste-tolerance; (d) the meat is preserved when the salt content ranges from 9% - 11% and above but a salt

[172] EC's reply to Panel question No. 97.
[173] EC's second written submission, para. 35.
[174] EC's reply to Panel question No. 100.
[175] EC's second written submission, para. 35; EC's reply to Panel question No. 100.
[176] Thailand's comments on the EC's reply to Panel question No. 100.
[177] Thailand's oral statement at the second substantive meeting, para. 15.
[178] Excerpted in Exhibit BRA-43.
[179] Brazil's comments on the EC's reply to Panel question No. 100; Thailand's comments on the EC's reply to Panel question No. 100.
[180] Brazil's reply to Panel question No. 119; Thailand's comments on the EC's reply to Panel question No. 100.

content of 1.2% – 3% may also have some preservative effect; and (e) the meat develops rancidity more rapidly than cuts without salt because sodium from salt favours the oxidation of fats.[181]

7.122 In response, the **European Communities** submits that, while the addition of salt to the products at issue might arguably have an effect on taste, it cannot be considered that such addition is made with the objective of changing the taste since the taste of the products at issue is changed to conform to the manufacturers' requirements upon further processing which is performed in the European Communities.[182] As for the assertion that the addition of salt reduces moisture loss during cooking, the European Communities notes that the cooking is done by the EC processing industry once the products at issue have been imported into the European Communities. Therefore, the European Communities questions why the addition of salt before export gives the product any distinguishing characteristics.[183] Further, the European Communities submits that the issue of "drip loss" does not concern the loss of water (which can be replaced in the course of further processing) but of protein when thawing and, therefore, only arises in respect of frozen food. The European Communities argues that, moreover, low levels (0.5%) of salt are regarded in the industry as sufficient for the purposes of preventing "drip loss". According to the European Communities, there is no need for a salt content of 1.2% or above. Therefore, even if drip loss were relevant, it does not require that the salt content be greater than 0.5%.[184]

7.123 **Thailand** responds that, while the "drip loss" effect of salt is an important technical reason why EC importers of the products at issue prefer salted chicken, the amount of salt that may or may not be required for "drip loss" to be prevented is an *ex post facto* consideration and is not relevant to the issue before the Panel, namely, the scope of the European Communities' tariff concession contained in heading 02.10 of the EC Schedule at the time of the conclusion of the WTO Agreement.[185]

7.124 **Brazil** submits that the European Communities' allegations that 0.5% of salt is regarded by the industry as sufficient to prevent drip loss is unsubstantiated by evidence. Brazil argues that it, on the other hand, has provided letters from European companies attesting that salted meat exported from Brazil to the European Communities – that is, meat impregnated with a minimum of 1.2% salt – is favoured over unsalted chicken precisely because it reduces drip loss. Brazil argues that technical literature submitted by it explains that, up to a certain limit, the more salt one adds to meat, the greater the water-holding capacity and the lower the drip loss.[186] Brazil submits that, in any event, the fact that the impregnation of salted chicken meat with 1.2% salt reduces drip loss is a commercial reason why there is a demand for the product in the European Communities.[187]

Desalting

7.125 **Thailand** submits that, unlike the chilling or freezing of chicken, which, according to Thailand, may easily be reversed, the salting of chicken deeply and homogeneously in all parts cannot be thoroughly removed. Thailand submits that once a product is salted, it cannot be completely

[181] Brazil's first written submission, paras. 3, 84-87, 102, Brazil's oral statement at the first substantive meeting, para. 26; Brazil's reply to Panel question No. 14(b); Brazil's second written submission, para. 15; Brazils' oral statement at the second substantive meeting, para. 2 referring to Exhibits BRA-16 and BRA-30; Brazil's replies to questions posed by the EC following the second substantive meeting; Thailand's first written submission, paras. 53, 77 and 128 and Thailand's reply to Panel question No. 14(b) referring to Exhibits THA-15 and THA-16.

[182] EC's first written submission, para. 49.

[183] EC's first written submission, para. 22.

[184] EC's second written submission, paras. 14 and 36.

[185] Thailand's reply to Panel question No. 86.

[186] Brazil's reply to Panel question No. 86.

[187] Brazil's reply to Panel question No. 86.

unsalted by immersion in water. The essential character of the chicken product is changed as a result of the salting.[188]

7.126 **Brazil** acknowledges that some desalting is possible. However, Brazil submits that Brazilian salted chicken cuts, which are deeply and evenly impregnated with a salt content of over 1.2%, cannot be completely desalted to the point that the chicken returns to the state of being unsalted chicken with the same basic characteristics and use that existed prior to salting. According to Brazil, once deeply and evenly impregnated with salt, chicken meat will always present itself as salted meat, even after desalting. Brazil adds that, because desalting entails the addition of water to meat for a certain period, when part of the salt is removed by the water, certain important muscle proteins, vitamins and minerals are also removed. As a result, the desalting process depletes meat of fundamental characteristics and sometimes even leaves it inadequate to be used as raw material for the processing of meat products. Further, Brazil submits that Brazilian producers and exporters would have raised the salt content in meat so as to meet the European Communities' new definition of "salted meat" of heading 02.10 if salted chicken meat exported from Brazil could be desalted. Brazil submits that they have not done so because the salting process carried out by Brazilian producers irreversibly renders the product salted, and, therefore, different from the product without salt.[189]

7.127 The **European Communities** submits that, as a matter of theory, common salt (sodium chloride, NaCl) that has been added to meat can be entirely removed through a process of osmosis.[190] The European Communities also submits that press reports regarding the products at issue suggest that salt can be removed from a salted product.[191] Nevertheless, the European Communities acknowledges that such removal would require sophisticated techniques and would be expensive. The European Communities accepts that, therefore, desalting does not occur commercially. The European Communities also notes that the preservation of meat by "salting" often involves the use not only of sodium chloride, but also of sodium nitrate and nitrite. The European Communities also acknowledges that this process cannot be reversed although residual sodium chloride can be reduced by osmosis.[192] The European Communities submits that, nevertheless, the fact that, as a matter of theory, it is not commercially viable to desalt a product, does not imply that the products at issue are not desalted. According to the European Communities, since those products are used for processed chicken products that contain a substantial salt content, it will rarely be necessary, as a matter of commercial practice, to completely desalt them. The European Communities submits that, nevertheless, the salt content is reduced either by tumbling with water or by tumbling with other unsalted products.[193] In addition to the foregoing, the European Communities acknowledges that the process of preservation caused by drying or smoking products cannot be reversed because these processes bring about irreversible chemical and physical changes in the meat.[194]

7.128 **Brazil** argues that the possibility of desalting the products at issue is irrelevant for the purposes of product classification at the border. According to Brazil, the customs authority is charged with the task of classifying a product based on its objective characteristics at the time it crosses the

[188] Thailand's first written submission, paras. 77, 79 and 128; Thailand's reply to Panel question No. 61.
[189] Brazil's first written submission, para. 83; Brazil's oral statement at the first substantive meeting, paras. 14-15; Brazil's reply to Panel question No. 61; Brazil's second written submission, paras. 6, 11-14. See also Exhibit BRA-36 and Exhibit BRA-38.
[190] EC's reply to Panel question No. 37.
[191] EC's first written submission, para. 14 referring to Exhibit EC-1.
[192] EC's reply to Panel question No. 37.
[193] EC's reply to Panel question No. 37; EC's oral statement at the second substantive meeting, para. 8.
[194] EC's reply to Panel question No. 36.

border, not based on whether the product is subsequently further transformed nor on the use each particular importer will make of the product.[195]

Preparation or preservation?

7.129 **Brazil** argues that, for the purposes of heading 02.10, salt is used to "prepare" meat rather than to "preserve" it.[196]

7.130 In response, the **European Communities** submits that the addition of salt for the purposes of heading 02.10 is for preservation.[197] The European Communities submits that preservation of foodstuffs does not necessarily imply that an object must be maintained in its existing condition. Instead, it implies that the process of spoilage and decay is prevented or inhibited. This may or may not involve changes to the object that has been preserved.[198] The European Communities notes that salting a product reduces the water activity and, hence, reduces the ability of microbes to proliferate. The European Communities also submits that the panel on *Argentina – Hides and Leather* recognized that salting is a means of preservation of organic bodies.[199]

7.131 **Brazil** submits that scientific literature establishes that, in order for meat to be properly preserved by salting alone, it should contain 9% – 11% of salt.[200]

7.132 In response, the **European Communities** submits that scientific literature cited by the complainants makes it clear that salting can preserve a meat product on its own (i.e. without the additional need for freezing).[201] The European Communities relies upon an expert's opinion to argue that a minimum 7% of common salt is necessary to preserve meat on its own.[202] The European Communities submits that, in any event, there is no dispute between the parties that a salt content of 1.2% – 3% is insufficient to ensure preservation.[203] The European Communities further notes that, while the shelf-life of preserved meats may be extended by cooling or freezing such meats, there is no suggestion that these products need to be preserved by freezing.[204]

7.133 **Thailand** submits that there is an apparent inconsistency between, on the one hand, the European Communities' expert opinion that a minimum 7% salt content is necessary to preserve meat and, on the other hand, that provided in the *Gausepohl* case[205] by the Federal Office for Meat Research, which stated that 4% - 5% salt was necessary to preserve meat. Thailand submits that, in any event, the European Communities has stated that meat salted at the level of 3% or more would have no commercial market in the European Communities.[206] Therefore, the European Communities is requiring that meat be salted for the purposes of preservation at such high levels that the meat would be inedible and unsuitable for human consumption. Thailand notes that the Note to Chapter 2 to the HS, upon which the EC's CN is based, states that "[t]his chapter does not cover … products of the kinds described in headings 0201 to 0208 or 0210, unfit or unsuitable for human consumption." Thailand submits that meat salted at the level of 7% would be "unfit or unsuitable for human

[195] Brazil's oral statement at the first substantive meeting, para. 16. Brazil notes that the EC uses the "objective characteristics" criterion when classifying products at the border. In this regard, Brazil refers to Exhibit EC-12, page 969, Exhibit THA-18, page 1276 and Exhibit BRA-27.
[196] Brazil's first written submission, paras. 75, 90-103.
[197] EC's first written submission, para. 50; EC's second written submission, para. 23.
[198] EC's first written submission, para. 35.
[199] EC's first written submission, para. 37.
[200] Brazil's first written submission, para. 103.
[201] EC's first written submission, para. 9.
[202] EC's reply to Panel question No. 97 referring to Exhibit EC-32.
[203] EC's reply to Panel question No. 26 referring to Brazil's first written submission, para. 85.
[204] EC's reply to Panel question No. 49.
[205] This case is discussed below in para. 7.372 *et seq*.
[206] Thailand referring to EC's reply to Panel question No. 27.

consumption." Therefore, according to Thailand, the European Communities is seeking to establish a criterion for "salted meat" (i.e., 7% salt content) that, if applied, would render the product ineligible for coverage under Chapter 2.[207]

7.134 **Brazil** acknowledges that it is possible for some meat, prepared by salting, drying or smoking, to also be preserved by those processes.[208] However, Brazil notes that, in the case of some products that the European Communities categorizes under heading 02.10, the relevant processes are insufficient to inhibit outgrowth of certain poisonous organisms and, therefore, freezing from the time of production until cooking and/or consumption is necessary.[209]

7.135 Similarly, **Thailand** submits that some salted products require an additional means of preservation. Thailand points to Exhibits THA-25(a), THA-25(b) and THA-25(c), which include packages of parma ham, prosciutto and jamón serrano, to illustrate that they must be conserved at a temperature below that of ambient temperature, namely at a chilled level.[210]

7.136 In response, the **European Communities** indicates that the products referred to by Thailand would be classified by the European Communities under heading 02.10 but disputes that these types of products require additional means of preservation.[211] The European Communities submits that, in any event, the possibility of applying the means to ensure further preservation to meat covered by heading 02.10 would not affect the classification of that meat.[212] Further, according to the European Communities, the fact that the useful life of meats preserved by salting can be extended by the use of chilling or freezing does not mean that they have not been preserved.[213] In this regard, the European Communities submits that the complainants' arguments appear to be premised on the notion that "preservation" means protection against deterioration and decay for an indefinite period.[214] In addition, the European Communities submits that preserved meat is often sliced and packaged in preparation for retail sale and that this may contaminate the meat. The European Communities notes that it is not arguing that meat retains the same qualities following such processing. The European Communities submits, however, that such meat has been preserved by salting, and customs authorities would have no difficulties recognizing it as such. Finally, the European Communities submits that the use of additional preservation techniques for meat falling within the scope of heading 02.10 is explicitly envisaged in the HS Explanatory Notes to Chapter 2 which provide that vacuum packing (Modified Atmosphere Packing) and the application of this additional preservation technique does not alter the classification of a product under Chapter 2.[215]

7.137 Regarding the question of for how long a product should be preserved in order for it to be covered by heading 02.10, the European Communities submits that the shelf life of preserved meats is many months at ambient temperatures.[216] The European Communities submits that meats that are preserved for several months are clearly preserved for the purposes of heading 02.10.[217]

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[207] Thailand's comments on the EC's reply to Panel question No. 97.
[208] Brazil's oral statement at the first substantive meeting, para. 40.
[209] Brazil's oral statement at the first substantive meeting, para. 42; Brazil's reply to Panel question No. 4.
[210] Thailand's oral statement at the first substantive meeting, para. 19; Thailand's second written submission, para. 37.
[211] EC's reply to Panel question No. 96 referring to Exhibit EC-31 and Exhibit EC-32.
[212] EC's second written submission, para. 30.
[213] EC's oral statement at the second substantive meeting, para. 9.
[214] EC's second written submission, para. 41.
[215] EC's oral statement at the second substantive meeting, para. 9; EC's replies to Panel question Nos. 96 and 98.
[216] EC's replies to Panel question Nos. 49 and 96.
[217] EC's reply to Panel question No. 102.

7.138 In response, **Brazil** submits that, while the European Communities appears to have defined long-term preservation for the purposes of heading 02.10 as many or several months, the Annex to EC Regulation No. 1223/2002 indicates preservation for one year. Brazil also notes that recital (4) of EC Regulation No. 1871/2003 suggests preservation for a period other than transportation. In *Gausepohl*, long-term preservation was described as "preservation considerably exceeding the time required for transportation".[218] Brazil notes that, in that case, the period of preservation was two days. Brazil also notes that, in Exhibit EC-32, the European Communities' expert has asserted that salted chicken meat is preserved for a few days without refrigeration.[219] Brazil argues that preservation is not an absolute and unequivocal concept. According to Brazil, a product may undergo a process that allows preservation for entirely different time spans: from a few hours to indefinite duration.[220] In addition, Brazil submits that the expert opinion submitted by the European Communities in Exhibit EC-32 should be disregarded because, *inter alia*, it was provided at a late stage of the proceedings, which made it impossible for the complainants to fully address the information presented in that Exhibit.[221]

7.139 The **European Communities** submits that defining heading 02.10 by reference to the criterion of preservation is straightforward; the varieties of meat that would qualify according to this criterion are well-established and easily identifiable. The European Communities submits that, in contrast, the vague criterion of "some salting", or "some drying", or "some smoking" implicit in the complainants' submissions would create inevitable problems of defining the borderline – that is, the degree of salting etc. that would be sufficient to qualify a product under heading 02.10. Further, even if a borderline could be defined, it would be impossible to say whether it had been achieved in a particular case.[222] The European Communities also submits that there are no national rules specifying percentages of salt etc. for the purposes of heading 02.10 and there are no subheadings in national tariffs that rely on such criteria. Nor are there decisions of customs authorities providing individual importers with rulings on such questions.[223]

Analysis by the Panel

Products covered by the concession contained in heading 02.10

7.140 The Panel notes that the dictionary definitions to which it referred in determining the ordinary meaning of the term "salted" did not indicate the particular types of products that would necessarily qualify as "salted". The European Communities appears to suggest that the category of "salted products" is a closed list including those referred to in the European Communities' Exhibit EC-5[224], products that are "similar" to those contained in Exhibit EC-5 and bacon.[225] However, we have seen no evidence to indicate that salted products covered by the concession contained in heading 02.10 are necessarily limited to those identified by the European Communities. In this regard, we note that the 1996 version of subheading 0210.90 of the HS is textually similar to subheading 0210.90 of the EC Schedule. The WCO on-line database of products traditionally traded under the 1996 version of

[218] Brazil's reply to Panel question No. 118.
[219] Brazil's comments on the EC's reply to Panel question No. 97.
[220] Brazil's reply to Panel question No. 4.
[221] Brazil's comments on the EC's reply to Panel question No. 97.
[222] EC's oral statement at the second substantive meeting, para. 36.
[223] EC's second written submission, para. 122.
[224] Exhibit EC-5, identified by the European Communities as a "Non-exhaustive list of Traditional European salted and dried/smoked meat products", refers to bünder fleisch/viande de grisons, parma ham, san daniele, prosciutto, jamon serrano, jamon iberico, bayonne ham, südtiroler speck and schwarzwälder schinken.
[225] EC's reply to Panel question No. 97. In question 97, the European Communities was asked to indicate whether or not Exhibit EC-5 contained an exhaustive list of all products traditionally traded under heading 02.10. The European Communities was also asked to identify any other products that are currently traded under heading 02.10 in the event that Exhibit EC-5 did not contain an exhaustive list. In response to this question, the only products referred to by the European Communities were those listed in Exhibit EC-5, products that are "similar" to those contained in Exhibit EC-5 and bacon.

subheading 0210.90 of the HS[226] includes "salted meat of chicken" and "salted meat of poultry". Therefore, the Panel concludes that chicken or poultry to which salt has been added is not necessarily precluded from coverage under the concession contained in heading 02.10 of the EC Schedule.[227]

Flavour, texture, other physical properties

7.141 In the Panel's view, the factual context indicates that, in order for a product to be "salted" within the meaning of the concession contained in heading 02.10 of the EC Schedule, the character of that product must have been altered through the addition of salt as compared to that product's fresh state prior to the addition of salt. In particular, the evidence before us indicates that the addition of salt to meat changes the meat's physical characteristics. For example, the literature indicates that, *inter alia*, salt enhances flavour[228]; reduces the aqueous or water level of food[229]; contributes to the solubilization of muscle proteins and the emulsification of fats[230]; eliminates water-soluble ingredients, such as body minerals, vitamins and proteins[231]; reduces the solubility of oxygen in water[232]; acts as a pro-oxidant of fats[233]; and favours the development of rancidity[234].

7.142 We also note that the European Communities appears to accept that salt changes certain physical properties of the meat to which the salt has been added. For example, the European Communities does not appear to dispute that the addition of salt to meat changes its taste. The European Communities does, however, argue that the purpose of the addition of salt to the products at issue is not to change their taste.[235] In our view, the fact that the *purpose* for the addition of salt may not have been to change the physical properties (e.g. taste) of the meat to which the salt has been added does not detract from the conclusion that such physical properties have been changed.

7.143 In addition, the European Communities does not appear to dispute that moisture loss is reduced through the addition of salt. However, it argues that this moisture loss is the concern of the EC processing industry importing the products at issue.[236] Again, we do not consider that this factor undermines the conclusion that salt changes the physical properties of meat to which salt has been

[226] Excerpted in Exhibit BRA-43.

[227] The Panel notes that there is nothing in the WCO response to Panel question No. 10 to the WCO (relating to the kinds of products the WCO Secretariat considers would clearly qualify under heading 02.10 of the HS, which is textually identical to heading 02.10 of the EC Schedule) to indicate that such products would be excluded from coverage under heading 02.10 of the HS.

[228] Exhibit BRA-16: Lück, E. & Jager, M., *Chemical Food Preservation*, 2nd Edition, p. 86; Pardi, Dos Santos, De Souza, Pardi, *Meat Science, Technology and Hygiene*, Vol. II, p. 721; Silva, João, *Topics on Food Technology*, p. 181; Montana Meat Processors Convention, *Ingredients in Processed Meat Products*, April 27 - 29 2001, p. 11. Exhibit THA-15.

[229] Exhibit BRA-16: Evangelista, José, *Food Technology*, 2nd Edition, p. 409; Lück, E. & Jager, M., *Chemical Food Preservation*, 2nd Edition, p. 80. Exhibit THA-15.

[230] Exhibit BRA-16: Pardi, Dos Santos, De Souza, Pardi, *Meat Science, Technology and Hygiene*, Vol. II, p. 721; Price, J.F. & Schweigert, B.S., *Science of Meat and Meat Products*, pp. 420-421; Silva, João, *Topics on Food Technology*, p. 181; Montana Meat Processors Convention, *Ingredients in Processed Meat Products*, April 27 - 29 2001, p. 11.

[231] Exhibit BRA-16: Lück, E. & Jager, M., *Chemical Food Preservation*, 2nd Edition, p. 86; Price, J.F. & Schweigert, B.S., *Science of Meat and Meat Products*, pp. 380 - 381.

[232] Exhibit BRA-16: Evangelista, José, *Food Technology*, 2nd Edition, p. 409; Lück, E. & Jager, M., *Chemical Food Preservation*, 2nd Edition, p. 81; Silva, João, *Topics on Food Technology*, p. 182.

[233] Exhibit BRA-16: Lawrie, R.A., *Meat Science*, pp. 301 - 302.

[234] Exhibit BRA-16: Price, J.F. & Schweigert, B.S., *Science of Meat and Meat Products*, pp. 420-421.

[235] EC's first written submission, para. 49.

[236] EC's first written submission, para. 22.

added, for example through its contribution to the solubilization of muscle proteins and the emulsification of fats.[237]

7.144 That the character of a product is altered through the addition of salt is, in our view, also confirmed by the fact that desalting such products would, by the European Communities' own admission, require sophisticated techniques and would be expensive.[238] The European Communities has also stated that desalting does not occur commercially.[239] We consider that the fact that tumbling[240] with water or with other unsalted products may reduce the relative salt content by volume for a particular product does not detract from the conclusion that the product in question cannot, as a practical matter, be completely desalted.

7.145 The Panel does not consider it necessary to provide a comprehensive list of the ways in which salt may alter the character of a product. Nor do we consider it necessary to express a view on the extent to which the addition of salt changes meats' physical characteristics.[241] In our view, for the purposes of our determination of the ordinary meaning of "salted" in heading 02.10, our main concern here is whether salt changes the character of the product to which the salt has been added. For the reasons outlined in the immediately preceding paragraphs, we consider that the answer to this question is in the affirmative.

Preservation

7.146 The Panel recalls, that in paragraph 7.116 above, we found that the ordinary meaning of the term "salted" includes preservation. The factual information that has been presented to us confirms that salt may act as a preservative.[242] The Panel further recalls that the term "preserve" has a range of meanings, including "maintaining a product in its original or existing state" as well as "preventing a product from decomposing".[243] The Panel understands from this range of meanings that there is a spectrum of degrees to which a product may be preserved. The information available to us indicates that the preservative effect of salt may differ depending upon the amount of salt that is added.[244]

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[237] Exhibit BRA-16: Pardi, Dos Santos, De Souza, Pardi, *Meat Science, Technology and Hygiene*, Vol. II, p. 721; Price, J.F. & Schweigert, B.S., *Science of Meat and Meat Products*, pp. 420-421; Silva, João, *Topics on Food Technology*, p. 181; Montana Meat Processors Convention, *Ingredients in Processed Meat Products*, April 27 - 29 2001, p. 11.

[238] EC's reply to Panel question No. 37.

[239] EC's reply to Panel question No. 37.

[240] Brazil describes the "tumbling" process as the tumbling of chicken cuts that have been manually salted in a tumbling barrel: Brazil's reply to Panel question No. 14(a). Thailand describes the "tumbling" process as the mixing of chicken cuts with salted water in a vacuum tumble machine: Thailand's reply to Panel question No. 14(a).

[241] For example, we do not consider it necessary to determine how much salt is needed to achieve drip loss to the satisfaction of the EC further processing industry.

[242] Exhibit BRA-16: Evangelista, José, *Food Technology*, 2nd Edition, pp. 408-409; Forrest, Aberle, Hedrick, Judge, Merkel, *Meat Science Foundations*, p. 246; Lawrie, R.A., *Meat Science*, pp. 303-305; Lück, E. & Jager, M., *Chemical Food Preservation*, 2nd Edition, pp. 77, 84; Pardi, Dos Santos, De Souza, Pardi, *Meat Science, Technology and Hygiene*, Vol. II, pp. 704, 721, 722; Price, J.F. & Schweigert, B.S., *Science of Meat and Meat Products*, pp. 365, 420-421; Silva, João, *Topics on Food Technology*, p. 181; Montana Meat Processors Convention, *Ingredients in Processed Meat Products*, April 27 - 29 2001, p. 11.

[243] See paragraph 7.114 above, including footnotes thereto.

[244] Exhibit BRA-16: Pardi, Dos Santos, De Souza, Pardi, *Meat Science, Technology and Hygiene*, Vol. II, p. 723; Silva, João, *Topics on Food Technology*, p. 182. Mr Silva states that "in sufficiently high concentrations, salt inhibits microbial growth by increasing the osmotic pressure of the environment, with the consequent reduction of the water activity; low concentrations of salt, between 1.0%-3%, already exert a significant antimicrobial action, due to the reduction in the water activity of the environment. Low concentrations, such as 2.0% inhibit the growth of some bacteria, while the majority of molds and yeasts are capable of growing in salt concentrations close to saturation. However, for the development of halophilic microorganisms salt concentrations higher than 10% are required. For a good preservation, the maximum

Further, different types of meat may require different amounts of salt in order for them to be preserved.[245] Finally, the application of the food in question may affect the salt content required for its preservation.[246] For example, it appears that 2% - 3% salt content is the level usually found in commercially processed meat products[247] whereas a salt content level of 26.5% eliminates larvae of *cisticercos bovis* and *celulosae*.[248] In other words, it appears that even small quantities of salt may have a preservative effect, although the preservative effect is less effective and less long-lasting than in cases where greater quantities of salt have been added.[249]

7.147 In light of the foregoing, the Panel considers that the amount of salt needed to preserve a product will differ depending upon for how long a particular product must be preserved. As noted above in paragraph 7.115, the dictionary definitions of the term "salted" do not cast any light on for how long a product must be preserved in order to be "salted". More specifically, those definitions do not indicate whether this period is to be determined by reference to the period of transportation as indicated by the ECJ in the *Gausepohl* case[250] or many or several months as indicated by the European Communities during these proceedings[251] or for any other period of time. Therefore, in our view, it is difficult to draw any conclusions regarding the amount of salt that must be added to a product in order for it to be "salted" within the ordinary meaning of the concession contained in heading 02.10 of the EC Schedule.[252]

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amount of water in the product should not exceed 55%. Salt contents between 9% and 10% nearly saturate the aqueous phase. The preservation of products with salt concentrations lower than this value should be made by means of refrigeration (cooling)". In an expert opinion, contained in Exhibit EC-32, Professor Honikel states that "[i]n the raw and chilled state 3% salt is too low to prevent spoilage for more than a few days. If salt alone is used the final salt concentration must be above 7% salt in the product as a whole or above 11% in the water part with a water activity of 0.91 and lower".

[245] Exhibit BRA-16: Price, J.F. & Schweigert, B.S., *Science of Meat and Meat Products*, p. 394.

[246] Exhibit BRA-16: Price, J.F. & Schweigert, B.S., *Science of Meat and Meat Products*, pp. 420-421. The authors state that mature processed products generally contain 3% - 5% of salt whereas fresh processed products contain 1.5%-2.0% of salt. They add that the great majority of cooked processed products contain 2%-2.5% of salt.

[247] Exhibit BRA-16: Forrest, Aberle, Hedrick, Judge, Merkel, *Meat Science Foundations*, p. 246. The authors state that "with respect to today's commercially processed meat products, salt only exerts a limited preserving effect, whereas these products need other methods of preservation in order to have their shelf-life extended". In addition, Lück, E. & Jager, M. in *Chemical Food Preservation*, 2nd Edition contained in Exhibit BRA-16 at page 84 state that common salt exerts a good microbicidal effect at concentrations as low as 1%-3%. The authors also state that these relatively small additions reduce water activity sufficiently to prevent the growth of important putrefaction bacteria, such as those in sausages, hams and salted meats. Further, Pardi, Dos Santos, De Souza, Pardi in *Meat Science, Technology and Hygiene*, Vol. II contained in Exhibit BRA-16 at p. 722 state that salt concentrations of 1%-3% exert a good antimicrobial action.

[248] Exhibit BRA-16: Evangelista, José, *Food Technology*, 2nd Edition p. 409. See also Lück, E. & Jager, M., *Chemical Food Preservation*, 2nd Edition, p. 80 contained in Exhibit BRA-16 which indicates that the salt content may affect the types of micro organizms that can survive.

[249] We do not consider that these comments are inconsistent with those made by the EC's expert, Professor Honikel, which are contained in Exhibit EC-32. In particular, Professor Honikel states that "[i]n the raw and chilled state 3% salt is too low to prevent spoilage for more than a few days." In other words, Professor Honikel appears to accept that 3% salt may prevent spoilage, albeit for a period of only a few days.

[250] Exhibit EC-14: *Gausepohl-Fleisch GmbH v Oberfinanzdirektion Hamburg*, ECR [1993], I -3047. At p. I-3066, para. 11, the ECJ stated that "meat of bovine animals to which a quantity of salt has been added merely for the purpose of transportation cannot be regarded as salted for the purposes of heading 0210. On the other hand, salting as a method of preserving meat of bovine animals for a longer period must be applied evenly to all parts of the meat." The *Gausepohl* judgement is discussed in more detail below in paragraph 7.372 *et seq*.

[251] EC's replies to Panel question Nos. 49 and 96.

[252] Accordingly, the Panel does not consider it necessary to address Thailand's argument that the EC is seeking to establish a salt content for "salted meat" under heading 02.10 (i.e. 7%) that, if applied, would render the product ineligible for coverage under Chapter 2: Thailand's comments on the EC's reply to Panel question No. 97.

7.148 In fact, on the basis of the ordinary meaning of the term "salted" in the concession contained in heading 02.10 when considered in light of the relevant factual context, it is the Panel's view that the amount of salt added to products qualifying as "salted" under this concession may well vary depending upon the meat product in question and the specific application of that product, which will, in turn, affect the period for which a product must be preserved. While the evidence indicates that the more salt that is added, the longer the period for which the product in question will be preserved[253], there is nothing to suggest that products preserved by salt for relatively short periods of time are precluded from qualifying under the concession contained in heading 02.10 of the EC Schedule.

7.149 The variable salt content and period of preservation that is, in our view, permissible on the basis of the ordinary meaning of the concession contained in heading 02.10 when read in its factual context would seem to explain, at least in part, why certain products that the European Communities categorizes under heading 02.10 such as parma ham, prosciutto and jamón serrano may require additional means of preservation. Indeed, we consider that the European Communities' acknowledgement that products covered by heading 02.10 may require means of preservation in addition to that effected through the addition of salt[254] provides some support for the view that a product preserved by salt for relatively short periods of time is not necessarily precluded from qualifying under heading 02.10 of the EC Schedule.

(iv) Summary and conclusions regarding the "ordinary meaning"

7.150 In summary, on the basis of the dictionary definitions for the term "salted", the Panel concludes that the ordinary meaning of that term includes a range of meanings – namely, to season, to add salt, to flavour with salt, to treat, to cure or to preserve. The dictionary definitions also suggest that the ordinary meaning of the term "salted" is not necessarily limited to salting with common salt (NaCl). The Panel considers that, in essence, the ordinary meaning of the term "salted" when considered in its factual context indicates that the character of a product has been altered through the addition of salt.

7.151 The Panel considers that there is nothing in the range of meanings comprising the ordinary meaning of the term "salted" that indicates that chicken to which salt has been added is not covered by the concession contained in heading 02.10 of the EC Schedule. Nevertheless, it is our view that the ordinary meaning of the term "salted" in heading 02.10 is not dispositive regarding the question of whether or not the specific products at issue in this dispute, to which salt has been added and which are frozen, are covered by this concession. Therefore, we now turn to an analysis of the context for the concession contained in heading 02.10 of the EC Schedule pursuant to Article 31(2) of the *Vienna Convention* for further guidance in this regard.

(b) Context: Article 31(2) of the *Vienna Convention*

(i) What qualifies as "context" for the interpretation of the EC Schedule?

7.152 Article 31(2) of the *Vienna Convention* provides that:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

[253] For example, the EC's expert, Professor Honikel suggests that while a 3% salt content may prevent spoilage for a few days, a 7% salt content is necessary to completely preserve the product in question.

[254] EC's oral statement at the second substantive meeting, para. 9; EC's replies to Panel question Nos. 96 and 98.

> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

7.153 The chapeau of Article 31(2) indicates that the text of the treaty, the terms of which are being interpreted, including its preamble and annexes, qualify as "context" under Article 31(2) of the *Vienna Convention*. Regarding other agreements or instruments that may qualify under Article 31(2), the International Law Commission stated that:

> "[T]he principle on which [Article 31(2)] is based is that a unilateral document cannot be regarded as forming part of the context [...] *unless not only was it made in connexion with the conclusion of the treaty, but its relation to the treaty was accepted in the same manner by the other parties*. [...] What is proposed in paragraph 2 is that, for purposes of interpreting the treaty, these categories of documents should not be treated as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty."[255] (emphasis added)

7.154 Further, a leading international law commentator suggests that, in order to be related to the treaty, and thus be part of the "context" as opposed to the negotiating history, which is dealt with in Article 32 of the *Vienna Convention*, an instrument "must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application. It must equally be drawn up on the occasion of the conclusion of the treaty."[256]

7.155 In light of the foregoing, the Panel will first consider the terms of relevant aspects of the EC Schedule to ascertain whether they assist in the interpretation of the concession contained in heading 02.10 of the EC Schedule. The Panel will then consider whether there are any other agreements or instruments that qualify as "context" under Article 31(2) of the *Vienna Convention* that may also assist us in the interpretative exercise we are required to undertake.

(ii) The text of the EC Schedule

7.156 As noted above in paragraph 7.108, the complainants discussed the terms other than "salted" in the concession contained in heading 02.10 of the EC Schedule in their examination of the "ordinary meaning" of that concession whereas the European Communities did so in the "context" section of its arguments. As we stated previously, we have adopted the approach suggested by the European Communities regarding these other terms, recalling that it is the term "salted" that is in issue in this dispute and that the complainants have submitted that they do not consider that the result of the interpretative exercise will differ depending upon whether the terms other than "salted" in heading 02.10 are assessed as part of the "ordinary meaning" under Article 31(1) of the *Vienna Convention* or as "context" under Article 31(2).[257]

Other terms contained in heading 02.10 of the EC Schedule

Arguments of the parties

7.157 **Brazil** and **Thailand** refer to a number of dictionary definitions of "salted", "in brine" "dried", and "smoked" and conclude that, taken together, these terms share a common attribute. In particular, according to Brazil and Thailand, they all relate to how food is prepared – that is, the way

[255] *Yearbook of the International Law Commission*, 1966, Vol. II, p. 221, para. 13.
[256] Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984) p. 129.
[257] Brazil's reply to Panel question No. 66; Thailand's reply to Panel question No. 66.

in which the natural condition of the product has been altered – regardless of the purpose for the preparation of meat (e.g. for treatment, seasoning, flavouring, preservation).[258]

7.158 The **European Communities** submits that the dictionary definitions cited by the complainants for the terms "in brine", "dried" and "smoked" indicate that these terms denote methods of preservation of meat products.[259] In particular, the European Communities argues that "in brine" refers to preservation by salt water, "dried" refers to preserved by the removal of natural moisture, and "smoking" refers to drying, curing, or tainting by exposure to smoke.[260] According to the European Communities, the terms "salted", "in brine", "dried" and "smoked" all concern traditional methods for preserving meat and they are the only traditional methods for preserving meat that are of any significance.[261] The European Communities argues that, therefore, heading 02.10 is based on a comprehensive and exclusive list of traditional methods of preserving meat.[262]

7.159 The various dictionary definitions relied upon by the parties are contained in the table set out immediately below:[263]

	Brazil	**Thailand**	**EC**
Dictionaries Relied Upon	Concise Oxford Dictionary (1995)	Concise Oxford Dictionary (1995)	New Shorter Oxford English Dictionary (1996)
"In Brine"	-[brine] Water saturated or strongly impregnated with salt or to soak in or saturate in brine	-Water saturated or strongly impregnated with salt or to soak in or saturate in brine	
"Dried"	-To make or become dry by wiping, evaporation, draining, etc. or to preserve (food etc.) by removing the moisture (*dried egg; dried fruit; dried flowers*)	-To make or to become dry by wiping, evaporation, draining, etc., or to preserve (food, etc) by removing the moisture	-Spec. of food: preserved by the removal of its natural moisture
"Smoked"	-To cure or darken by the action of smoke (*smoked salmon*)	-To cure or darken by the action of smoke	-Of meat, fish, etc.: dried, cured, or tainted by exposure to smoke, or loosely by a process that produces a similar effect

Analysis by the Panel

7.160 The Panel notes that the terms other than "salted" in heading 02.10 are defined as follows in the various dictionaries to which the Panel has made reference:

[258] Brazil's first written submission, paras. 74 and 75; Thailand's first written submission, paras. 68-69; Thailand's oral statement at the first substantive meeting, para. 13.

[259] EC's first written submission, paras. 128, 135 and 136; EC's second written submission, para. 31; EC's oral statement at the second substantive meeting, para. 29.

[260] EC's first written submission, paras. 129, 130, and 132.

[261] EC's oral statement at the second substantive meeting, para. 30.

[262] EC's oral statement at the second substantive meeting, para. 31.

[263] Brazil's first written submission, para. 74; Thailand's first written submission, para. 68; EC's first written submission, paras. 130 and 132.

Dictionaries Relied Upon	Concise Oxford Dictionary (1999)	Webster's New Encyclopaedic Dictionary (1993)	New Shorter Oxford English Dictionary (1993)
"In Brine"	-[brine] Water saturated or strongly impregnated with salt; -(technical) A strong solution of a salt or salts -[brined] soak in or saturate with brine	-[brine] Water containing a great deal of salt	-[brine] Water saturated or strongly impregnated with salt; salt water
"Dried"	-[dry] Free from moisture or liquid -preserve by evaporating the moisture from	-[dry] Free or freed from water or liquid -Characterized by loss or lack of water -[dried] To make or become dry	-Deprived of moisture, desiccated -Spec. of food: preserved by the removal of its natural moisture
"Smoked"	-[smoke] Cure or preserve (meat or fish) by exposure to smoke	-[smoke] To cure by exposure to smoke (smoked meat)	-Of meat, fish, etc: dried, cured, or tainted by exposure to smoke

7.161 The key issue for the Panel's determination here is whether there is any intrinsic notion common to all terms referred to in the concession contained in heading 02.10 of the EC Schedule that may assist in clarifying the meaning of the term "salted" in that concession. In this regard, we recall that the complainants submit that the intrinsic notion common to all terms referred to in heading 02.10 is that of "preparation" to change the natural condition of meat whereas the European Communities argues that the intrinsic notion is that of "preservation".

7.162 In the Panel's view, it is difficult to identify a notion that characterizes all the terms in the concession contained in heading 02.10 of the EC Schedule. While the notion of "preservation" appears in the dictionary definitions for the terms "dried" and "smoked" (and, as previously noted, also "salted"), this notion does not appear in the dictionary definitions for "in brine". Even in respect of those terms for which the notion of "preservation" does appear, the dictionary definitions indicate that their respective meanings are broader than just pertaining to preservation. Further, it is not clear to us that preservation is necessarily the dominant characteristic that should be used to characterize those processes. In addition, in our view, the definitions for each of the terms in the concession contained in heading 02.10 of the EC Schedule may be characterized as pertaining to "preparation" as well as to "preservation". We recall that there appears to be a certain degree of overlap between these two concepts in that, for example, a product may be "prepared" for the purposes of "preservation" and "preserve" is defined, *inter alia*, as to "prepare food for future use".[264]

7.163 In light of the foregoing, the Panel does not consider that the definitions of the terms other than "salted" point to any single notion that is intrinsic to or characterizes all the terms in the concession contained in heading 02.10 of the EC Schedule. Nor does the Panel find that these terms can be defined as pertaining exclusively either to "preparation" or "preservation" or, for that matter, to long-term preservation. In conclusion, it is the Panel's view that an examination of the terms contained in that concession other than "salted" does not clarify the ordinary meaning of the term "salted".

[264] See paragraph 7.114 above.

Structure of Chapter 2 of the EC Schedule

Arguments of the parties

7.164 **Thailand** submits that the structure of the ten headings contained in Chapter 2 of the EC Schedule, of which heading 02.10 is one, indicates that products are either classified as "fresh", "chilled" or "frozen" (the first eight headings) or as "salted", "in brine", "dried" or "smoked" (heading 02.10); and that only heading 02.09 specifically lists all the various states. According to Thailand, the fact that heading 02.10 does not list all the states but, rather, only lists the states of "salted", "in brine", "dried" or "smoked" – which Thailand submits are methods of preparation – indicates that, for heading 02.10, it is the type of "preparation" that is the determining factor for the classification of that product.[265] According to Thailand, an analysis of the structure of the headings in Chapter 2 indicates that heading 02.10 is specific for all types of meat that are salted, in brine, dried or smoked. Thailand argues that that heading is not meant to be a residual category. In contrast to heading 02.08, which applies to "other meat" not specified in headings 02.01 – 02.07, heading 02.10 applies to all meat and edible meat offal as long as the meat is salted, in brine, dried or smoked. Thailand submits that all such meat is to be classified under heading 02.10 regardless of the state in which it is presented, i.e. fresh, chilled or frozen.[266]

7.165 In response, the **European Communities** argues that an examination of Chapter 2 as a whole shows that it is divided into different forms of "preservation" rather than into meat that has undergone a process and meat that has not.[267] More particularly, the European Communities argues that the headings in Chapter 2 of the EC Schedule form two categories based on whether or not meat has been subjected to the processes listed in heading 02.10.[268] According to the European Communities, chilling and freezing is an important feature of the headings in the first category comprising all headings in Chapter 2 except heading 02.10, because it is made explicit that the headings in that category include meat that is chilled and frozen. As for the second category, consisting of heading 02.10 on its own, the European Communities submits that the omission of freezing or chilling exists because the purpose achieved by chilling and freezing – that is, preservation – has already been achieved by salting, drying or smoking. The European Communities also submits that, even though meat of heading 02.10 may be "further preserved" by other methods (such as freezing), chilling or freezing is, nevertheless, not a significant consideration in relation to such meat, which explains why the terms "chilled" or "frozen" are absent from heading 02.10.[269] The European Communities argues that, therefore, the context of heading 02.10, viewed in this schematic manner, gives powerful support to the view that all the processes referred to in Chapter 2 serve to preserve meat from decay. Therefore, according to the European Communities, the meaning of the term "salted", viewed in its context, and in light of its object and purpose, means that "salting" is for the purpose of preservation.[270] The European Communities clarifies that preserving a foodstuff does not imply that it has not been subject to some form of process. Rather it simply means that the process of decomposition has in some way been inhibited.[271]

7.166 **Brazil** and **Thailand** disagree with the European Communities' argument that Chapter 2 of the EC Schedule is structured on the basis of preservation processes. Brazil submits that if "salting", "drying" and "smoking" were meant as means of preservation, these terms would have been placed at the subheading level together with the terms "fresh", "chilled" and "frozen" found in Chapter 2, but

[265] Thailand's first written submission, para. 89; Thailand's second written submission, paras. 24-25.
[266] Thailand's second written submission, para. 27.
[267] EC's first written submission, para. 138.
[268] EC's oral statement at the first substantive meeting, paras. 12-16.
[269] EC's first written submission, para. 138; EC's second written submission, paras. 27, 30, 41 and 45.
[270] EC's oral statement at the first substantive meeting, paras. 12-16.
[271] EC's first written submission, para. 137.

not separately as a different heading.[272] Thailand questions how Chapter 2 could be structured on the basis of preservation methods given that the state of "fresh", being one of the states of meat products covered by Chapter 2, could not qualify as a form of preservation.[273] Brazil and Thailand acknowledge that freezing is not a significant consideration in relation to meat of heading 02.10. However, according to Brazil, this is so because what is important in relation to meat of heading 02.10 is the fact that it is a different type of meat from the non-prepared meat of headings 02.01 to 02.08, irrespective of whether it is chilled or frozen.[274] Thailand submits that the fact that salted meat is subsequently frozen should not affect its classification under heading 02.10.[275] Brazil questions why further preservation would be necessary for meat under heading 02.10 if the processes of heading 02.10 themselves ensure long-term preservation as argued by the European Communities. Brazil and Thailand argue that, therefore, long-term preservation is not a concept that defines the structure of Chapter 2 or the processes of heading 02.10.[276]

Analysis by the Panel

7.167 The Panel considers that the structure of Chapter 2 of the EC Schedule as a whole may provide textual context from which inferences may be drawn regarding the interpretation of the term "salted" in the concession contained in heading 02.10 of the EC Schedule, pursuant to Article 31(2) of the *Vienna Convention*.

7.168 Chapter 2 of the EC Schedule consists of ten headings – i.e., headings 02.01 through 02.10 – which are set out below:

"02.01 Meat of bovine animals, fresh or chilled

02.02 Meat of bovine animals, frozen

02.03 Meat of swine, fresh, chilled or frozen

02.04 Meat of sheep or goats, fresh, chilled or frozen

02.05 Meat of horses, asses, mules or hinnies, fresh, chilled or frozen

02.06 Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen

02.07 Meat and edible offal, of the poultry of heading No 0105, fresh, chilled or frozen

02.08 Other meat and edible meat offal, fresh, chilled or frozen

02.09 Pig fat free of lean meat and poultry fat (not rendered), fresh, chilled frozen, salted, in brine, dried or smoked

02.10 Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal."

7.169 The Panel recalls that, on the one hand, the complainants argue that the headings are structured in a way such as to distinguish meat "prepared" by the processes listed in heading 02.10

[272] Brazil's oral statement at the second substantive meeting, para. 22.
[273] Thailand's second written submission, para. 35.
[274] Brazil's oral statement at the second substantive meeting, para. 24.
[275] Thailand's oral statement at the second substantive meeting, para. 15.
[276] Brazil's oral statement at the second substantive meeting, para. 29; Thailand's second written submission, para. 35.

from non-prepared meat referred to in the other headings of Chapter 2 of the EC Schedule. On the other hand, the European Communities argues that preservation is an important feature for all the headings in Chapter 2. More particularly, the European Communities submits that an examination of Chapter 2 as a whole shows that it is divided into different forms of "preservation". In the European Communities' view, heading 02.10 does not refer to other preservation methods such as "chilling" and "freezing" because the processes of "salting", " brining", "drying" and "smoking" achieve preservation on their own.

7.170 Generally speaking, the headings within Chapter 2 are structured as follows: (a) they identify the type of meat or meat product concerned by the heading in question; and (b) they indicate the state(s) of the meat that are covered by the heading – namely, the states of being "fresh", "chilled" and/or "frozen". An important exception to this generalisation is heading 02.10, which covers all types of meat listed in headings 02.01 through 02.08 and states that the meat covered by that heading must be "salted, in brine, dried or smoked".[277] What is not clear to us is the rationale for and significance of the unique formulation used in heading 02.10.

7.171 Indeed, in the Panel's view, there is nothing in the terms of Chapter 2 that clearly indicates which of the approaches put forward by the parties is the correct one, if either. The European Communities itself appears to have cast doubt on the view that the processes referred to in heading 02.10 result in "preservation" in the same manner that "chilling" or "freezing" achieves preservation. In particular, the European Communities has acknowledged that meat of heading 02.10 may be "further preserved" by other methods, such as freezing.[278] Counterbalancing the foregoing, however, is the absence of any compelling evidence deriving from the structure of Chapter 2 to indicate definitively that the concession contained in heading 02.10 is characterized by the notion of "preparation" rather than "preservation", as has been submitted by the complainants.

7.172 In our view, there may be a host of reasons that, individually and/or in combination, could explain the unique formulation used in heading 02.10. In particular, it may be that it is based on the fact that, in contrast to other processes referred to in the headings of Chapter 2, the processes referred to in heading 02.10 "prepare" meat so that the meat's natural condition is altered, as has been submitted by the complainants; and/or the unique formulation may be linked to the fact that the processes referred to in heading 02.10 on their own "preserve" the meat to which those processes are applied, as has been submitted by the European Communities; and/or, the formulation may be based on a factor that is completely different from the "preparation" and "preservation" theories that have been put forward by the parties. For example, the terms and structure of heading 02.10 may merely reflect international trade patterns.[279] The Panel considers that, on the basis of the terms and structure of heading 02.10, it is difficult to know which of the above-mentioned reasons is the applicable one, if any.

7.173 In conclusion, the Panel considers that the structure of Chapter 2 of the EC Schedule does not provide any insights regarding the question of whether "preservation" and/or "preparation", if either, characterize Chapter 2 and, more particularly, the concession contained in heading 02.10 of the EC Schedule. In addition, the Panel's view is that the structure of Chapter 2 of the EC Schedule does not indicate that the concession contained in heading 02.10 is necessarily characterized by the notion of long-term preservation.

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[277] We note that heading 02.09 is also somewhat different from headings 02.01-02.08 in that, in addition to identifying the type of meat product concerned by that heading and referring to the states of "fresh", "chilled" and "frozen", it also refers to the states of "salted", "in brine", "dried" or "smoked".

[278] EC's first written submission, para. 138; EC's second written submission, paras. 27, 30, 41 and 45.

[279] In this regard, see the WCO's reply to Panel question No. 2 to the WCO referred to in paragraph 7.196 below.

Other parts of the EC Schedule

Arguments of the parties

7.174 **Thailand** submits that headings 08.12 and 08.14 of the EC Schedule illustrate that, in the EC Schedule, when the European Communities considers that a product must be classified on the basis of its preservative characteristics, those characteristics are specifically referred to in the relevant tariff heading.[280] In particular, Thailand refers to the following tariff headings from the EC Schedule:

> "08.12 Fruit and nuts provisionally preserved (for example by sulphur dioxide gas, in brine, in sulphur water or in other preservative solutions), but unsuitable in that state for immediate consumption:
>
> 0812.10.00 Cherries
>
> 0812.20.00 Strawberries
>
> 0812.90 Other
>
> 08.14 Peel of citrus fruit or melons (including watermelons) fresh, frozen, dried or provisionally preserved in brine, in sulphur water or in other preservative solutions."

7.175 Thailand submits that, in contrast to headings 08.12 and 08.14, heading 02.10 makes no reference to "preservation". Thailand also submits that, under the general principles of interpretation of Article 31 of the *Vienna Convention*, the Appellate Body has stated that an interpreter must not "adopt a reading [of a treaty provision] that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[281] Therefore, according to Thailand, a reading of "salted" as meaning for the purpose of long-term preservation would reduce to inutility the terms "preserved" in headings 08.12 and 08.14. Accordingly, in the view of Thailand, the absence of a reference to "preservation" in heading 02.10 means that preservation is not the defining characteristic.[282]

7.176 In response, the **European Communities** submits that the terms "dried", "salted", "smoked" and "in brine" necessarily imply that a meat that has been subjected to these processes is preserved. The European Communities submits that, consequently, there is no need to explicitly mention "preservation" with respect to these processes as such a reference would be redundant. Further, the European Communities submits that the *a contrario* reading suggested by Thailand is baseless. The European Communities submits that, moreover, a closer examination of Chapter 8 of the EC Schedule supports the view that the processes described in heading 02.10 are meant for long-term preservation because heading 08.14 juxtaposes peel of citrus fruit or melons that are "frozen" or "dried" with those that are "provisionally preserved" in brine. According to the European Communities, where the preservation is only provisional, this has to be expressly indicated.[283]

Comments by the World Customs Organization

7.177 Regarding the importance to be attached to the reference to the term "provisionally preserved" in heading 08.14 of the HS (which mirrors heading 08.14 of the EC Schedule), the WCO states that the term "provisionally preserved" was understood to distinguish between finished products of Chapter 20, on the one hand, and peel of citrus fruit or melons subjected only to certain preservation processes, but not further prepared, on the other. Further, according to the WCO, this reference was

[280] Thailand's oral statement at the first substantive meeting, para. 13.
[281] Thailand's oral statement at the first substantive meeting, para. 14 referring to Appellate Body Report, *US – Gasoline*, page 23 (DSR 1996: I, 3 at 21).
[282] Thailand's oral statement at the first substantive meeting, paras. 14-15.
[283] EC's reply to Panel question No. 39.

intended to widen the scope of heading 08.14 to include not only fresh, frozen and dried products but also those provisionally preserved by processes listed in the text of the heading. The WCO opines that the inclusion of a reference to the concept of "preservation" in Chapter 8 is likely to be of limited relevance for other headings in respect of which such a reference is absent.[284]

Analysis by the Panel

7.178 The Panel considers that parts of the EC Schedule other than Chapter 2 may also be considered as relevant context for the interpretation of the term "salted" in the concession contained in heading 02.10 of the EC Schedule, pursuant to Article 31(2) of the *Vienna Convention*.

7.179 The Panel notes that the headings referred to by Thailand in Chapter 8 of the EC Schedule are mirror images of the same headings in the HS.[285] As noted above in paragraph 7.11, as a signatory to the HS, the European Communities is obliged to use the HS headings and subheadings at the 6-digit level. Therefore, we consider that it is reasonable to assume that the inclusion of the reference to "preservation" in headings 08.12 and 08.14 in the EC Schedule was not the result of an express intention on the part of the European Communities to make such a reference but, rather, was a result of the European Communities' obligations under the HS Convention to adopt the same headings in its domestic tariff nomenclature. In other words, it would appear that the reference to "preservation" in headings 08.12 and 08.14 originates from the HS rather than as a result of a desire on the part of the European Communities to expressly incorporate the notion of "preservation" into those two headings. In addition, the Panel notes that, with regard to the analogues of headings 08.12 and 08.14 of the EC Schedule in the HS, the WCO has suggested that limited significance should be attached, if any, to the reference to "preservation" in specific headings (such as 08.12 and 08.14) for other headings (such as heading 02.10), in which such a reference was omitted. Therefore, on the basis of the foregoing, we consider that inferences cannot be drawn from headings 08.12 and 08.14 with respect to the meaning of the term "salted" in the concession contained in heading 02.10 of the EC Schedule.

Summary and conclusions regarding the EC Schedule

7.180 In summary, the Panel concludes that the definitions of the terms in the concession contained in heading 02.10 of the EC Schedule other than "salted" do not indicate any intrinsic notion that characterizes all the terms in that concession other than that they are in a state that is not simply fresh, chilled or frozen. Nor does the Panel consider that these terms can be defined as pertaining exclusively to "preparation" or to "preservation" processes. In addition, the Panel does not consider that any inferences that are useful for the purposes of our interpretation of the concession contained in heading 02.10 of the EC Schedule can be drawn from the structure of Chapter 2 of the EC Schedule nor from other parts of the EC Schedule other than the fact that they do not indicate that Chapter 2, including heading 02.10, is necessarily characterized by the notion of long-term preservation. In conclusion, it is the Panel's view that an examination of these various aspects of the EC Schedule does not clarify the ordinary meaning of the term "salted" in the concession contained in heading 02.10 of the EC Schedule.

(iii) The Harmonized System

Does the Harmonized System qualify as "context" for the interpretation of the EC Schedule?

Arguments of the parties

7.181 **Brazil, Thailand** and the **European Communities** submit that the HS should be taken into consideration in interpreting the EC Schedule. The complainants note that the HS is used by over 175

[284] WCO's reply to Panel question No. 12 to the WCO.
[285] The HS is discussed in greater detail below in section VII.G.3(b)(iii).

countries and customs territories as a basis for their customs tariffs and for the collection of trade statistics. They also submit that the 1992 version of the HS was the basis for negotiation of the EC Schedule.[286] Brazil is of the view that, in light of the foregoing, reference can be made to the terms of the headings and subheadings of the 1992 version of the HS for clarification of the meaning of the EC Schedule.[287] Thailand submits that all the parties agree that an interpretation of the EC Schedule under Article 31 of the *Vienna Convention* must take into account the HS and its Explanatory Notes and emphasizes that the Appellate Body in *EC – Computer Equipment* stated that the HS and its Explanatory Notes should have been considered by the panel in that case when interpreting the terms of the EC Schedule.[288]

7.182 **Brazil** considers that the HS qualifies as "context" under Article 31(2)(b) of the *Vienna Convention*. According to Brazil, the HS was an instrument made by various parties to the WTO Agreement "in connection with" the conclusion of the WTO Agreement, in the sense that it relates to the WTO Agreement – because tariff negotiations were held on the basis of the HS – and not in the sense that it was concluded at the same time as the WTO Agreement.[289]

7.183 **Thailand** does not consider that the HS is "context" within the meaning of Article 31(2) of the *Vienna Convention* given that, in Thailand's view, the HS does not fulfil the criteria set out in that Article.[290] However, Thailand submits that the HS could be taken into account under either Article 31(1) of the *Vienna Convention* as "context" or under Article 31(3)(c) of the *Vienna Convention* as "a relevant rule of international law".[291] Thailand notes that, in *EC – Computer Equipment*, the Appellate Body expressed the view that the HS should have been taken into consideration by the panel in that case in its effort to interpret the terms of the EC Schedule but that the Appellate Body did not specify the provision in the *Vienna Convention* under which the HS shoud have been taken into account.[292] Thailand submits that it may not be necessary for the Panel in this case to specify the provision in Article 31 of the *Vienna Convention* under which to address the HS.[293]

7.184 The **European Communities** submits that, in the context of this case, the HS qualifies as "context" under Article 31(3)(c) of the *Vienna Convention*.[294] In support, the European Communities points out that the Appellate Body in *EC – Computer Equipment* considered the HS as part of the context of the schedule at issue in that case.[295]

Analysis by the Panel

7.185 The Panel recalls that, pursuant to Article 3.1 of the HS Convention, the European Communities is obliged to use the HS headings and subheadings at the 6-digit level. Therefore, the European Communities' CN and the HS are identical at the 6-digit level.

7.186 The HS originates from the "Geneva Nomenclature" (GN), which came into existence on 1 July 1937 in the form of the 1937 Draft Customs Nomenclature of the League of Nations. The GN was replaced in 1959 by the Brussels Convention on Nomenclature for the Classification of Goods in

[286] Brazil's first written submission, paras. 106-108; Thailand's first written submission, paras. 97-101; EC's reply to Panel question No. 73.
[287] Brazil's first written submission, para. 111.
[288] Thailand's second written submission, paras. 30 and 31; Thailand's oral statement at the second substantive meeting, para. 25.
[289] Brazil's reply to Panel question No. 73; Brazil's second written submission, para. 27.
[290] Thailand's reply to Panel question No. 73; Thailand's second written submission, para. 31.
[291] Thailand's second written submission, para. 32; Thailand's reply to Panel question No. 121.
[292] Thailand's reply to Panel question, no. 73 referring to the Appellate Body Report in *EC – Computer Equipment*, para 89.
[293] Thailand's reply to Panel question No. 73; Thailand's second written submission, para. 31.
[294] EC's reply to Panel question No. 73.
[295] EC's oral statement at the second substantive meeting, para. 28.

Customs Tariffs (Brussels Tariff Nomenclature or BTN)[296], which was subsequently renamed as the Customs Co-operation Council Nomenclature in 1974 (CCCN). The CCCN was replaced by the HS in 1988. The HS has been amended three times since 1988 – in 1992, 1996 and in 2002.

7.187 The Panel notes that the membership of the HS is extremely broad and includes the vast majority of WTO Members, including the parties to this dispute.[297] Further, the HS was used as a basis for the preparation of the Uruguay Round GATT schedules. This is apparent from the Modalities Agreement[298], which provides that agricultural products in respect of which tariff commitments are to be established are based on the HS[299] and from the fact that the HS has been used to define product coverage under the Agreement on Agriculture.[300]

7.188 In addition, the Panel notes that, in *EC – Computer Equipment*, the Appellate Body stated that the panel should have considered the HS and its Explanatory Notes when interpreting the terms of the schedule at issue in that case, which happens to be the same schedule that is at issue in this case – namely, the EC Schedule. In particular, the Appellate Body stated that:

> "We believe ... that a proper interpretation of [EC] Schedule LXXX should have included an examination of the *Harmonized System* and its *Explanatory Notes*."[301]

7.189 In light of the foregoing, it is clear to the Panel that the 1992 version of the HS and its Explanatory Notes are relevant to the interpretation of concessions contained in the EC Schedule. We do not consider that the outcome of the interpretative exercise we are undertaking with respect to heading 02.10 of the EC Schedule will be affected depending upon whether we classify the HS as "context" under Article 31(2)(b) of the *Vienna Convention* as submitted by Brazil, or as "context" under Article 31(1) as submitted by Thailand, or as a "relevant rule of international law" under Article 31(3)(c) as submitted by Thailand and the European Communities. Therefore, we will treat the HS as if it qualifies as "context" under Article 31(2), recalling that the Appellate Body in *EC – Computer Equipment* indicated that the HS should be taken into consideration for the interpretation of a Member's schedule. We will now consider whether any relevant inferences can be drawn from the HS for the purposes of the interpretation of the concession contained in heading 02.10 of the EC Schedule.

Interpretation of the relevant aspects of the Harmonized System

Interpretative approach

7.190 In determining the relevance, if any, of the HS for the interpretation of the concession contained in heading 02.10 of the EC Schedule, we will consider all relevant aspects of the HS – i.e. the terms and structure of the HS, its Explanatory Notes and the General Rules. We will initially consider each aspect individually but will finally appraise all these aspects in totality. We consider that we will be better-placed to draw relevant inferences from the HS for the purposes of our interpretation of the EC Schedule if all relevant aspects of the HS are considered as a whole.

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[296] The BTN came into force on 11 September 1959, following the adoption on 1 July 1955 of a Protocol of Amendment establishing a revised version of the Nomenclature.

[297] The Panel notes that 102 out of 148 WTO Members are signatories to the HS Convention and the vast majority of other WTO Members, although not signatories, apply the HS.

[298] The Modalities Agreement is referred to above in para. 7.96.

[299] See paragraph 3 of Annex 3 of the Modalities Agreement.

[300] See paragraph 1 of Annex 1 of the Agreement on Agriculture**.**

[301] Appellate Body Report, *EC – Computer Equipment*, para. 89.

Terms and structure of the HS

Arguments of the parties

7.191 In relation to the terms of heading 02.10 of the HS, **Brazil** and **Thailand** submit that they are identical to the terms of heading 02.10 of the EC Schedule.[302] In particular, Thailand submits that the term "salted" in heading 02.10 of the HS is not qualified in any way to clarify the threshold level of salt that must be met to classify the product as "salted".[303]

7.192 Regarding the structure of Chapter 2 of the HS, Brazil notes that the WCO did not refer to preservation or long-term preservation in its reply to Panel questions regarding the structure of Chapter 2 of the HS.[304]

7.193 Brazil also refers to the predecessor nomenclature to the HS – namely, the GN – and the Explanatory Notes to that nomenclature to demonstrate that Chapter 2 of the HS is structured on the basis of "preparation" rather than "preservation".[305] First, Brazil submits that the GN shows that Chapter 2 was structured in such a way that the more meats were prepared and/or processed, the farther they were placed from live animals.[306] Secondly, Brazil submits that an Explanatory Note in Chapter 2 of the GN only referred to two preservation categories – i.e., "fresh/chilled" and "frozen", but not to "salted", "dried" or "smoked". According to Brazil, had the drafters of the GN conceived of "salted", "dried" or "smoked" as preservation methods under Chapter 2, they would have placed them as tertiary items next to "fresh/chilled" and "frozen".[307] Thirdly, Brazil argues that the same Explanatory Note reflects a concern to avoid the drawing of distinctions in Chapter 2 that would result in discrimination among the same type of meat coming from different places.[308] According to Brazil, if preservation determined classification under heading 02.10, that objective would be undermined.[309] Fourthly, Brazil refers to the terms of the predecessor of heading 02.10 in the GN. Brazil argues that the reference to "simply prepared" in that heading means that the heading pertains to meat that was "prepared", but not "preserved".[310] According to Brazil, this is further confirmed by the Explanatory Note to that heading in the GN, which states that further processed meat such as hermetically sealed and specifically packaged products, as opposed to simply prepared meat, fall under Chapter 16 as meat of the preserved foods industries.[311] Brazil concludes that Chapter 2 of the GN was structured according to the degree of preparation and that, under the GN, "salted", "dried" and "smoked" meats were regarded as "prepared" meats rather than "preserved" meats.[312] Therefore, according to Brazil, Chapter 2 of the HS is structured on the basis of the same principle – i.e., the degree of "preparation" rather than the degree of "preservation".[313]

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[302] Brazil's first written submission, para. 112; Thailand's first written submission, para. 107.
[303] Thailand's first written submission, para. 109.
[304] Brazil's oral statement at the second substantive meeting, para. 32; Brazil's closing statement at the second substantive meeting, para. 14.
[305] Brazil's second written submission, paras. 33-47. Brazil submitted the GN and its Explanatory Notes in Exhibit BRA-40(a).
[306] Brazil's second written submission, para. 37; Brazil's closing statement at the second substantive meeting, para. 14.
[307] Brazil's second written submission, para. 40; Brazil's oral statement at the second substantive meeting, para. 25; Brazil's reply to Panel question 121.
[308] Brazil's second written submission, para. 41; Brazil's oral statement at the second substantive meeting, para. 26; Brazil's reply to Panel question No. 121.
[309] Brazil's oral statement at the second substantive meeting, para. 27.
[310] Brazil's second written submission, para. 44.
[311] Brazil's second written submission, para. 45.
[312] Brazil's second written submission, para. 47.
[313] Brazil's second written submission, paras. 46-47.

7.194 The **European Communities** quotes the WCO's reply to a question from the Panel, which the European Communities submits indicates that the rationale behind the product coverage in the HS was to meet the needs of those involved in international trade by including goods or groups of goods for which there was a significant volume of international trade.[314] According to the European Communities, the WCO's response confirms that the drafters of the HS put meats which had been "salted, in brine, dried or smoked" for preservation in a specific heading because they constituted a significant category in international trade. The European Communities further submits that trade in meat "preserved" in the ways mentioned in heading 02.10 in the HS clearly qualifies as products with a significant volume of international trade and this can be confirmed by the fact that European countries were the principal participants in the 1937 GN and the GN's successor, the 1955 CCCN. According to the European Communities, partially processed meats, such as the products at issue, have played no role in international trade since they did not exist in 1937 nor in 1955. The European Communities argues that, therefore, there was no reason for the drafters of the GN, the CCCN and the HS to provide for a class of products that did not exist in international commerce. Rather, the type of meats they had in mind when providing a separate heading must have been "preserved" meats, the varieties of which were well established and easily identifiable and comprised a fairly short list.[315] The European Communities also submits that, despite the use of the terminology "prepared" in the GN predecessor to heading 02.10 of the HS, it could not have referred to anything but meat that had been processed in order to protect it from decay and deterioration given the almost total absence of domestic refrigeration in pre-war Europe. The European Communities explains that, because the GN heading included cooked meat along with meats that were salted etc., the term "simply prepared" was used to cover all such processes. The European Communities notes that "cooked meat" was eventually placed together with other preparations of meat in Chapter 16 of the CCCN and, subsequently, in the HS.[316]

Comments by the World Customs Organization

7.195 The WCO states that Chapter 2 of the Harmonized System is based on the structure of the CCCN. The CCCN, which had been used since 1959, was, to some extent, based on the former "Geneva Nomenclature". The WCO further states that the historical development of the two HS headings at issue in this dispute (02.07 and 02.10) has been as follows:

> Item 14 Dead poultry. (Geneva Nomenclature)
>
> 02.02 Dead poultry (that is to say, fowls, ducks, geese, turkeys and guinea fowls) and edible offals thereof (except liver), fresh, chilled or frozen. (CCCN)
>
> 02.07 Meat and edible offal, of the poultry of heading 01.05, fresh, chilled or frozen. (HS)
>
> Item 18 Meat, salted, dried, smoked, cooked, or otherwise simply prepared. (Geneva Nomenclature)
>
> 02.06 Meat and edible meat offals (except poultry liver), salted, in brine, dried or smoked. (CCCN)

[314] EC's oral statement at the second substantive meeting, para. 32 referring to the WCO's reply to Panel question No. 2 to the WCO.
[315] EC's oral statement at the second substantive meeting, paras. 34-36.
[316] EC's oral statement at the second substantive meeting, paras. 41-45.

> 02.10 Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal. (HS)[317]

7.196 The WCO further states that, when the HS was developed, the separate identification of goods or group of goods was, as a general rule, approved only if there was agreement amongst participants that the goods or group of goods were significant in international trade. Consequently, the rationale behind the product coverage in the HS was to meet the needs of those involved in international trade by including goods or groups of goods with a significant volume of international trade, taking into consideration the structure of the nomenclatures consulted.[318]

Analysis by the Panel

7.197 The contents and structure of the HS are identical to the EC Schedule at the 6-digit level. The Panel considers that, to the extent that the terms of heading 02.10 in the HS and the structure of Chapter 2 of the HS are identical to the terms of the concession contained in heading 02.10 and Chapter 2 of the EC Schedule, they do not provide us with any helpful guidance regarding the interpretation of the term "salted" in that concession in addition to what the Panel has already obtained from its analysis thus far regarding the terms and structure of the EC Schedule. Therefore, in this section, we will focus on elements of the terms and structure of the HS that do not appear in the EC Schedule and which we have not been called upon to consider up until now.

7.198 Regarding the evolution of the structure of Chapter 2 of the HS, we recall that the GN and the BTN were concluded respectively in 1937 and 1959. The timing of their conclusion suggests to us that they might be of limited relevance for the headings contained in the HS given changes in trade patterns and technology since their conclusion, which may have necessitated changes in tariff nomenclature. Having said this, we turn to the evolution of the structure of Chapter 2 of the HS to determine whether it may, nevertheless, assist us in the interpretation of the concession contained in heading 02.10 of the EC Schedule.

7.199 We acknowledge that certain aspects associated with the evolution of Chapter 2 of the HS may suggest that heading 02.10 was intended to relate to the "preparation" of meat. In this regard, we note that the predecessor in the GN to heading 02.10 of the HS – i.e. Item 18 – referred to:

> "Item 18 Meat, salted, dried, smoked, cooked, or otherwise simply prepared:
>
> a. Ham
> b. Other.
>
> Note. – *Meat imported in tins, terrines, crusts, or in hermetically sealed receptacles is not included under Item 18.*"[319]

7.200 In addition, the Explanatory Note to Item 18 stated that:

> "The last basic item of this chapter includes all other meat, salted, dried, smoked, cooked or otherwise simply prepared. ... this item consists of very simply prepared articles, the production of which is rather closely connected with that of fresh meat. The joint expediency for the simplification of and ready reference to the Customs tariffs therefore makes it desirable that such meat should not be classified otherwise than as simple preparations of fresh meat. On the other hand, this chapter does not include meat in tins, jars, croûtes or in hermetically sealed containers, these actually

[317] WCO's reply to Panel question No. 3 to the WCO.
[318] WCO's reply to Panel question No. 2 to the WCO.
[319] The GN is contained in Exhibit BRA-40(a).

> being products of the preserved foods industries and therefore included in Chapter 16."

7.201 It is true that the reference to "simply prepared" in Item 18 may be read as characterizing all the terms preceding it. More specifically, that reference could imply that "salted", "dried", "smoked" and "cooked" are all methods of "simple preparation". Indeed, this view appears to be supported by the term "otherwise", which immediately precedes "simply prepared" as well as the Explanatory Note to Item 18, which states that "this item consists of very simply prepared articles" and "does not include meat in tins, jars, croûtes or in hermetically sealed containers ... products of the preserved food industries".

7.202 Nevertheless, the Panel considers that, even if Item 18 of the GN and its successor heading in the HS – namely, heading 02.10 – were intended to relate to "prepared" foods, in our view, there is nothing in the GN nor in the HS that suggests that they could not concurrently relate to "preserved" foods. In this regard, the Panel recalls its observation above in paragraph 7.114 that there is a certain degree of overlap in the definitions of the terms "preparation" and "preservation".

7.203 In considering whether the evolution of the HS supports the view that the concession contained in heading 02.10 of the EC Schedule relates not only to "preparation" but also to "preservation", we note that Brazil has submitted that the evolution of the GN indicates that the notion of "preserve" cannot characterize heading 02.10 of the HS and its predecessors. In particular, Brazil submits that, had the drafters of the GN conceived of "salted", "dried" or "smoked" as preservation methods, they would have placed them as tertiary items next to fresh/chilled and frozen.[320] Brazil also submits that, if preservation determined classification under heading 02.10, this would undermine the objective of avoiding discrimination among meat coming from different places.[321] Brazil bases both arguments on the following Explanatory Note to Item 13 in the GN[322]:

> "With regard to the subdivision of this item, there are, of course, two possibilities: the four important kinds of animals for slaughter: the bovine species, sheep, pigs and the equine species could be taken as a basis; or the two main categories of fresh and chilled or frozen meat could be taken. The draft combines these two methods of classification. It is no doubt essential that tariffs should show a discrimination between the various kinds of animals and, as a matter of fact, this distinction is now made in most tariffs. The draft, therefore, applies the same rule with regard to subdivisions, by providing, in the case of meat of the bovine species and sheep (large quantities of which are imported frozen), tertiary items which distinguish between fresh and frozen meat. To proceed otherwise – i.e., to make a fundamental distinction between fresh and frozen meat – would compel several countries to introduce into their Customs tariffs a subdivision which they have so far regarded as unnecessary and would lead to a discrimination being made between fresh meat, which is usually produced by neighbouring countries, and frozen meat, which generally comes from very remote parts of the world."

7.204 The Explanatory Note to Item 13 identifies two main categories of meat – namely, "fresh/chilled meat" and "frozen meat". Even if those categories are categories of "preservation" as has been submitted by Brazil, we see nothing in the Explanatory Note to suggest that they are necessarily the *only* categories of preservation in Chapter 2. Further, the Panel notes that the objective to avoid discrimination referred to in the Explanatory Note, which Brazil submits militates

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[320] Brazil's second written submission, para. 40; Brazil's oral statement at the second substantive meeting, para. 25; Brazil's reply to Panel question No. 121.

[321] Brazil's oral statement at the second substantive meeting, para. 27.

[322] Item 13 referred to: "Butcher's meat" (i.e., beef, veal, mutton, lamb, pork excluding bacon and horseflesh).

against an interpretation of Item 18 to include the notion of "preservation", is expressed with respect to fresh and frozen meat in Item 13 only and not with respect to the meats to which Item 18 applies. Therefore, we do not consider that the expression of the concern regarding non-discrimination, which is contained in the Explanatory Note to Item 13, necessarily indicates that the processes in Item 18 and, in turn, heading 02.10, exclude the concept of "preservation".

7.205 The Panel recalls again that, following our examination of the ordinary meaning of the concession contained in heading 02.10 of the EC Schedule, we concluded that the term "salted" means to season, to add salt, to flavour with salt, to treat, to cure or to preserve and encompasses the notion of both "preservation" and "preparation".[323] In our view, the evolution of the terms and structure of Chapter 2 of the HS does not definitively indicate whether or not the predecessor to heading 02.10 of the HS was characterized by the notion of "preparation" and/or "preservation" and/or reflected international trade patterns at the time the heading was finalised. Therefore, we consider that the evolution of the terms and structure of Chapter 2 of the HS does not clarify the ordinary meaning of the concession contained in heading 02.10 of the EC Schedule. Further, it is the Panel's view that the terms and structure of the HS do not indicate that the concession contained in heading 02.10 is necessarily characterized by the notion of long-term preservation.

Explanatory Notes to the HS

Arguments of the parties

7.206 **Brazil** and **Thailand** acknowledge that Article 1(a) of the HS Convention does not define the HS to include Explanatory Notes to the HS. Brazil and Thailand submit that, nevertheless, knowing that Explanatory Notes were not part of the HS, in *EC – Computer Equipment*, the Appellate Body intentionally gave them the same interpretative weight and status as that given to the HS when it stated that the panel in that case should have considered both the HS and its Explanatory Notes.[324]

7.207 In response, the **European Communities** does not dispute that parts of the HS that do not appear in the EC Schedule – that is, the various HS Notes including Chapter notes and the Explanatory Notes – should be taken into account when interpreting the EC Schedule.[325] However, the European Communities submits that the Explanatory Notes to the HS provide non-authoritative guidance and should not be treated the same way as treaty provisions.[326]

7.208 With respect to *the Explanatory Note to heading 02.10 in the HS*, **Brazil** and **Thailand** state that the Note makes it clear that heading 02.10 covers meat that has been "prepared" in the manner described in the heading – that is, through salting, brining, drying or smoking.[327] Thailand submits that, therefore, any meat that has been prepared in a manner decribed in the heading must be classified under heading 02.10.[328] Brazil adds that there is nothing in the Note to indicate that "salting" is a process used to ensure [long-term] preservation since the term "preserve" is not mentioned in the Note.[329] According to Brazil, to read in the requirement that salting is a process used to ensure long-

[323] See para. 7.114 above.

[324] Brazil's oral statement at the second substantive meeting, para. 35; Brazil's reply to Panel question No. 121; Thailand's second written submission, para. 31; Thailand's reply to Panel question No. 121 referring to Appellate Body Report, *EC – Computer Equipment*, para. 89.

[325] EC's oral statement at the first substantive meeting, para. 17.

[326] EC's first written submission, para. 156; EC's oral statement at the second substantive meeting, para. 46.

[327] Brazil's first written submission, paras. 118-119; Brazil's second written submission, para. 29; Brazil's oral statement at the second substantive meeting, para. 21; Thailand's first written submission, para. 120.

[328] Thailand's first written submission, para. 120; Thailand's reply to Panel question No. 67.

[329] Brazil's first written submission, para. 120; Brazil's oral statement at the first substantive meeting, para. 33.

term preservation would have the effect of reading out the term "prepared" from the Note to heading 02.10 of the HS.

7.209 In response, the **European Communities** submits that, when viewed as a whole, it is doubtful that the term "prepare" was used as a term of art in the Explanatory Note to heading 02.10 in the HS.[330] In addition, the European Communities submits that the purpose of the Note is not to distinguish between heading 02.10 and headings 02.01 - 02.08 (being the matter at issue in this dispute) but, rather, it seeks to distinguish between the specific meats covered by heading 02.09 (pig and poultry fat) and all other kinds of meat in Chapter 2.[331]

7.210 **Thailand** submits in response that the fact that the Note makes reference to the delineation between headings 02.09 and 02.10 does not detract from the intrinsic value of the description that is used in that Note. According to Thailand, the Note makes it clear that the terms "salted, in brine, dried or smoked" are descriptions of the manner in which meat and meat offal have been prepared.[332]

7.211 **Brazil** and **Thailand** refer to *the Explanatory Notes to Chapter 2 in the HS*, which provide that the "fresh" state of meat may include meat and meat offal that is packed with salt as a temporary preservative during transport and, therefore, refers to meat whose essential characteristics have not been altered through the addition of salt. They submit that, in contrast, the products at issue have been deeply and homogenously impregnated with salt.[333] Thailand submits that, since fresh meat packed with salt as a temporary preservative must be classified as "fresh" meat, meat to which salt has been added as more than a temporary preservative must be classified as something other than "fresh"; that is, it must be viewed as "salted" meat under heading 02.10.[334] Brazil also submits that nothing in the Notes suggests that frozen meat impregnated or prepared in salt must be classified as "frozen" meat rather than "salted" meat. Brazil submits that, on the contrary, because the reference to salt in the Notes is only made with respect to fresh meat, it shows the explicit intention to include salt only in relation to fresh meat and in a specific circumstance.[335]

7.212 In response, the **European Communities** submits that salt cannot act as a preservative, even for temporary preservation, if it does not have some type of reaction with the meat in transport. The European Communities submits that, therefore, the distinction between the addition of salt as a temporary preservative and the addition of salt as an ingredient is not obvious. The European Communities submits that the relevant aspect of the Explanatory Notes should be applied *mutatis mutandis* to "frozen" meat, with an added salt content.[336]

7.213 **Brazil** and **Thailand** further submit that the Explanatory Notes to Chapter 2 of the HS indicate that meat under Chapter 2 is classified according to four states only: fresh; chilled; frozen; and, salted/in brine/dried/smoked.[337] According to Brazil, this indicates that "frozen" meat and "salted" meat are considered two different products that must be classified in separate headings of Chapter 2.[338] Brazil maintains that the Explanatory Notes to Chapter 2 do not provide that the "states" represent methods of preservation.[339] Thailand adds that the state of "fresh" – one of the four states listed in the Explanatory Notes – is not a state related to preservation. Thailand submits that the state

[330] EC's first written submission, para. 157.
[331] EC's oral statement at the first substantive meeting, para. 21; EC's oral statement at the second substantive meeting, para. 39.
[332] Thailand's reply to Panel question No. 67.
[333] Brazil's first written submission, para. 141; Thailand's first written submission, para. 114.
[334] Thailand's first written submission, para. 114.
[335] Brazil's first written submission, para. 140.
[336] EC's first written submission, para. 150.
[337] Brazil's first written submission, para. 125; Thailand's reply to Panel question No. 79(a).
[338] Brazil's first written submission, para. 125.
[339] Brazil's first written submission, para. 127; Brazil's oral statement at the first substantive meeting, paras. 36-37.

of "salted, in brine, dried or smoked" is also not related to preservation.[340] Further, according to Brazil, the Explanatory Notes to Chapter 2 and to heading 02.10 indicate that the term "salted" in heading 02.10 of the EC Schedule does not mean salted for purposes of long-term preservation.[341]

7.214 Brazil also submits that, in illustrating what kind of meat should be classified under the headings of Chapter 16 (as opposed to the headings of Chapter 2), the Explanatory Notes to Chapter 2 list meat "otherwise *prepared or preserved* by any process not provided for" in Chapter 2.[342] Brazil submits that only headings 02.09 and 02.10 relate to meat that has undergone a process of preparation.[343] Brazil also argues that the Explanatory Notes show that classification under Chapter 2 is determined either by a process of preparation or by a process of preservation.[344] Brazil argues that, if a product has been "prepared" by a process in Chapter 2, and has also been "preserved" by a process under that Chapter, the product will be classified according to the process of "preparation", otherwise the phrase "prepared or preserved" in the Notes to Chapter 2 would have no meaning.[345] Brazil submits that, had the structure of Chapter 2 been based exclusively on "preservation", there would have been no need for the inclusion of the term "prepared" in the Notes because any preparation – including that provided for in heading 02.10 – would only serve the purpose of preservation. However, according to Brazil, "preparation" is meant to be something different from and broader than "preservation" under the Notes.[346]

7.215 With regard to *the Explanatory Notes to Chapter 16 in the HS*, **Thailand** submits that these Notes also make it clear that Chapter 2 refers to products that have undergone certain preparation processes ("salted", "in brine", "dried" or "smoked") or that have undergone preservation processes ("chilled" or "frozen") or which are in the natural state and are not prepared or preserved by any process ("fresh").[347] Thailand states that the Note to Chapter 16 excludes products that are "*prepared or preserved* by the processes specified in Chapter 2 or 3 or heading 0504." Thailand submits that, since the terms "fresh", "chilled" and "frozen" relate to preservation, the terms "salted, in brine, dried or smoked" cannot also be interpreted as relating to preservation because, otherwise, the reference to "prepared" in the Note to Chapter 16 would be rendered inutile. According to Thailand, the correct interpretation would be to refer to "salted, in brine, dried or smoked" as processes for the purposes of preparation since this reading would give meaning to all the terms in the Explanatory Note to Chapter 16.[348]

7.216 In response, the **European Communities** submits that the Explanatory Notes to Chapter 16 are inconclusive regarding the classification of the products at issue since they simply imply that meat to which salt alone has been added in order to affect taste, as opposed to seasoned meat to which both pepper and salt have been added, should be classified elsewhere than under Chapter 16. This can only mean that such meat should be classified under Chapter 2, but the Notes do not indicate under which heading.[349]

[340] Thailand's second written submission, para. 35.
[341] Brazil's oral statement at the first substantive meeting, para. 5.
[342] Brazil's first written submission, para. 128; Brazil's second written submission, para. 28.
[343] Brazil's first written submission, para. 129.
[344] Brazil's first written submission, para. 132.
[345] Brazil's first written submission, para. 133; Brazil's oral statement at the first substantive meeting, para. 39.
[346] Brazil's oral statement at the first substantive meeting, para. 39.
[347] Thailand's first written submission, para. 122.
[348] Thailand's second written submission, para. 36; Thailand's reply to Panel question No. 121.
[349] EC's first written submission, para. 154.

7.217 **Brazil** and **Thailand** conclude that the HS Explanatory Notes offer unequivocal confirmation that heading 02.10 applies to meat that has been "prepared" by salting, brining, drying or smoking rather than to meat that has been "preserved" by these processes.[350]

Comments by the World Customs Organization

7.218 The WCO states that the classification of products under the HS is based on the wording of the legal texts – that is, the terms of the headings and any relative Section, Chapter and Subheading Notes and the General Rules of the HS. The WCO adds that Explanatory Notes to the HS, which the WCO describes as the "official interpretation of the HS", are taken into consideration in conjunction with the legal texts.[351]

Analysis by the Panel

7.219 Article 1(a) of the HS Convention provides that:

> "[T]he 'Harmonized Commodity Description and Coding System', hereinafter referred to as the 'Harmonized System', means the Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading Notes and the General Rules for the interpretation of the Harmonized System, set out in the Annex to this Convention."

7.220 The Panel notes that the Explanatory Notes are not referred to in Article 1(a) and, therefore, do not appear to form part of the HS, which we have decided to consider as "context" for the interpretation of the EC Schedule pursuant to Article 31(2) of the *Vienna Convention*. Nevertheless, the Panel notes that, in *EC – Computer Equipment*, the Appellate Body explicitly stated that the panel in that case should have considered the Explanatory Notes to the HS in its examination of the EC Schedule, even though the non-binding status of those Notes had been brought to its attention by one of the parties.[352] Further, we note that the WCO has indicated that the Explanatory Notes to the HS are taken into consideration in conjunction with the legal texts when interpreting the HS.[353] Therefore, on the basis of the foregoing, we will examine the Explanatory Notes to the HS for our interpretation of the concession contained in heading 02.10 of the EC Schedule, bearing in mind as we proceed that the Explanatory Notes do not form part of the HS and are non-binding.

7.221 The Panel first notes that certain aspects of the Explanatory Notes may be read as indicating that the processes referred to in the concession contained in heading 02.10 are to be characterized as processes for "preparation". For example, the Explanatory Note to heading 02.10 of the HS, which appears to be most relevant to the present case, states that:

> "This heading applies to all kinds of meat and edible meat offal which have been *prepared* as described in the heading, other than pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted (heading 02.09) ... ."[354] (emphasis added)

7.222 In addition, the Explanatory Notes to Chapter 2 refer to the processes listed in Chapter 2 as "prepared or preserved" and the Explanatory Notes to Chapter 16 exclude products that are "prepared or preserved" by the processes specified, *inter alia*, in Chapter 2. These Explanatory Notes indicate

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[350] Brazil's second written submission, paras. 28-29; Thailand's second written submission, paras. 33-35.

[351] WCO's reply to Panel question No. 1 to the WCO.

[352] See United States' arguments in Appellate Body Report, *EC – Computer Equipment*, para. 38.

[353] WCO's reply to Panel question No. 1 to the WCO.

[354] The aspects of the Explanatory Notes to the HS upon which the complainants rely are contained in Annex I to the EC's oral statement at the first substantive meeting. The full text of the Explanatory Notes to Chapter 2 of the HS can be found in Exhibit BRA-24.

that at least some processes referred to in Chapter 2 result in "preparation" and the Explanatory Note to heading 02.10 suggests that the processes referred to in that heading are some such processes.

7.223 Even though the above Explanatory Notes may suggest that the processes referred to in heading 02.10 are processes for the "preparation" of meat, we do not consider that they are particularly helpful for our purposes in light of the fact that it is not clear to us whether the notions of "preservation" and "preparation" are mutually exclusive in the context of heading 02.10.[355] Therefore, we consider that the Explanatory Notes to the HS do not clarify the ordinary meaning of the term "salted" in the concession contained in heading 02.10 of the EC Schedule. Further, it is our view that the Explanatory Notes do not indicate that that concession is necessarily characterized by the notion of long-term preservation.

General Rules

Arguments of the parties

7.224 **Brazil** and **Thailand** note that Article 1(a) of the HS Convention provides that "the 'Harmonized System', means the Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading notes and the General rules for the interpretation of the Harmonized System". Therefore, according to Brazil and Thailand, the General Rules of the HS are part of the HS and, consequently, also qualify as "context" for the interpretation of headings under the EC Schedule.[356]

7.225 The **European Communities** disputes the applicability of the General Rules for the interpretation of the EC Schedule. According to the European Communities, an application of the General Rules cannot displace any conclusions regarding the interpretation of the EC Schedule that might be reached through the application of Articles 31 and 32 of the *Vienna Convention*.[357]

7.226 Regarding General Rule 1, **Thailand** notes that it provides that the classification of a product shall be determined according to the terms of the headings and the relevant Chapter and heading notes. Thailand submits that the terms of the headings and the relevant Chapter and heading notes in the HS confirm the ordinary meaning of "salted" as relating to a product that contains salt and not a product that is preserved by the method of salting.[358]

7.227 With respect to General Rule 3, **Brazil**, **Thailand** and the **European Communities** concur that the condition for its application – namely, that the products at issue are prima facie classifiable under two or more headings – has not been fulfilled in this case. The complainants consider that the products at issue are classifiable under heading 02.10 whereas the European Communities considers that the products at issue are classifiable under heading 02.07.[359]

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[355] In this regard, we recall again our observation in paragraph 7.114 above that there is a certain degree of overlap in the definitions of the terms "preparation" and "preservation".

[356] Brazil's reply to Panel question No. 74; Brazil's second written submission, para. 48; Brazil's reply to Panel question No. 121; Thailand's reply to Panel question No. 74; Thailand's reply to Panel question No. 121.

[357] EC's oral statement at the second substantive meeting, para. 54.

[358] Thailand's first written submission, para. 124; Thailand's reply to Panel question No. 121.

[359] Brazil's first written submission, para. 147; Brazil's reply to Panel question No. 72; Brazil's second written submission, para. 49; Thailand's oral statement at the first substantive meeting, para. 29; Thailand's second written submission, para. 44; EC's reply to Panel question No. 72; EC's first written submission para. 159.

7.228 Nevertheless, **Brazil** and **Thailand** submit that the Panel may resort to General Rule 3 if it considers that the products at issue fall to be classified under two or more headings of the HS.[360] In this regard, Thailand notes that the European Communities itself appears to consider that the products at issue are classifiable under two or more headings given that, in the minutes of a meeting of the EC Customs Code Committee, the Committee stated that the "[products at issue] correspond at the same time to the wording of the heading 02.07 (frozen) and to the wording of the heading 02.10 (salted)."[361]

7.229 Brazil and Thailand note that General Rule 3(a) provides that the heading that provides the most specific description of a good is to be preferred to a heading that provides a more general description.[362] Brazil submits that the adjective "specific" means "clearly defined", "relating to, characterizing, or distinguishing a species" or "special, distinctive, or unique".[363] Brazil and Thailand submit that salting confers meat with specific, distinctive characteristics that distinguish salted meat from unsalted meat.[364] In support, they point to the different flavour and texture of salted meat which affects consumer choices, the fact that meat that has been deeply and homogenously impregnated with salt cannot be thoroughly unsalted and the fact that such meat has more limited and specific uses.[365] Brazil and Thailand submit that, in contrast, the freezing of chicken does not modify the characteristics of the meat.[366]

7.230 Further, Brazil submits that the reference to poultry in heading 02.07 does not make it more specific than heading 02.10. Brazil submits that the European Communities has not disputed the fact that both subheadings 0207.41.10 and 0210.90.20 include chicken meat. Hence, there is no question that chicken meat is a product covered by both subheadings. In addition, Brazil argues that, because the term "meat" in heading 02.10 includes all kinds of meat, heading 02.10 could easily have referred specifically to meat of swine, bovine animals, horses, lambs, goats, geese, turkeys, chicken, etc.[367] Thailand submits that while, in abstract terms, poultry is more specific than meat, this is not relevant for the purposes of determining the appropriate heading for the classification of the products at issue in this dispute as an analysis of the headings show that heading 02.10 is more specific for all types of meat that are salted, in brine, dried or smoked.[368] Brazil also points out that the term "salted" is what specifically describes the product at issue in this case given the way Chapter 2 is structured.[369] Thus, according to Brazil and Thailand, heading 02.10 is more specific within the meaning of General Rule 3(a) because, in their view, the fact that a product is "salted", "in brine", "dried" or "smoked" is a more specific criterion than the type of meat for purpose of customs classification.[370]

7.231 In response, the **European Communities** submits that all poultry is meat but not all meat is poultry. Consequently, according to the European Communities, the reference to "poultry" is more specific for the purposes of General Rule 3(a).[371] The European Communities submits that, in any

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[360] Brazil's comments on EC's reply to Panel question No. 121 quoting EC's reply to Panel question No. 76; Thailand's second written submission, paras. 42-44.

[361] Thailand's second written submission, para. 46 referring to Exhibit THA-22. Exhibit THA-22 contains the Minutes of the EC's Customs Code Committee dated 25 January 2002.

[362] Brazil's first written submission, para. 150; Thailand's first written submission, para. 127.

[363] Brazil's first written submission, para. 150.

[364] Brazil's second written submission, paras. 50-51; Thailand's second written submission, paras. 24-29 and 45-47.

[365] Brazil's first written submission, paras. 152-153; Brazil's reply to Panel question No. 72; Thailand's first written submission, paras. 128 and 131; Thailand's second written submission, paras. 24-29.

[366] Brazil's first written submission, para. 154; Thailand's first written submission, para. 129.

[367] Brazil's reply to Panel question No. 72.

[368] Thailand's second written submission, paras. 26-27.

[369] Brazil's second written submission, para. 50.

[370] Brazil's second written submission, paras. 50-51; Thailand's second written submission, paras. 27-28; Thailand's oral statement at the second substantive meeting, para. 22.

[371] EC's reply to Panel question No. 72.

event, it sees no reason why "salting" should be regarded as more specific than "freezing" when the words both refer to processes that can be applied to meat.[372]

7.232 **Brazil** and **Thailand** submit that, if the classification of the products at issue cannot be resolved by General Rule 3(a) and, given that General Rule 3(b) is not applicable in this case, General Rule 3(c), should be applied. They note that General Rule 3(c) requires that the products at issue be classified under the heading that occurs last in numerical order.[373] They submit that the application of General Rule 3(c) will lead to the classification of frozen salted chicken under heading 02.10 since that heading occurs after heading 02.07 in terms of numerical order.[374]

7.233 In response, the **European Communities** submits that the meaning of the term "salted" in heading 02.10 in the EC Schedule must be interpreted in accordance with Article 3.2 of the DSU by applying the customary rules of treaty interpretation set forth in Articles 31 and 32 of the *Vienna Convention*. The European Communities submits that General Rule 3(c) is a mechanistic *non liquet* rule, whose application is precluded by Article 3.2 of the DSU. According to the European Communities, in a *non liquet* situation, the general rules regarding the burden of proof in WTO law would require the Panel to err on the side of the respondent – in this case, the European Communities.[375]

7.234 **Thailand** responds by submitting that the application of General Rule 3(c) does not lead to a *non liquet* situation – that is, a situation resulting in "a tribunal's nondecision resulting from the lack of clarity of the law applicable to the dispute at hand."[376] Thailand submits that the purpose of General Rule 3(c) is not to determine the meaning of heading 02.10. Rather, it assumes that the product in question falls under the scope of two or more headings. Thailand submits that, in any event, the characterization of a rule as a "mechanistic" tool does not diminish its value as a means of identifying the proper classification of a product.[377] Further, according to Thailand, General Rule 3(c), is a general rule of interpretation, which can be applied in a harmonious manner together with the customary rules of interpretation of public international law since the customary rules of interpretation are commonly understood to mean those set out in the *Vienna Convention* and given that the Appellate Body has specifically stated that a panel should examine the HS, including its General Rules.

Comments by the World Customs Organization

7.235 The WCO states that, for the purposes of General Rule 3(a), it could be argued that heading 02.07 of the HS provides the more "specific" description since it refers to "meat of poultry, frozen", whereas heading 02.10 of the HS refers to "meat, salted", in general. However, the WCO states that it could also be argued that the reference to the specific type of meat (poultry) in heading 02.07 should not be taken into consideration since it is the processing (freezing and salting) that matters when determining the classification of the products at issue in this case, giving rise to a possibility of heading 02.10 providing a more specific description.[378]

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[372] EC's oral statement at the second substantive meeting, para. 58.

[373] Brazil's oral statement at the second substantive meeting, para. 34; Thailand's second written submission, para. 48.

[374] Brazil's first written submission, para. 158; Brazil's oral statement at the second substantive meeting, para. 34; Thailand's first written submission, para. 132; Thailand's oral statement at the first substantive meeting, para. 29; Thailand's second written submission, para. 48; Thailand's oral statement at the second substantive meeting, para. 24.

[375] EC's reply to Panel question No. 74.

[376] Thailand's oral statement at the second substantive meeting, para. 25 referring to the definition of "*non liquet*" in *Black's Law Dictionary*.

[377] Thailand's second written submission, para. 49.

[378] WCO's reply to Panel question No. 6 to the WCO.

Analysis by the Panel

7.236 The Panel notes that Article 1(a) of the HS Convention provides that the HS is comprised of the headings and subheadings of the HS and their related numerical codes, the Section, Chapter and heading notes and the General Rules. Given that the General Rules clearly form a part of the HS and, in light of our conclusion above in paragraph 7.189 that the HS is relevant to the interpretation of heading 02.10 of the EC Schedule, we will examine the General Rules to determine whether they can assist us in interpreting heading 02.10 of the EC Schedule. However, we note that, in light of our mandate in this case, we will only examine those General Rules to which reference has been made by the parties. In particular, we will only make reference to General Rule 1 and General Rule 3, being the General Rules that have been specifically invoked by the complainants in the context of this dispute.[379]

7.237 We commence our analysis with General Rule 3, which provides that:

> "When by application of Rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

7.238 As regards the question of whether or not General Rule 3 applies, all the parties appear to be in agreement that a textual and contextual analysis of the relevant headings indicates that the products at issue in this dispute are not prima facie classifiable under two or more headings. Accordingly, we will proceed on the same assumption with the result that we will not apply General Rule 3. Given our conclusion that General Rule 3 is inapplicable, we do not consider it necessary to address the various arguments that have been advanced by the parties regarding that Rule.

7.239 General Rule 1 provides that:

> "The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions ..."

7.240 With regard to General Rule 1, as explained above in paragraphs 7.205 and 7.223, we consider that, on the basis of the evidence we have considered thus far, the terms of the headings in

[379] In any event, we note that General Rules other than Rules 1 and 3 do not appear to be relevant in light of the facts of this case.

question and the relevant Chapter and heading notes of the HS do not provide us with guidance as to what precisely is meant by the term "salted" in addition to what we already learned from the ordinary meaning of that term as it appears in the concession contained in heading 02.10 of the EC Schedule.

Overall appraisal of the Harmonized System

7.241 The Panel recalls that, in paragraph 7.190 above, we stated that we would consider each aspect of the HS individually but that we would finally appraise all these aspects in totality. In the Panel's view, the terms and structure of the HS and the evolution of heading 02.10 of the HS do not provide indications as to what the term "salted" means in addition to what we already know following our examination of the ordinary meaning of that term as it appears in the concession contained in heading 02.10 of the EC Schedule. Further, the Panel considers that the terms and structure of the HS do not clearly indicate whether the notions of "preservation" and/or "preparation" characterize heading 02.10. In any event, the Panel is of the view that the terms and structure of the HS do not indicate that heading 02.10 is necessarily characterized by the notion of long-term preservation. As for the non-binding Explanatory Notes to the HS, the Panel considers that they do not help to clarify the ordinary meaning of the term "salted" in the concession contained in heading 02.10 of the EC Schedule. With respect to the General Rules invoked by the complainants, namely General Rule 1 and General Rule 3, we do not consider that General Rule 3 is applicable to this case. With respect to General Rule 1, on the basis of the evidence we have considered thus far, we do not consider that it provides guidance as to what precisely is meant by the term "salted" in addition to what we have already learned from the ordinary meaning of that term as it appears in the relevant concession in the EC Schedule. Therefore, overall, the Panel considers that the HS does not further clarify the interpretation of the concession contained in heading 02.10 of the EC Schedule.

(iv) Other WTO Members' schedules

Arguments of the parties

7.242 **Brazil** refers to tariff concessions for heading 02.10 found in the schedules of some WTO Members that are major importers of chicken products from Brazil. Brazil submits that, as far as it is aware, there are no significant markets, other than the European Communities, that import frozen salted chicken cuts for further processing. Brazil submits that, therefore, it was unable to obtain details of classification practice of other Members regarding imports of frozen salted chicken meat.[380]

7.243 The **European Communities** submits that, because tariff headings in WTO Members' schedules are derived from the HS, which was widely adopted among the parties to the Uruguay Round negotiations, the European Communities assumes that the schedules of most, if not all, other WTO Members are identical in so far as the headings in Chapter 2 are concerned. The European Communities submits that this is the case for a number of schedules including those of Brazil, Thailand and the United States. The European Communities submits that the only countries that have any practice of classifying the products at issue are Brazil, Thailand and the European Communities.[381]

Analysis by the Panel

7.244 To the extent that the terms of the relevant concessions in other WTO Members' schedules are identical to the terms of the concession contained in heading 02.10 of the EC Schedule and of the HS, we do not consider that they can assist us any further in the analysis we have undertaken thus far. Regarding the importance that should be attached, if any, to classification practice under the

[380] Brazil's reply to Panel question No. 59 referring to Exhibit BRA-37.
[381] EC's reply to Panel question No. 59.

equivalent of heading 02.10 of the EC Schedule in other Members' schedules, this is discussed below in section VII.G.3(c).

(v) Summary and conclusions regarding "context"

7.245 The Panel recalls that it considered various aspects of the EC Schedule as "context" under Article 31(2) of the *Vienna Convention* to determine whether the terms other than "salted" in heading 02.10 of the EC Schedule, the structure of Chapter 2 of the EC Schedule and other parts of the EC Schedule could assist us in our interpretation of the term "salted" in the concession contained in heading 02.10 of the EC Schedule. We also considered as "context" the terms and structure of the HS, and particularly, the evolution of heading 02.10 of the HS, the non-binding Explanatory Notes to the HS, and General Rules 1 and 3. Finally, we considered the schedules of other WTO Members as "context". In our view, none of the foregoing added to conclusions that we already drew regarding the ordinary meaning of the term "salted" in the concession contained in heading 02.10 of the EC Schedule other than to indicate that, on the basis of the terms of heading 02.10, the structure and the other parts of the EC Schedule as well as the terms and structure, the Explanatory Notes and the General Rules of the HS do not indicate that that concession is necessarily characterized by the notion of long-term preservation. Therefore, we will now turn to an analysis of matters to be taken into account together with context pursuant to Article 31(3) of the *Vienna Convention*.

(c) Matters to be taken into account together with the context: Article 31(3) of the *Vienna Convention*

(i) Subsequent practice: Article 31(3)(b) of the Vienna Convention

Classification practice since 1994

Whose classification practice should be considered for the interpretation of the EC Schedule?

Arguments of the parties

7.246 **Brazil** submits that, even though all Members must agree on the scope of a tariff concession made by the European Communities in its Schedule,[382] what is under examination is the meaning and scope of the tariff concession for heading 02.10 in the EC Schedule.[383] Brazil submits that, therefore, six years of concordant, common and consistent classification of frozen salted chicken cuts under heading 02.10 by EC customs authorities is sufficient to establish subsequent practice for the purposes of Article 31(3)(b) of the *Vienna Convention*.[384] Brazil acknowledges that the subsequent classification practice of other WTO Members in the application of their schedules may be relevant in interpreting tariff concessions in the EC Schedule in cases where, for example, other Members import the product at issue and the scope and meaning of the tariff concession in the schedules of those other Members is similar or identical to the scope and meaning of the tariff concession in the EC Schedule.[385] However, Brazil submits that this is not the case for "salted" meat of heading 02.10 in the EC Schedule because, through EC Regulation No. 535/94, the European Communities inserted a specific definition that differs from that found in most, if not all, Members' schedules.[386] Brazil submits that, therefore, heading 02.10 of the EC Schedule is unique and distinct from heading 02.10 of every other WTO Member's schedule.[387]

[382] Brazil's reply to Panel's question No. 16.
[383] Brazil's reply to Panel question No. 77; Brazil's second written submission, para. 75.
[384] Brazil's second written submission, para. 69.
[385] Brazil's oral statement at the second substantive meeting, para. 42.
[386] Brazil's replies to Panel's question Nos. 16 and 77.
[387] Brazil's oral statement at the second substantive meeting, para. 41.

7.247 **Thailand** submits that EC customs classification practice is not relevant in order to ascertain the meaning of heading 02.10 because the unilateral classification practices of Members cannot be considered as subsequent practice establishing "the agreement of the parties" regarding the interpretation of the tariff heading at issue for the purposes of Article 31(3)(b) of the *Vienna Convention*.[388] Thailand is of the view that reliance upon such practice is of limited value in order to determine the terms of a multilaterally agreed concession, such as heading 02.10 in the EC Schedule.[389]

7.248 According to the **European Communities**, subsequent practice of one party alone cannot determine the interpretation of a treaty. The European Communities submits that, if matters were otherwise, the European Communities could claim support for its interpretation of the EC Schedule by reference to a post-2002 period during which there has been a consistent EC practice of classifying frozen chicken cuts with added salt under heading 02.07. The European Communities argues that, since all parties to this dispute accept the relevance of the HS in interpreting the EC Schedule, and since the HS is also relevant to the interpretation of the schedules of all, or almost all, WTO Members, the experience of all WTO Members is relevant.[390]

7.249 In response, **Brazil** submits that the fact that negotiations of WTO Members' schedules were based on the HS does not mean that all concessions negotiated were the same because the starting point and the end point of negotiations are not necessarily the same. Brazil submits that they were not the same in the case of heading 02.10.[391] Brazil further submits that, even though part of the European Communities' CN is based on the HS, one cannot say that the CN is identical to the HS.[392]

Analysis by the Panel

7.250 The Panel recalls that Article 31(3)(b) of the *Vienna Convention* refers to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". In *Japan – Alcoholic Beverages II*, the Appellate Body stated that "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention* entails a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern.[393]

7.251 In essence, Brazil argues that, in the context of this case, since the EC Schedule is at issue, it is only the European Communities' practice that is relevant for the identification of "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*. On the other hand, the European Communities argues that the subsequent practice of one party alone cannot determine the interpretation of a treaty. Therefore, the main question for the Panel's determination here is whether the reference to "common" and "concordant" practice by the Appellate Body necessarily means that all WTO Members must have engaged in a particular practice in order for it to qualify as "subsequent

[388] Thailand's oral statement at the first substantive meeting, para. 20; Thailand's second written submission, para. 68.

[389] Thailand's oral statement at the first substantive meeting, para. 21.

[390] EC's second written submission, para. 50.

[391] Brazil's oral statement at the second substantive meeting. para. 45.

[392] Brazil's oral statement at the second substantive meeting. paras. 46-48.

[393] Appellate Body Report, *Japan – Alcoholic Beverages II*, page 13 (DSR 1996: I, 97 at 106). The Panel also notes that Ian Sinclair has stated that "[i]t should of course be stressed that paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice – that is to say, concordant subsequent practice common to all the parties": Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984) p. 138. In addition, Anthony Aust has stated that "[h]owever precise a text appears to be, the way in which it is actually applied by the parties is usually a good indication of what they understand it to mean, provided the practice is consistent, and is common to, or accepted by all the parties": Anthony Aust, *Modern Treaty Law and Practice*, Cambridge University Press, (2000) p. 194.

practice" under Article 31(3)(b) of the *Vienna Convention* or whether the practice of a sub-set of the entire WTO-membership, including the practice of one Member only, may suffice.[394]

7.252 We note that the International Law Commission has stated that:

> "The [original text of Article 31(3)(b)] spoke of a practice which 'establishes the understanding of all the parties'. By omitting the word 'all', the Commission did not intend to change the rule. It considered that the phrase 'the understanding of the parties' necessarily means the 'parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice."[395]

7.253 The above statement indicates that it is not necessary to show that all signatories to a treaty must have engaged in a particular practice in order for it to qualify as subsequent practice under Article 31(3)(b) of the *Vienna Convention*. Rather, it may be sufficient to show that all parties to the treaty have accepted the relevant practice. In our view, such acceptance may be deduced from a party's reaction or lack of reaction to the practice at issue.[396] We consider that such an approach makes practical sense especially in the context of GATT schedules that are particular to each WTO Member. If, in contrast, it were necessary to show the existence of practice common to all parties to a treaty (in this case, all 148 Members of the WTO) in order to demonstrate the existence of "subsequent practice" for the purposes of Article 31(3)(b) of the *Vienna Convention*, it is highly unlikely that subsequent practice could ever be proved in the WTO context with respect to schedules.

7.254 That is not to say that, with respect to this case, other WTO Members' practice is necessarily irrelevant. In this regard, we note that, in the *EC – Computer Equipment* case, the Appellate Body stated that:

> "The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States was *not* relevant."[397]

In our view, the Appellate Body's statement confirms the importance of the classification practice of the importing Member whose schedule is being interpreted. However, the Appellate Body also indicated that the classification practice of other WTO Members, including the exporting Member's practice, may be relevant.

7.255 The Panel notes that it is the EC Schedule that is at issue in this case and not the schedules of other WTO Members. The Panel further notes that it has not been provided any evidence to indicate that WTO Members protested against the EC classification practice in question from 1996 - 2002, being the period during which Brazil submits consistent practice on the part of the European Communities existed. (This classification practice is discussed by us in more detail below in paragraph 7.265 *et seq*). Further, the European Communities itself has stated that the only WTO Members that have any practice of classifying the products at issue are Brazil, Thailand and the

[394] We deal with the question of "consistency" of practice in paragraph 7.258 *et seq* below.

[395] *Yearbook of the International Law Commission* (1966) Vol. II, p. 222, para. 15.

[396] Mustafa Yasseen states that: "... acceptance by a party may be 'deduced from that party's reaction or lack of reaction to the practice at issue'." Mustafa Yasseen, "L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités" in *Recueil des Cours de l'Académie de Droit International*, (1974) Vol. III, p. 49, para. 18.

[397] Appellate Body Report, *EC – Computer Equipment*, para. 93.

European Communities.[398] It appears that, among these Members, the European Communities is the only one that imports the products at issue.[399] Therefore, in our view, it would be reasonable to conclude that EC classification practice alone with respect to the concession at issue in this case could be considered as "subsequent practice" for the purposes of Article 31(3)(b) of the *Vienna Convention*. Nevertheless, in light of the comments made by the Appellate Body in *EC – Computer Equipment*, to the extent that we consider it relevant, we will also make reference to the evidence of classification practice of other WTO Members that is available to us.

7.256 Regarding the European Communities' argument that the subsequent practice of one party alone cannot determine the interpretation of a treaty because, otherwise, the European Communities could claim support for its interpretation of its Schedule by reference to a post-2002 period during which it claims there has been a consistent EC practice of classifying frozen chicken cuts with added salt under heading 02.07, we note that this argument tends to be undermined by the fact that the post-2002 practice cannot be construed as "concordant" and "common" because the complainants have objected to such practice and those objections are at the heart of this dispute.

7.257 The Panel now turns to the evidence of classification practice that is before us.

Classification practice: Imports into the EC

Arguments of the parties

7.258 Regarding the *evidence of "subsequent practice" that allegedly exists*, **Thailand** submits that from 1996 to mid-2002, Thai frozen salted boneless chicken cuts were classified by the European Communities as "salted" meat under subheading 0210.90.20 at the *ad valorem* tariff rate of 15.4%.[400]

7.259 **Brazil** refers to statistics to show that, from 1998 - 2002, until EC Regulation No. 1223/2002 became effective, EC customs authorities classified and issued BTIs for frozen salted chicken meat from Brazil under subheading 0210.90.20 of the CN.[401]

7.260 The **European Communities** accepts that a number of BTIs were issued by EC member State customs authorities (principally Hamburg in Germany, Rotterdam in the Netherlands and various offices in the United Kingdom), which classified the products at issue under subheading 0210.90. The European Communities further accepts that, given the commercial importance of some of the customs offices – namely, Hamburg and Rotterdam – substantial trade entered the European Communities under this incorrect interpretation. However, the European Communities submits that this interpretation was not followed in other EC customs offices.[402] The European Communities further submits that BTIs issued by national customs authorities from 1996 onwards, which classified frozen chicken cuts with added salt under heading 02.10, must be seen against a background in which a legal principle based on a criterion of preservation has been repeatedly enunciated by the European Communities, both legislatively and judicially.[403]

7.261 In response to a request by the Panel, the European Communities submits that it cannot identify any BTIs of instances where the products at issue were classified under heading 02.07 rather than under heading 02.10 before the introduction of EC Regulation No. 1223/2002 and EC Decision 2003/97/EC.[404] The European Communities argues that, in any event, information taken from BTIs

[398] EC's reply to Panel question No. 59.
[399] In its reply to Panel question No. 59, Brazil states that "[t]o the best of our knowledge, there are no significant markets, other than the EC, that import frozen salted chicken cuts for further processing."
[400] Thailand's first written submission, para. 7.
[401] Brazil's first written submission, paras. 177-178; Exhibit BRA-14.
[402] EC's first written submission, paras. 52, 91-92.
[403] EC's first written submission, para. 178.
[404] EC's reply to Panel question No. 117.

cannot be relied upon as an indicator of the pattern of trade since they merely enable importers to have advance knowledge of the tariff classification which customs authorities consider is applicable to their products.[405] The European Communities submits that a BTI gives no indication of the volume of imports to which it is applied.[406] The European Communities adds that it is possible under EC law to withdraw an application for a BTI where the outcome is considered unfavourable by the importer.[407] The European Communities further explains that traders who have doubts about a particular classification are major users of BTIs whereas those dealing in well-established products do not bother with them.[408] The European Communities submits that, for the most part, the classification of products under heading 02.10 was uncontroversial and, therefore, did not lead to requests for BTIs. The European Communities further submits that the interpretation of heading 02.10 as applying to products that were salted, but not for preservation, was only followed in a few member States whereas a significant volume of trade of products classified under heading 02.10 which were salted, dried or smoked for preservation continued. In support of this latter point, the European Communities refers to Exhibit EC-26 which contains a BTI issued by Spanish customs authorities. The European Communities submits that this BTI clearly indicates that, in order for a product to be classified under heading 02.10, it must be preserved.[409]

7.262 In response, **Brazil** submits that BTIs contain tariff information issued by customs authorities of EC member States that is binding on the administration of all EC member States. According to Brazil, BTIs are easily accessible by EC authorities and BTI holders (importers) but not by non-EU producers/exporters. Brazil also submits that, despite a request from the Panel and requests by Brazil, the European Communities has not indicated the volume of total imports of frozen salted chicken cuts that were classified under heading 02.10 of the EC Schedule.[410] Further, according to Brazil, the European Communities has failed to provide BTIs or any supporting material to support the allegation that no customs office within the European Communities classified the product at issue under subheading 0210.90.[411] Brazil notes that, under Article 13 of the DSU, the Panel has the right to request this information from the European Communities. Brazil further notes that, in *Canada – Aircraft*, the Appellate Body concluded that Members are "under a duty and an obligation to 'respond promptly and fully' to requests made by panels for information under Article 13.1 of the DSU."[412] Brazil submits that, in addition, the Appellate Body made clear that adverse inferences could and should be drawn in cases of refusal to cooperate.[413] Brazil also submits that, even if an application for a BTI was withdrawn by the importer, the EC Commission – or customs authorities of EC member States – would at least have access to the written application.[414] As regards the BTI referred to by the European Communities contained in Exhibit EC-26, Brazil argues that the product the subject of that BTI differs from the products at issue in this case. Brazil submits that, therefore, there is no evidence that the products at issue were classified by certain EC customs offices under heading 02.07 rather than under heading 02.10.[415]

7.263 *As for how the evidence of practice that allegedly exists should be interpreted*, according to **Brazil** and **Thailand**, classification practice for the products at issue under heading 02.10 by EC

[405] EC's second written submission, para. 51; EC's reply to Panel question No. 117.
[406] EC's second written submission, para. 51.
[407] EC's second written submission, para. 51; EC's reply to Panel question No. 117.
[408] EC's second written submission, para. 51; EC's reply to Panel question No. 117.
[409] EC's reply to Panel question No. 53.
[410] Brazil's second written submission, para. 72.
[411] Brazil's second written submission, para. 71; Brazil's reply to Panel question No. 120; Brazil's comments on the EC's reply to Panel question Nos. 117 and 120.
[412] Brazil's comments on the EC's reply to Panel question No. 117 referring to Appellate Body Report, *Canada – Aircraft*, para. 187.
[413] Brazil's comments on the EC's reply to Panel question No. 117 referring to Appellate Body Report, *Canada – Aircraft*, para.204.
[414] Brazil's comments on the EC's reply to Panel question No. 117.
[415] Brazil's comments on the EC's reply to Panel question No. 117.

customs authorities constituted a concordant, common and consistent sequence of acts that lasted over six years, beginning shortly after the conclusion of the Uruguay Round, i.e. in 1996, and ending in 2002, when the measures at issue were adopted by the European Communities.[416] Brazil submits that this six-year practice was sufficient to establish a discernible pattern implying the agreement of all Members on the scope of heading 02.10 of the EC Schedule.[417] Brazil submits that the European Communities itself has acknowledged that a number of BTIs were issued by EC member State customs authorities classifying the products at issue under heading 02.10, particularly in Germany, the Netherlands, and the United Kingdom. According to Brazil, although the European Communities alleges that not all customs authorities in the same or other EC member States followed that interpretation, the European Communities has admitted that the customs offices that did classify the product under heading 02.10 are commercially important in the European Communities and that "substantial" trade entered the Community under heading 02.10 through them.[418] Thailand notes that the EC Commission has an obligation under Article X:3(a) of the GATT 1994 to ensure that EC customs laws are applied uniformly. The EC Commission has the power to intervene if EC member States do not apply a uniform classification but, according to Thailand, the EC Commission failed to intervene in the matter at the heart of this dispute until 2002. Thailand submits that this suggests that the European Communities had no objections to the classification of the product at issue under heading 02.10. Thailand further submits that the European Communities was aware that customs authorities in several EC member States had issued BTIs classifying frozen salted chicken under heading 02.10 in accordance with the criteria specified in Additional Note 7 of the CN.[419]

7.264 In response, the **European Communities** states that it does not accept that the erroneous classification by certain EC customs offices could have altered the European Communities' international obligations, nor that it could constitute practice that might be relevant in the sense of Articles 31 or 32 of the *Vienna Convention*. The European Communities submits that it did not wait until 2002 (when EC Regulation No. 1223/2002 was enacted) to address the problem of erroneous classification, since it only became evident to EC officials that there was a problem during 2001. According to the European Communities, this delay in becoming aware of the problem was attributable to the fact that the tariff line under which the imports were classified was "salted meats, other" so that the EC Commission could not tell what products were entering under this heading, and it was not until 2000 that there was a substantial leap in the relevant statistics. The European Communities submits that, even then, it was still not known that the products the subject of the erroneous classification were not salted for preservation. According to the European Communities, this only became apparent after further investigation. The European Communities also notes that roughly 30,000 BTIs are issued each year, that there were substantial problems communicating BTIs as a result of a lack of interoperability of computer systems and that the EC Commission only had one official and two administrative assistants monitoring all issues with respect to the first 40 chapters of the CN during the period prior to 2001.[420] The European Communities submits that it has both imported and exported substantial quantities of frozen chicken meat for many years and that it was always classified under heading 02.07.[421]

[416] Brazil's second written submission, para. 76; Brazil's oral statement at the second substantive meeting, para. 40; Thailand's second written submission, para. 73.
[417] Brazil's second written submission, para. 76.
[418] Brazil's second written submission, para. 70.
[419] Thailand's oral statement at the first substantive meeting, para. 42.
[420] EC's reply to Panel question No. 54.
[421] EC's first written submission, paras. 52, 57 and 91-92.

Analysis by the Panel

7.265 Here, the Panel will consider whether or not there was evidence of "consistent" classification practice on the part of the European Communities with respect to the products at issue during the period 1996 - 2002.[422]

7.266 By way of background, we note that, in *EC – Computer Equipment*, the Appellate Body pointed out that the panel in that case attributed special importance to the classification practice of two EC member States, which the panel considered represented the "largest" and "major" markets for the product in question. The Appellate Body criticized this approach noting that:

> "[T]he European Communities constitutes a customs union, and as such, once goods are imported into any Member State, they circulate freely within the territory of the entire customs union. The export market, therefore, is the European Communities, not an individual Member State."[423]

The Appellate Body further suggested that practice must be truly consistent in order to qualify under Article 31(3)(b) of the *Vienna Convention*. More particularly, the Appellate Body seemed to suggest that evidence that products were "generally" classified under a particular heading is insufficient if there is also evidence of classification under another heading.[424]

7.267 While the Panel agrees that, in the context of the present case, it would be best to have evidence of classification practice amongst all EC member States that is fully consistent, from a practical perspective, in all likelihood, such evidence will be extremely difficult to obtain. In the absence of such complete evidence, we consider that evidence of consistent practice that covers a major proportion of importation of the products at issue into the European Communities, at the least, would provide a reasonable *indication* of consistent practice for the purposes of Article 31(3)(b) of the *Vienna Convention*.[425]

7.268 Turning now to the facts of this case, the Panel has at its disposal three separate sets of evidence that have been adduced by the parties regarding EC classification practice relating to the concession contained in heading 02.10 of the EC Schedule. In particular, the Panel has before it: (a) the European Communities' acknowledgement that, during the relevant period, certain EC customs offices were classifying the products at issue under heading 02.10; (b) a number of BTIs relating to the classification by EC customs authorities under heading 02.10, including some BTIs relating to the products at issue as well as to some other products; and (c) three sets of minutes of the meetings of the EC Customs Code Committee concerning classification under heading 02.10. In our view, it is necessary to review the various pieces of evidence in their totality prior to forming a conclusion as to whether or not the EC classification practice can be viewed as "consistent" for the purposes of Article 31(3)(b) of the *Vienna Convention*. We deal with each of these sets of evidence in turn.

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[422] We recall our conclusion above in para. 7.255 that, for the purposes of this case, the EC's classification practice alone may be considered as "concordant" and "common" subsequent practice under Article 31(3)(b) of the *Vienna Convention*.

[423] Appellate Body Report, *EC – Computer Equipment*, para. 96.

[424] Appellate Body Report, *EC – Computer Equipment*, para. 95. citing paras. 8.41-8.43 of the panel report in that case.

[425] We note in this regard that Mustafa Yasseen refers to "a *certain* consistency" rather than to a more demanding notion of absolute consistency. He states that: "[The condition of a certain consistency] is made necessary by the very notion of 'practice'. A practice is a series of occurrences or acts, and cannot generally be materialized by an isolated occurrence or act, or even by a few scattered applications." Mustafa Yasseen, "L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités" in *Recueil des Cours de l'Académie de Droit International*, (1974) Vol. III, p. 48, para. 17.

7.269 Regarding the *European Communities' acknowledgement*, the Panel recalls that the European Communities has stated that the products at issue had been classified under heading 02.10 by some EC members States' customs offices up until 2002 – in particular, those in Germany, the Netherlands and various offices in the United Kingdom.[426] In an effort to determine the volume of trade in the products at issue affected by this classification practice, the Panel requested the European Communities to provide details of: (a) the period during which this classification practice existed; and (b) the volume of total imports affected.[427] The European Communities did not provide this information but did acknowledge that "substantial trade" entered the European Communities under what the European Communities labels as an "incorrect interpretation" of heading 02.10.[428]

7.270 With respect to the *BTIs* available to the Panel, the Panel has been provided with a number of BTIs concerning the products at issue. It has also been provided with a BTI concerning another product. Regarding BTIs that pertain to the products at issue,[429] these Exhibits indicate that, until September 2002, the products at issue, which were apparently covered by these BTIs, were classified under heading 02.10.[430] The BTIs relate to imports into Germany, the Netherlands and the United Kingdom. The Panel also notes that it is evident from EC Decision 2003/97/EC that at least 66 BTIs classified the products at issue (or a subset thereof) under heading 02.10.[431] The European Communities has not produced any BTIs of instances where the products at issue were classified under a heading other than heading 02.10, such as heading 02.07. With respect to the BTI concerning a product other than those directly at issue in this case, the European Communities refers to a 1999 BTI relating to dried and salted ham which was classified under heading 02.10.[432] The BTI relates to imports into Spain. The BTI does not indicate the salt content of the product in question; nor does it indicate whether the salt had the effect of preserving the product in question.

7.271 The Panel takes note of the European Communities' argument that BTIs are of limited value for the purposes of the task before us here – namely, to determine whether there has been consistent classification practice with regard to the products at issue on the part of the European Communities. However, we consider that BTIs may be useful to provide an *indication* of how products with a particular set of characteristics are being classified by the importing Member. Trade data helps to confirm or to verify such an indication.

7.272 In this case, in addition to the BTIs referred to above, we have trade data at our disposal. In particular, Brazil[433] and the European Communities[434] have provided trade statistics concerning trade flows into the European Communities under headings 02.07 and 02.10 of the EC Schedule. Brazil has provided statistics at the 8-digit level for the period 1990 until 2001. The European Communities has provided statistics at the 4 and 8-digit level for the period 1990 until 2003. When read in conjunction, the trade data and the BTIs indicate that significant trade volumes of the products at issue imported

[426] EC's first written submission, paras. 52 and 91-92.
[427] Panel question No. 54.
[428] EC's first written submission, paras. 91-92.
[429] These BTIs are contained in Exhibit EC-24, Exhibit BRA-31 and Exhibits THA-24(a), 24(b) and 24(c).
[430] The earliest BTI among the ones the Panel has been provided is contained in Exhibit THA-24(a) and is dated May 1998.
[431] All the BTIs covered by EC Decision 2003/97/EC were issued by German customs authorities. This suggests that the total number of BTIs classifying the products at issue under heading 02.10 during 1996-2002 exceeds 66 given that the EC has indicated that Dutch and UK customs authorities also issued BTIs classifying the products at issue under heading 02.10.
[432] This BTI is contained in Exhibit EC-26.
[433] See Tables at para. 177 of Brazil's first written submission and Exhibit BRA-14.
[434] See Tables 2 and 3 of the EC's first written submission.

from Brazil and Thailand to the European Communities were being classified under heading 02.10 during the relevant period.[435]

7.273 Concerning the *minutes of meetings of the EC Customs Code Committee*[436], Brazil refers to an extract of the minutes of a meeting of the EC Customs Code Committee held on 25-26 September 2003[437] at which the classification of frozen salted/smoked bacon was discussed.[438] The minutes suggest that a number of EC member States indicated at the meeting that that product should "remain" classified under heading 02.10. There is no reference to the salt content of the bacon in question in the minutes, nor is there any indication as to whether the salt had the effect of preserving the bacon. Therefore, we do not consider that these minutes are particularly helpful for the present case.

7.274 Thailand submits what appear to be minutes of a meeting of the EC Customs Code Committee dated 25 January 2002[439] and the minutes of a meeting of the EC Customs Code Committee held on 18 - 19 February 2002[440].[441] Brazil also refers to these minutes.[442] We note the European Communities' statement that these minutes are non-binding.[443] Even so, we consider that they provide useful insights into the EC classification practice regarding heading 02.10 as perceived by the EC Customs Code Committee. In particular, the minutes dated 25 January 2002 indicate that frozen boneless chicken cuts with a salt content of between 1.2% - 1.4% had been classified under heading 02.10 since 1996. The minutes of the meeting of the EC Customs Code Committee held on 18 - 19 February 2002 indicate that frozen salted meat with a salt content of not less than 1.2% by weight were "classifiable" under heading 02.10.

7.275 Having considered all the evidence before us relating to the EC classification practice concerning heading 02.10 in general and, more specifically, concerning the products at issue, it remains for us to assess that evidence in its totality. In our view, the evidence taken as a whole indicates that, during 1996 - 2002, the European Communities engaged in a consistent practice of classifying the products at issue under heading 02.10. In particular, the European Communities itself has acknowledged that "substantial trade" of the products at issue entered the European Communities under heading 02.10 during this period.[444] We also have before us copies of a number of BTIs that indicate that, during the relevant period, the products at issue were being classified by the European

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[435] In this regard, we note that the European Communities itself has submitted that imports into the European Communities started to appear under heading 02.10 principally from Brazil and Thailand during the relevant period: EC's first written submission, paras. 57 and 180. Incidentally, the Panel considers that the BTIs and the trade statistics indicate that a real market demand existed for the products at issue prior to enactment of the measures at issue. In addition, this is apparent, *inter alia*, from correspondence, invoices, bills of lading and purchase orders relating to the importation of these products from Brazil and Thailand into the European Communities contained in Exhibits BRA-29, 30, 41 and 42 and Exhibit THA-26. Some of this documentation also tends to confirm that the products at issue were being imported into the European Communities under heading 02.10 during the relevant period.

[436] The EC Customs Code Committee is composed of representatives of each of the EC member States: EC's reply to Panel question No. 55.

[437] These minutes are contained in Exhibit BRA-32.

[438] Brazil's reply to Panel question No. 4.

[439] Working Document TAXUD/1636/2002 of the Customs Code Committee of 25 January 2002 contained in Exhibit THA-22. The Panel notes that the electronic version of Exhibit THA-22, which was submitted by Thailand to the Panel during the first substantive meeting, the document reference for which is TAXUD/1815/2003, does not appear to correspond to the hard copy of that exhibit which was submitted by Thailand during the first substantive meeting and relied upon by Thailand in its oral statement during that meeting. In our Report, we have relied upon the hard copy version of Exhibit THA-22 submitted by Thailand during the first substantive meeting.

[440] These minutes are contained in Exhibit THA-23.

[441] Thailand's oral statement at the first substantive meeting, para. 39.

[442] Brazil's reply to Panel question No. 10 referring to Exhibit THA-22 and Exhibit THA-23.

[443] EC's reply to Panel question No. 45.

[444] EC's first written submission, paras. 52 and 91-92.

Communities under heading 02.10.[445] We have not been provided with any BTIs to indicate that the products at issue were being classified under any other heading of the CN, such as heading 02.07. When read together, trade data and the BTIs indicate that significant trade volumes of the products at issue imported from Brazil and Thailand to the European Communities were being classified under heading 02.10 during the relevant period. Finally, we have evidence that, in 2002, prior to the introduction of the measures at issue, the EC Customs Code Committee, which is a committee comprising representatives of all EC member States, considered that products with characteristics matching those possessed by the products at issue were "classifiable" and were also classified under heading 02.10. It is the Panel's view that, when taken together, the various pieces of evidence before us indicate that, during 1996 - 2002, the European Communities engaged in a consistent practice of classifying the products at issue under heading 02.10. In this regard, we note that we have seen no evidence that the products at issue were being classified under a heading other than heading 02.10 during this period.

7.276 Regarding the fact that the European Communities did not provide certain information requested by the Panel, we recall that Brazil has objected and submitted that the Panel would be within its rights to draw adverse inferences under Article 13.2 of the DSU from this refusal. Given the Panel's conclusion that the totality of evidence before it indicates that a consistent practice existed within the European Communities of classifying the products at issue under heading 02.10 rather than under another heading such as heading 02.07, we do not consider it necessary to consider whether adverse inferences should be drawn against the European Communities, as has been suggested by Brazil.

Classification practice: Imports into and exports from Brazil and Thailand

Arguments of the parties

7.277 **Brazil** and **Thailand** submit that their respective classification practice is not relevant to the present case. Brazil submits that its classification is not relevant for the interpretation of the EC Schedule given that the treaty language being examined is contained in the EC Schedule and concerns the EC's commitments and not any other Member's commitments.[446] Thailand argues that the unilateral classification practice of Members cannot be considered as subsequent practice establishing "the agreement of the parties" regarding the interpretation of the tariff heading at issue.[447] Thailand also notes that the Appellate Body made clear that reliance on customs classification practice is only relevant to the extent that it interprets a tariff concession.[448] Thailand submits that, consequently, under WTO law, customs classification of a product would matter only if the classification were germane to the granting of a concession agreed upon in the WTO Agreement.[449]

7.278 As regards *import classification practice*, Brazil submits that it does not import salted chicken cuts and that, therefore, there is no classification practice in relation to imports of this product.[450] Thailand submits that, at the time of the conclusion of the WTO Agreement, Thailand did not import frozen salted chicken.[451] Further, Thailand submits that it has never imported salted frozen chicken

[445] We do not consider that the BTI before us relating to a product different from those at issue in this dispute is particularly relevant for the present case.
[446] Brazil's reply to Panel question No. 16.
[447] Thailand's second written submission, para. 68.
[448] Thailand's second written submission, para. 70.
[449] Thailand's second written submission, para. 72.
[450] Brazil's reply to Panel question No. 16.
[451] Thailand's second written submission, para. 70.

because it is a competitive supplier of chicken meat[452] and, therefore, has never classified the product at issue for customs purposes.[453]

7.279 With respect to *export classification practice*, the **European Communities** notes that during 2000 - early 2002, while substantial imports into the European Communities started to appear under heading 02.10 principally from Brazil and Thailand, this is not matched by a corresponding increase in exports under that heading from those two countries. The European Communities submits that an analysis of exports from those countries shows a marked increase in exports under heading 02.07, which corresponds to the total imports of the European Communities under headings 02.07 and 02.10.[454]

7.280 **Thailand** submits that the classification of products for exportation is not relevant to determine the classification practice of a Member because only the practice of Members in implementing their tariff concessions is relevant.[455]

7.281 **Brazil** submits that, in situations where duties do not have to be assessed, authorities are usually less rigorous about classification and will not always ascertain whether goods declared by a producer/exporter correspond to what is actually being exported. Therefore, because in most cases, imports are subject to duties, import classification practice is a more reliable and accurate source of classification information because producers are only alert to classification issues when they have an impact on their commercial operations or profits.[456] Brazil submits that, in Brazil, there are no export duties assessed on exports of frozen salted chicken meat nor on frozen chicken meat *in natura*.[457] Brazil also submits that Brazil's export classification practice of frozen salted chicken was inconsistent; sometimes the product was correctly classified under heading 02.10 and sometimes it was incorrectly classified under heading 02.07.[458]

7.282 Brazil also submits that, in Brazil, the exporter is responsible for export documentation, including identification of the appropriate customs classification although the Brazilian government has the ability to monitor and control such documentation.[459] Similarly, Thailand submits that shipping companies hired by exporters handle export procedures and paperwork, including custom classification on export declaration forms.[460]

7.283 In response, the **European Communities** submits that the complainants' distinction between classification of products for export and for import has no basis in law. According to the European Communities, classification of products in both cases should follow the same principles. The European Communities submits that this is recognized in Article 3.1(a) of the HS Convention, which requires the customs tariff and statistical nomenclatures to be in conformity with the HS. The European Communities notes that the preamble of the HS Convention envisages the promotion of "as close a correlation as possible between import statistics and export trade statistics and production statistics". The European Communities also submits that a market access negotiator needs to rely on accurate export/import data in negotiating tariff concessions. The European Communities submits

[452] Thailand's oral statement at the first substantive meeting, para. 44.
[453] Thailand's reply to Panel question No. 16.
[454] EC's first written submission, paras. 57 and 180; EC's oral statement at the second substantive meeting, para. 49.
[455] Thailand's oral statement at the first substantive meeting, para. 44; Thailand's reply to Panel question No. 16; Thailand's second written submission, para. 71.
[456] Brazil's oral statement at the first substantive meeting, para. 55; Brazil's reply to Panel's question No. 16.
[457] Brazil's reply to Panel's question No. 16.
[458] Brazil's comments on the EC's reply to Panel question No. 120 referring to Exhibits BRA-42(c) and BRA-42(d).
[459] Brazil's reply to Panel question No. 85.
[460] Thailand's reply to Panel question No. 85.

that GATT Contracting Parties recognized this in the GATT Council Decision of 12 July 1983 on "GATT Concessions under the Harmonized System Commodity Description and Coding System".[461] In that Decision, the Contracting Parties noted that "[i]n addition to the benefits for trade facilitation and analysis of trade statistics, from a GATT point of view adoption of the Harmonized System would help ensure greater uniformity among countries in customs classification and, thus, a greater ability for countries to monitor and protect the value of tariff concessions." The European Communities notes that the Appellate Body has held that tariff negotiations are a process of "give and take" between exporting and importing Members. A common basis of understanding for the classification of the goods is, therefore, necessary. The European Communities submits that, in light of the foregoing, the complainants are wrong to suggest that classification on export is any less relevant than classification on import.[462]

Analysis by the Panel

7.284 The Panel notes that it does not have any import classification data for Brazil and Thailand in respect of the products at issue because, apparently, these countries export rather than import these products.[463] As for export classification data, this appears to be inconsistent at least with respect to Brazil.[464] In any event, we are not convinced of the utility of making reference to export classification data from Brazil and Thailand given that, evidently, export classification is less rigorous because duties are not levied on products upon exportation.[465] In this regard, we note that Article 1(b) of the HS Convention defines "customs tariff nomenclature" as "the nomenclature established under the legislation of a Contracting Party for the purposes of *levying duties of Customs on imported goods*" (emphasis added).

Classification practice: Imports into and exports from the US and China

Arguments of the parties

7.285 **Brazil** refers to four US classification rulings during the period 1996 - 1998 which classify bacon from Denmark under heading 02.10.[466] Brazil also refers to a US bill of lading, in which the importer claimed tariff treatment for its frozen sliced bacon product under heading 02.10.[467]

7.286 In relation to the US bill of lading, the **United States**[468] notes that an importer's claim for tariff treatment under a particular subheading does not represent an official statement by US customs authorities on the correct classification of the product. The United States submits, however, that in a

[461] L/5470/Rev. 1.

[462] EC's reply to Panel question No. 28 citing Appellate Body Report, *EC – Computer Equipment*, para. 109.

[463] Brazil's reply to Panel question No. 16; Thailand's oral statement at the first substantive meeting, para. 44; Thailand's second written submission, para. 70. The European Communities does not dispute that Brazil and Thailand are exporters rather than importers of the products at issue.

[464] We note that the EC refers to data in Table 3 of its first written submission and in Exhibits EC-17 and EC-18, which it says indicates that the complainants consistently classified the products at issue under heading 02.07 rather than under heading 02.10: EC's first written submission, para. 180. However, Brazil has produced an October 2001 bill of lading, export registration and export receipt (contained in Exhibit BRA-42(c)) and a November 2001 bill of lading, export registration and export receipt (contained in Exhibit BRA - 42(d)) according to which, upon export from Brazil, the products at issue were classified under heading 02.10. This evidence indicates that the export classification of, at least, Brazil is not consistent with respect to the products at issue.

[465] Further, we note that, in Brazil and Thailand, exporters rather than customs officers classify the products at issue, at least in the first instance: Brazil's reply to Panel question No. 85; Thailand's reply to Panel question No. 85.

[466] Exhibit BRA-39.

[467] Exhibit BRA-19.

[468] The United States is a third party to this dispute.

1996 ruling, US customs authorities ruled that frozen bacon from Denmark was properly classified under heading 02.10.[469]

7.287 **China**[470] notes that, in 2000 and 2001, there were imports and exports under subheading 0210.90.00 of China's tariff classification nomenclature but there have been no more such imports or exports since 2002.[471] China also submits that, in 2000, there were imports and exports under subheading 0207.14.00 of China's tariff classification nomenclature but that there have been no more such imports or exports since 2001.[472]

Analysis by the Panel

7.288 During these proceedings, Brazil referred to certain examples of what could broadly be referred to as US classification practice regarding the equivalent of heading 02.10 in the US schedule. In addition, China provided some information regarding its classification practice for headings equivalent to headings 02.10 and 02.07 of the EC Schedule. In the Panel's view, this evidence is too limited to draw any conclusions regarding the consistency or otherwise of classification practice of other WTO Members. Further, with respect to the evidence that is available of US classification practice, the relevant US classification rulings do not relate to products identical or similar to the products at issue; they do not indicate the salt content of the products in question; nor do they indicate whether the salt had the effect of preserving those products. Therefore, the usefulness of such evidence for the purposes of this case is questionable. Similarly, with respect to the information that was submitted by China, such information does not indicate the salt content of chicken cuts classified under headings 02.07 and 02.10; nor does it indicate whether the salt had the effect of preserving the products in question. Therefore, such evidence also appears to be of limited usefulness for this case.

Summary and tentative conclusions regarding "subsequent practice"

7.289 The Panel considers that, in this case, it is reasonable to rely upon EC classification practice alone in determining whether or not there is "subsequent practice" that "establishes the agreement" of WTO Members within the meaning of Article 31(3)(b) of the *Vienna Convention* regarding the interpretation of the concession contained in heading 02.10 of the EC Schedule. Among other reasons for this approach, we note that the European Communities is apparently the only importing WTO Member with any practice of classifying the products at issue. On the basis of evidence available to us, the Panel concludes that the European Communities engaged in a consistent practice of classifying the products at issue under heading 02.10 during 1996 – 2002. With respect to classification practice of other WTO Members, the Panel finds that there is no evidence of the complainants' import classification practice regarding the products at issue given that they export rather than import these products. The Panel considers that the evidence of the complainants' export classification practice is limited. Further, its utility is questionable given that the classification of the products at issue for export is less rigorous because they are not subject to duty upon export. In addition, the evidence of classification practice by the United States and China is so limited that the Panel is not able to draw any conclusions regarding the consistency or otherwise of the classification practice of other WTO Members.

7.290 Subject to what the Panel finds below with respect to WCO decisions and the Explanatory Note to the CN referred to by the European Communities, the Panel tentatively concludes that the European Communities' consistent practice of classifying the products at issue under heading 02.10 amounts to "subsequent practice" under Article 31(3)(b) of the *Vienna Convention*.

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[469] US reply to Panel question No. 85 referring to New York Ruling Letter NY A80393 (March 7, 1996), as modified by Customs Ruling Letter HQ 960585 (July 20, 1998) contained in Exhibit US-1.

[470] China is a third party to this dispute.

[471] China's reply to Panel question No. 81.

[472] China's reply to Panel question No. 81.

WCO letters of advice

Arguments of the parties

Qualification under Article 31(3)(b) of the Vienna Convention?

7.291 **Brazil** submits that a letter of advice or opinion provided by the WCO Secretariat as a response to an inquiry made by a customs authority does not constitute an official WCO position on the interpretation of the HS nomenclature. According to Brazil, such a letter of advice merely expresses the technical opinion of one individual or possibly more, which does not bind WCO members in any way and has no legal value.[473] Brazil also notes that the Appellate Body in *EC – Computer Equipment* considered that "decisions of the WCO *may* be relevant" in the interpretation of tariff concessions in the EC Schedule. According to Brazil, if, WCO decisions, which are taken by the HS Committee and approved by the Customs Co-operation Council, are questionable (given the use of the word "may" by the Appellate Body) as relevant means of interpretation, then opinions given by the WCO Secretariat are even more so.[474] Brazil submits that, if there are no WCO decisions regarding the classification of headings 02.07 and 02.10, there is no practice of WCO Members that qualifies as subsequent practice within the meaning of Article 31(3)(b) of the *Vienna Convention*.[475]

7.292 **Thailand** argues that subsequent practice under Article 31(3)(b) of the *Vienna Convention* must establish the agreement of the parties regarding the interpretation of the relevant treaty. According to Thailand, none of the parties to this dispute have submitted a WCO decision regarding the interpretation of heading 02.10. Thailand submits that a WCO letter does not constitute concordant subsequent practice that establishes the agreement of the parties regarding the interpretation of the terms of the treaty within the meaning of Article 31(3)(b) of the *Vienna Convention*.[476]

7.293 The **European Communities** submits that, in order to meet the legal threshold of relevant practice under Article 31(3)(b) of the *Vienna Convention* for the purposes of this case, the Panel must take into account that the dispute concerns the coverage of a tariff binding at the 4-digit level, which is internationally harmonized through the HS Convention and used by all WTO Members.[477] The European Communities notes that the HS Convention provides a specific mechanism for the expression of concordant practice in the form of decisions of its HS Committee.[478] The European Communities submits that the fact that such a procedure exists calls for a particularly high standard for demonstrating the existence of a coherent practice relevant for the interpretation of the schedules and concessions as based on the HS. Otherwise, a particular Member could unilaterally modify the common nomenclature agreed amongst all the parties to the HS Convention and, by consequence, impact the interpretation of WTO schedules.[479] The European Communities acknowledges that letters of advice or opinion written by the WCO Secretariat are not the same as a classification ruling or opinion made by the HS Committee. The European Communities submits that, nevertheless, they cannot be ignored given that they contain the opinions of a neutral expert from the WCO Secretariat.[480]

[473] Brazil's reply to Panel question No. 18.
[474] Brazil's reply to Panel question No. 18; Brazil's second written submission, para. 62 referring to Appellate Body Report, *EC – Computer Equipment*, para. 90.
[475] Brazil's oral statement at the second substantive meeting, para. 37.
[476] Thailand's second written submission, paras. 57-66.
[477] EC's first written submission, para. 174.
[478] EC's first written submission, para. 175.
[479] EC's first written submission, para. 176.
[480] EC's oral statement at the first substantive meeting, paras. 27-31.

1997 letter of advice from the WCO

7.294 The **European Communities** refers to a 1997 letter of advice from the WCO Secretariat to the Cypriot customs authorities. The European Communities notes that the matter at issue concerned the headings in Chapter 3 of the HS, which covers fish, and in many respects parallel those being examined in this dispute under Chapter 2. Regarding the type of salting necessary to bring fish within the ambit of heading 03.05, the European Communities notes that the WCO Secretariat stated in its letter that "salted" fish, classifiable in heading 03.05, is not normally lightly salted to render it necessary for freezing. The WCO further stated that salt is intended to penetrate the meat to give the fish a long preservative life.[481]

7.295 **Brazil** submits that the 1997 WCO Secretariat letter of advice regarding frozen salted fish is not consistent with the 2003 WCO Secretariat letter of advice referred to by Brazil immediately below regarding frozen salted swine meat and, therefore, the former does not qualify as "subsequent practice" in the interpretation of the EC Schedule.[482] **Thailand** submits that the 1997 WCO Secretariat letter is of little probative value to the dispute before the Panel as it conclusions are tentative and are based on unclear facts.[483]

2003 letter of advice from the WCO

7.296 **Brazil** points to a letter of advice from the WCO Secretariat dated May 2003 regarding the meaning of the term "salted" in heading 02.10.[484] Brazil notes that the 2003 WCO Secretariat letter was written in response to a question posed by the Bulgarian customs administration on whether imports "of bellies of swine, deboned, frozen, to which salt has been applied on the surface before freezing (sic)" should be classified under subheading 0203.29 or under subheading 0210.12. Brazil notes that, in that case, "the results of the laboratory analysis, after thawing, show that the salt only penetrated a very limited layer (just below the surface of the product), and not in depth (sic)", and the authority believed, guided by the language under Additional Note 7 of Chapter 2 of the European Communities' CN, that the product should be classified under heading 02.03 because it was not deeply and homogeneously impregnated with salt. The importer, on the other hand, argued that the product should be classified under heading 02.10 because the total salt content was approximately 1.9% by weight. Faced with this dilemma, the authority requested advice from the WCO Secretariat.[485] Brazil submits that the customs authority's inquiry in that case was based on the fact that the product only met part of the description/criterion for "salted meat" of heading 02.10, found in Additional Note 7 of Chapter 2 of the CN. However, Brazil argues that, in the present case, there is no doubt that the products at issue exported from Brazil fully met the definition of "salted meat" of heading 02.10 under the CN.[486] Brazil also notes that, in that case, the WCO Secretariat stated that there is no official definition in the HS and its Explanatory Notes for the term "salted". However, Brazil submits that the WCO acknowledged that the European Communities' CN had a specific criterion to define salted meat of heading 02.10 and that the Bulgarian authority should turn to the European Communities for clarification. Brazil submits that, even though the authority in question specifically asked for guidance with respect to the degree of salting and the method of salting for the purposes of heading 02.10, no mention was made of the fact that salting had to preserve the product for it to merit classification under heading 02.10.[487]

[481] EC's oral statement at the first substantive meeting, paras. 27-31 referring to Exhibit EC-19.
[482] Brazil's second written submission, para. 65.
[483] Thailand's second written submission, paras. 61 and 66.
[484] Brazil's second written submission, para. 65 referring to Exhibit BRA-35.
[485] Brazil's reply to Panel question No. 18.
[486] Brazil's reply to Panel question No. 18.
[487] Brazil's reply to Panel question No. 18; Brazil's oral statement at the second substantive meeting, paras. 38-39.

7.297 In response, the **European Communities** submits that, although the issue dealt with in the 2003 WCO Secretariat letter might be relevant to the present dispute, the WCO Secretariat avoided taking a position and did not provide classification advice to the Bulgarian authorities. The European Communities submits that Brazil cannot, from the fact that the WCO Secretariat declined to take a view, infer that it rejected "preservation" as the basis for heading 02.10. The European Communities submits that, consequently, the letter in question is not relevant "subsequent practice" for the purposes of Article 31(3)(b) of the *Vienna Convention*.[488]

Analysis by the Panel

7.298 In *EC – Computer Equipment*, the Appellate Body specifically stated that decisions taken by the HS Committee of the WCO might have been relevant to the interpretation of the EC Schedule in that case. The Panel considers that, even if not binding, WCO decisions concerning the headings at issue provided after 1994 could well be a very useful source of information on the subsequent practice of WTO Members, a large proportion of whom are signatories to the HS Convention and, therefore, are members of the HS Committee. However, we have been informed by the WCO Secretariat that there are no existing WCO decisions in relation to heading 02.10 of the HS, which corresponds to heading 02.10 of the EC Schedule.[489]

7.299 The Panel has been called upon by the parties to take into consideration two letters written by members of the WCO Secretariat – one dated 1997 and the other dated 2003 – as evidence of "subsequent practice" under Article 31(3)(b) of the *Vienna Convention*. We recall that the International Law Commission has indicated that "subsequent practice" qualifying under Article 31(3)(b) must be "concordant, subsequent practice common to all the parties". The Appellate Body has also indicated that a "concordant, common and consistent" sequence of acts or pronouncements is necessary for qualification under Article 31(3)(b). In our view, WCO Secretariat letters of advice or opinion that are directed at individual customs authorities, which have no legally binding effect, cannot be construed as constituting "concordant, subsequent practice common to all [WTO Members]" for the purposes of Article 31(3)(b) of the *Vienna Convention*. In any event, we note that the WCO Secretariat letters in question relate to products (fish and pigmeat) that are different from the products at issue. Therefore, the Panel will not take the two WCO Secretariat letters in question into consideration in applying Article 31(3)(b) of the *Vienna Convention*.[490]

Subsequent Explanatory Notes to the Combined Nomenclature

Arguments of the parties

7.300 The **European Communities** refers to an Explanatory Note to the CN of December 1994, which refers to subheadings 0210.11.11 and 0210.11.19. It provides *inter alia* that: "These subheadings cover only hams, shoulders and parts thereof, with bone in, of domestic swine, which

[488] EC's second written submission, para. 39; EC's oral statement at the second substantive meeting, para. 48.

[489] WCO's reply to Panel question No. 8 to the WCO.

[490] The Panel notes that, in reply to questions posed by the Panel regarding the 1997 and 2003 WCO Secretariat letters, the WCO itself counselled against reliance upon that correspondence in the absence of explicit authorization from the parties to those letters: WCO's replies to Panel question Nos. 13 and 14 to the WCO. We note that the EC submits that, after having initially become aware of the 1997 letter from the WCO to the Cypriot authorities when examining the WCO's archives, it sought and obtained the agreement of the Cypriot customs authorities before submitting the correspondence to the Panel: EC's comments on the WCO's replies to Panel question Nos. 13 and 14 to the WCO. Brazil submits that it gained unobstructed access to the 2003 WCO Secretariat letter and is not aware of any notification on the part of the Bulgarian customs authorities requesting that the letter not be published by the WCO: Brazil's comments on the Panel's Interim Report, para. 51. In any event, we do not consider that this changes our conclusion that we should not consider the letters in question pursuant to Article 31(3)(b) of the *Vienna Convention*.

have been preserved by deep dry salting or pickling in brine ...". The European Communities submits that this Explanatory Note is relevant under Article 31(3)(b) of the *Vienna Convention*.[491] The European Communities submits that the importance of the Note lies in the fact that it assumes the existence of the principle of long-term preservation with respect to heading 02.10.[492]

7.301 **Brazil** and **Thailand** submit that the Explanatory Note in question relates to salted meat of domestic swine and not to all "salted meat" of heading 02.10 and that, therefore, it cannot be applied to poultry meat.[493] According to Brazil, had the European Communities desired to apply the provisions regarding salted meat of domestic swine to all meat covered under heading 02.10 it would have placed such provisions as a general Explanatory Note to heading 02.10 rather than as a Note to particular subheadings. Brazil concludes that, therefore, there is no reason for the Panel to assume that this Explanatory Note would be applicable to a product different from salted domestic swine.[494] Thailand also argues that it is the European Communities' established practice to state explicitly in the Explanatory Notes whether a certain rule applies *mutatis mutandis* to other products. Thailand submits that, while this was done explicitly for products of subheading 0210.12.11, there is no such statement in the Explanatory Note for subheading 0210.90.20. Thailand concludes that, therefore, the European Communities cannot assert that the concept of preservation is applicable to poultry falling under heading 02.10.[495] Brazil also adds that the Explanatory Notes to the European Communities' CN are non-binding instruments and are not part of EC legislation.[496]

Analysis by the Panel

7.302 The Panel does not consider that a single non-binding Explanatory Note in the European Communities' domestic legislation – i.e. the CN – satisfies the requirement that "subsequent practice" be "concordant, common and consistent" so as to establish the agreement of all WTO Members within the meaning of Article 31(3)(b) of the *Vienna Convention*. In any event, the Note relates to products (pigmeat) that are different from the products at issue. Therefore, the Panel will not take into consideration the Explanatory Note to the CN of December 1994, which refers to subheadings 0210.11.11 and 0210.11.19, in applying Article 31(3)(b) of the *Vienna Convention*.

Final conclusion regarding "subsequent practice"

7.303 The Panel recalls the absence of WCO decisions that are relevant to this dispute. The Panel further recalls its decision not to take two WCO Secretariat letters and a single non-binding Explanatory Note to the CN into consideration when applying Article 31(3)(b) of the *Vienna Convention*. In light of those decisions, we confirm the tentative conclusion we reached above in paragraph 7.290 that the European Communities' consistent practice of classifying the products at issue under heading 02.10 amounts to "subsequent practice" under Article 31(3)(b) of the *Vienna Convention*. In the Panel's view, such subsequent practice indicates that the products at issue in this dispute are covered by the concession contained in heading 02.10 of the EC Schedule. To seek confirmation of this indication, we turn to a consideration of object and purpose under Article 31(1) of the *Vienna Convention*.

[491] EC's reply to Panel question No. 75.
[492] EC's oral statement at the second substantive meeting, para. 70.
[493] Brazil's second written submission, para. 93; Thailand's second written submission, para. 92.
[494] Brazil's second written submission, para. 94.
[495] Thailand's second written submission, para. 92.
[496] Brazil's second written submission, para. 93.

(d) Object and purpose: Article 31(1) of the *Vienna Convention*

(i) Arguments of the parties

The WTO Agreement and the GATT 1994

7.304 **Brazil** and **Thailand** submit that the security and predictability of tariff concessions is the main object and purpose of the GATT 1994.[497] According to Brazil, such security and predictability ensures the importance and worth of these concessions because it means that concessions will not be changed unilaterally without a proper remedy. Brazil submits that, if it were otherwise, Members would be unwilling to enter into trade negotiations.[498] Brazil argues that when, by virtue of the challenged measures, the European Communities unilaterally changed the concession it provided for salted meat under its Schedule, it disrupted this essential object and purpose of the WTO Agreement.[499]

7.305 According to Thailand, the object and purpose of the GATT 1994, as reflected in Article II of the GATT 1994, is to preserve the value of tariff concessions. Therefore, it is essential that the description of the products falling under a particular subheading be maintained as it was at the time of the negotiation of the relevant concession. According to Thailand, it would undermine the value of the tariff concession if a Member were able to unilaterally modify the scope and coverage of the product description for a specific tariff heading. This situation would diminish the security and predictability that binding tariff concessions are intended to have in the multilateral trading system.[500]

7.306 Brazil and Thailand submit that, with respect specifically to the application of Article II of the GATT 1994, the decisive criterion for characterization of a product is the "objective characteristics" of the product at the time of importation.[501] Brazil argues that this criterion ensures legal certainty and facilitates classification and verification by customs authorities at the border.[502] Thailand further submits that customs classification must depend on the assessment of the objective characteristics of the product at the border[503] and notes that this principle has been clearly recognised by the ECJ.[504]

7.307 The **European Communities** accepts that, under EC law, in implementing the HS, the objective characteristics of a product are decisive for classification. According to the European Communities, these objective characteristics are mostly based on the composition of the products or the properties, which can be established by laboratory examination.[505] The European Communities submits that, when a product arrives at the border, EC customs officials carry out: (a) inspection of customs and sanitary documents accompanying the good, including any BTI; (b) physical inspection by customs officers of container, packaging, labelling; (c) physical inspection of the product, in particular its temperature, smell, taste, colour; and (d) if necessary, samples are sent to a laboratory for analytical control to verify conformity of the product with relevant customs specifications.[506] The European Communities notes that there are no specific guidelines to assist customs officers in determining whether or not a product should be classified under heading 02.10, i.e. to determine whether or not salting achieves long-term preservation. The European Communities argues that, nevertheless, such guidelines have never been necessary because, with the exception of the facts at

[497] Brazil's first written submission, para. 160; Thailand's first written submission, para. 90.
[498] Brazil's first written submission, para. 160.
[499] Brazil's first written submission, para. 161.
[500] Thailand's first written submission, paras. 92-93.
[501] Brazil's reply to Panel question No. 13; Thailand's oral statement at the first substantive meeting, paras. 51-53; Thailand's second written submission, para. 39.
[502] Brazil's reply to Panel question No. 13.
[503] Thailand's oral statement at the first substantive meeting, paras. 8, 51-53.
[504] Thailand's second written submission, para. 3.
[505] EC's replies to Panel question Nos. 90 and 105.
[506] EC's reply to Panel question No. 89.

issue in the *Gausepohl* case[507] and in the present dispute, in practice, there has been little dispute regarding the type of product that falls under heading 02.10.[508] Further, the European Communities submits that the application of the principle of preservation has rarely been problematic because it is normally obvious whether a product has been preserved by one of the means mentioned in heading 02.10.[509] The European Communities clarifies that the preservation techniques referred to in heading 02.10 leave the meat with specific characteristics (e.g., colour, saltiness, dryness) that are readily detectable (e.g., in Parma ham).[510] The European Communities submits that it applies the principle of preservation irrespective of the origin of imports.[511]

7.308 **Brazil** submits that, in the absence of HS Committee decisions on practical aspects associated with the verification of classification criteria for products covered by heading 02.10, classification must be based simply on the wording of the legal text read in conjunction with the HS Explanatory Notes.[512]

7.309 **Thailand** argues that, even if one assumed that a specified purpose may be relevant to determine the classification of a product, the European Communities' approach suggests that the customs officers of the 25 EC member States would have to make individual judgements as to how the features of the product clearing customs achieve the purpose of long-term preservation, a concept which, in Thailand's view, is vague and uncertain. Thailand submits that this defeats the object and purpose of the WTO Agreement with respect to tariff concessions negotiated by the European Communities under its Schedule – namely, to ensure the "security and predictability of the 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade'".[513]

The EC Schedule

7.310 The **European Communities** submits that the object and purpose underlying the scope and content of its respective concessions on "frozen" chicken meat and "salted" products is self-evident, given the tariff structure and trade at the time the concessions were made. The European Communities submits that, at the time it concluded its Schedule, it was aware of the substantial trade in "frozen" chicken cuts and that such cuts would enter into competition with domestically produced chicken cuts for further processing. The European Communities argues that, therefore, it negotiated with other WTO Members an appropriate level of protection from imports of "frozen" chicken cuts including special safeguard measures under Article 5 of the Agreement on Agriculture. According to the European Communities, it did so in the knowledge that, in order to qualify as a "salted" product under heading 02.10, the product would have to be salted to ensure its preservation. The European Communities submits that it satisfied itself with significantly lower tariffs on salted products because it was aware that few products were traded on an international basis under that heading. The European Communities submits that, had it imagined that frozen chicken with added salt could have been classified under heading 02.10, it would never have set such a low tariff.[514] In addition, the European Communities submits that neither of the complainants have purported to show that, at the time WTO Members were making their Uruguay Round market access concessions, there was a common view that the market access being negotiated for "salted" products was not in respect of products which had been salted for preservation, nor that the object and purpose of negotiating a specific level of market access, suitable for importing and exporting interests was made on any other

[507] This case is discussed below in paras. 7.372 *et seq*.
[508] EC's reply to Panel question No. 23.
[509] EC's reply to Panel question No. 44.
[510] EC's reply to Panel question No. 91.
[511] EC's reply to Panel question No. 44.
[512] Brazil's comments on the WCO's reply to Panel question No. 11 to the WCO.
[513] Thailand's second written submission, para. 41 referring to Appellate Body Report, *EC – Computer Equipment*, para. 95; Thailand's reply to Panel question No. 118.
[514] EC's first written submission, para. 163.

basis. The European Communities submits that, consequently, the object and purpose of the tariff structure in question clearly supports the European Communities' interpretation of its obligations.[515]

7.311 **Brazil** submits that the "object and purpose" of a concession contained in the schedule of a particular Member must be determined on the basis of the common understanding of all parties, not just the alleged will or purpose of the party making the concession. Brazil submits that, for all intents and purposes, when the European Communities clarified the scope of its tariff concession by means of EC Regulation No. 535/94, it conceded that meat with a salt content of 1.2% would, by necessity, be subject to some form of preservation other than salting.[516] Brazil further argues that, at the time tariffs are negotiated, Members define their offers and their obligations in terms that best suit their needs. However, according to Brazil, a Member cannot possibly thoroughly foresee what its needs will be ten or more years from the date it negotiated its tariffs. Brazil argues that it is precisely because trade flow is dynamic that it is possible, and even likely, that some new and unexpected trade pattern will develop in a way that is contrary to or does not suit a Member's need. Brazil submits that the WTO Agreements recognize this possibility and provide ways for Members to address unexpected trade patterns, such as the imposition of safeguards, anti-dumping or countervailing measures or modification of its schedule under the provisions of Article XXVIII of the GATT 1994. However, Brazil submits that what a Member cannot do is to unilaterally change its commitments simply because a new trade pattern has emerged and the corresponding concession in its schedule no longer suits its needs.[517]

7.312 **Thailand** submits that the European Communities may not use the classification process to respond to changes in patterns of trade since it last negotiated its tariff schedules.[518] According to Thailand, the principle of long-term preservation was introduced by the European Communities in relation to heading 02.10 solely to narrow the scope of a tariff concession that had generated more trade than the European Communities had expected. Thailand submits that the European Communities should have addressed this concern by re-negotiating its concession under Article XXVIII of the GATT 1994 rather than by excluding products from the tariff heading implementing that concession.[519]

7.313 The **European Communities** accepts that trade flows may change after tariff commitments are made. However, the European Communities submits that this does not mean that such trade developments are without parameters. According to the European Communities, any new trade flows must fall under the scope of the tariff commitment they claim. The European Communities submits that, in the present case, the new trade flow does not fall under the European Communities' tariff commitment in respect of "salted" meat.[520]

(ii) Comments by the World Customs Organization

7.314 The WCO states that, when goods are classified under the HS, this is always done on the basis of the objective characteristics of the product at the time of importation. The WCO states that the factor which determines the essential character of a product will vary from one product to another. The WCO adds that the determination of the essential character of a product may be done through a visual inspection of the product including indications on the packing. Reference may also be made to accompanying documents. The WCO states that, in some cases, laboratory analysis may be required. The WCO states that, since headings 02.07 and 02.10 cover "frozen" and "salted" products respectively, it would have to be determined whether the products at issue essentially have the

[515] EC's first written submission, para. 164.
[516] Brazil's oral statement at the first substantive meeting, paras. 46-50.
[517] Brazil's reply to Panel question No. 80.
[518] Thailand's oral statement at the first substantive meeting, para. 46.
[519] Thailand's oral statement at the first substantive meeting, para. 6.
[520] EC's reply to Panel question No. 80.

character of a "frozen" or a "salted" product. The WCO surmises that it would probably be straightforward to determine whether or not a product is "frozen" whereas recourse to laboratory analysis might be required to determine whether a product can be regarded as a "salted" product within the meaning of heading 02.10.[521] The WCO also notes that practical aspects associated with the verification of classification criteria are taken into account for the purposes of classification of commodities at the HS level once they have become part of the legal text or of the Explanatory Notes.[522]

(iii) Analysis by the Panel

7.315 The Panel recalls that Article 31(1) of the *Vienna Convention* provides that:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.316 Article 31(1) of the *Vienna Convention* clearly indicates that a treaty must be interpreted in light of that *treaty's* object and purpose. Notably, Article 31(1) of the Vienna Convention does not indicate that the object and purpose of particular *terms of a treaty* must be determined, such as heading 02.10 of the EC Schedule.

7.317 In our view, for the purposes of this case, Article 31(1) of the *Vienna Convention* instructs us to consider the object and purpose of the treaty in which the treaty terms that are the subject of this dispute can be found. In particular, the treaty terms at issue in this case are contained in heading 02.10 of the EC Schedule. As noted above in paragraph 7.6, on the basis of Article II:7 of the GATT 1994 and Article II:2 of the WTO Agreement, the concessions contained in the EC Schedule are treaty terms of the GATT 1994 and the WTO Agreement. Accordingly, we consider that our task in this section is to determine the object and purpose of the WTO Agreement and the GATT 1994.[523]

The WTO Agreement and the GATT 1994

7.318 The object and purpose of the WTO Agreement can be deduced from the preambles of the WTO Agreement and of the agreements annexed thereto. The preamble of the WTO Agreement specifies that one of the purposes of the Agreement is to "expand[] ... trade in goods and services." It also states that Members should contribute to the above-mentioned expansion "by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade." In addition, in *EC – Computer Equipment*, the Appellate Body stated that:

> "[T]he security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to

[521] WCO's reply to Panel question No. 1 to the WCO.
[522] WCO's reply to Panel question No. 11 to the WCO.
[523] The Panel notes that, in theory, the object and purpose of the Agreement on Agriculture, being an agreement that is annexed to the WTO Agreement, may also be relevant for the interpretation of a WTO Member's concession on an agricultural product. The purpose of the Agreement on Agriculture is to discipline the progressive liberalization of trade in agricultural products as agreed by Members. The preamble of the Agreement on Agriculture notes that the negotiation of commitments is part of the reform process in the agricultural trading system. It also provides that "the ... long-term objective is to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets." This objective appears to be of limited relevance to the present case. Therefore, we will not proceed to further examine the object and purpose of Agreement on Agriculture.

> trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994."[524]

The Appellate Body made clear in that case that security and predictability is not to be based on the "subjective views" of exporting Members but, rather, on the common intentions of the parties at the time of the conclusion of the negotiations. [525]

7.319 With respect to the object and purpose of the GATT 1994, in *Argentina – Textiles and Apparel*, the Appellate Body stated that:

> "[A] basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule. Once a tariff concession is agreed and bound in a Member's Schedule, a reduction in its value by the imposition of duties in excess of the bound tariff rate would upset the balance of concessions among Members."[526]

7.320 Taken together, the relevant aspects of the WTO Agreement and the GATT 1994 indicate that concessions made by WTO Members should be interpreted so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs. It is also clear that such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous. In other words, the terms of a concession should not be interpreted in such a way that would disrupt the balance of concessions negotiated by the parties. Finally, the interpretation must ensure the security and predictability of the reciprocal and mutually advantageous arrangements manifested in the form of concessions.

7.321 With respect to the last point referred to in the preceding paragraph, namely that an interpretation of the WTO Agreement and the GATT 1994 must ensure the security and predictability of the reciprocal and mutually advantageous arrangements manifested in the form of concessions, the question has arisen in this case as to whether the interpretation of the concession contained in heading 02.10 of the EC Schedule to include a long-term preservation criterion could undermine this objective. In this regard, we note that all the parties to this dispute, including the European Communities, agree that, in characterizing a product for the purposes of tariff classification, it is necessary to look exclusively at the "objective characteristics" of the product in question when presented for classification at the border.[527] The WCO has suggested that a visual inspection may suffice for some products whereas laboratory analyses may be required for others. As regards the present case, the WCO surmises that laboratory analyses might be required to determine whether a product can be regarded as "salted" within the meaning of heading 02.10 of the HS.

7.322 With respect to the products at issue, the European Communities has stated that, if a product has been "frozen" within the meaning of heading 02.07, it will still be classified under heading 02.10 of the EC Schedule as a "salted" product provided that the salting has been undertaken for the purposes of "long-term preservation" within the meaning of EC Regulation No. 1223/2002 and EC Decision 2003/97/EC.[528] However, despite questioning by the Panel and by Brazil[529], the European

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[524] Appellate Body Report, *EC – Computer Equipment*, para. 82.

[525] Appellate Body Report, *EC – Computer Equipment*, paras. 82 and 84.

[526] Appellate Body Report on *Argentina – Textiles and Apparel*, at para. 47.

[527] Brazil's reply to Panel question No. 13; Thailand's oral statement at the first substantive meeting, paras. 51-53; Thailand's second written submission, paras. 38-41; EC's replies to Panel question Nos. 90 and 105.

[528] EC's replies to Panel question Nos. 49 and 70; EC's second written submission, paras. 27, 30, 41 and 45; EC's oral statement at the second substantive meeting, paras. 9, 14 and 15.

[529] Panel question No. 118. Brazil's question Nos. 1-3 to the EC following the first substantive meeting.

Communities has not provided the Panel with any clear idea of what is meant by "long-term preservation" in practice.[530] In addition, the Panel notes that the European Communities has acknowledged that there are no specific guidelines to assist customs officers in determining whether or not a particular product should be classified under heading 02.10[531] but submits that this is not problematic because products classifiable under heading 02.10 are "readily detectable".[532] However, if a product arrives at the EC border that is salted and then frozen, (as in the case of the products at issue)[533], the Panel questions how a customs officer at the border tasked with identifying the appropriate heading under which the product should be classified is to know whether: (a) the product has been preserved for the long-term; and (b) if so, whether the long-term preservation is the result of salting, freezing or a combination of the two. While the first question may be addressed through laboratory analyses, which the European Communities states that it conducts when necessary,[534] it is far from clear to us how the answer to the second question will be determined. Yet, without a means to determine the answer to the second question, the customs officer will not be in a position to know whether the product in question should be classified under heading 02.10 (i.e, because the long-term preservation is attributable to the salting) or under heading 02.07 (because the long-term preservation is attributable to the freezing).

7.323 In the Panel's view, the lack of certainty associated with the application of the criterion of long-term preservation with respect to the concession contained in heading 02.10 of the EC Schedule runs counter to one of the objects and purposes of both the WTO Agreement and the GATT 1994, namely that the security and predictability of the reciprocal and mutually advantageous arrangements must be preserved. Therefore, the Panel concludes that an interpretation of the term "salted" in the concession contained in heading 0.210 of the EC Schedule to include the criterion of long-term preservation could undermine the object and purpose of security and predictability, which lies at the heart of the WTO Agreement and the GATT 1994.

The EC Schedule

7.324 The Panel notes that, in *Canada – Dairy*, the Appellate Body stated that:

> "[W]e do not share the Panel's view as to the significance of the object and purpose of Article II of the GATT 1994 for the interpretive question at issue. It is true, as the Panel said, that the object and purpose of Article II is 'to preserve the value of tariff concessions...'. However, the issue facing the Panel was what was the scope and content of the concession? The Panel's reference to the object and purpose of Article II appears to us to beg the very question that the Panel should have addressed: namely, what is the meaning of that notation? That is, what is the shape and tenor of the concession that Canada had set forth in its Schedule of Commitments?"[535]

7.325 The European Communities relies upon this statement by the Appellate Body to argue that its object and purpose when concluding the tariff heading in question must be taken into a consideration. In our understanding, the above statement does not stand for this proposition. Rather, it stands for the proposition that an interpreter's primary task is to determine the meaning of a scheduled commitment. This principle is contained explicitly in Article 31 of the *Vienna Convention.*

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[530] The EC has merely stated that the shelf life of preserved meats is many months at ambient temperature: EC replies to Panel question Nos. 49 and 96.

[531] EC's reply to Panel question No. 23.

[532] EC's replies to Panel question Nos. 44 and 91.

[533] See Brazil's reply to Panel question No. 14(a) referring to Exhibit BRA-33 and Thailand's reply to Panel question No. 14(a).

[534] Indeed, Exhibit THA-23, which contains the minutes of a meeting of the EC Customs Code Committee held on 18 - 19 February 2002, indicates that analyses had been undertaken by certain EC member States regarding frozen salted chicken.

[535] Appellate Body Report, *Canada – Dairy*, para. 137.

7.326 Besides, as noted above in paragraph 7.317, it is the Panel's view that, for the purposes of this case, Article 31(1) of the *Vienna Convention* mandates us to consider the object and purpose of the WTO Agreement and GATT 1994. We do not consider that Article 31(1) of the *Vienna Convention* requires consideration of the object and purpose of particular terms of the treaties in question – in this case, the term "salted" in heading 02.10 of the EC Schedule. In any event, we note that one Member's unilateral object and purpose for the conclusion of a tariff commitment cannot form the basis of an interpretation pursuant to Articles 31 and 32 of the *Vienna Convention*. Indeed, in interpreting heading 02.10 of the EC Schedule, we are required to ascertain the *common* intentions of the parties.[536]

7.327 Therefore, in the context of the present case, we consider that Article 31(1) of the *Vienna Convention* does not authorize us to consider the European Communities' unilateral object and purpose when it concluded its Schedule in interpreting the concession contained in heading 02.10 of the EC Schedule.

(iv) Summary and conclusions regarding the "object and purpose"

7.328 In the Panel's view, the lack of certainty associated with the application of the criterion of long-term preservation with respect to the concession contained in heading 02.10 of the EC Schedule runs counter to one of the objects and purposes of the WTO Agreement and the GATT 1994, namely that the security and predictability of the reciprocal and mutually advantageous arrangements must be preserved. Therefore, the Panel concludes that an interpretation of the term "salted" in that concession to include the criterion of long-term preservation could undermine the object and purpose of security and predictability, which lie at the heart of both the WTO Agreement and the GATT 1994.

(e) Special meaning: Article 31(4) of the *Vienna Convention*

7.329 The Panel notes that Article 31.4 of the *Vienna Convention* provides that:

> "A special meaning shall be given to a term if it is established that the parties so intended."

7.330 The Panel notes that none of the parties have referred to Article 31.4 of the *Vienna Convention*. Nor have they advanced any argumentation to suggest that a "special meaning" of the term "salted" in the concession contained in heading 02.10 of the EC Schedule exists.

[536] We note that in *EC – Computer Equipment*, the Appellate Body stated that: "The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule -- the interpretation of which is at issue here -- are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members." Appellate Body Report, *EC – Computer Equipment*, para. 84. Further, Ian Sinclair reasons that, in the case of multilateral treaties, some parties will have acceded to a treaty and, therefore, must be assumed to have joined the treaty not on the basis of what the original negotiators intended but, rather, on the basis of what the text actually says and means. He adds that in a dispute as to treaty interpretation, the parties will obviously place differing constructions upon the text and, by so doing, they are professing to having had different intentions from the inception of the text. Mr Sinclair concludes that it is the text of the treaty that is the expression of the intention of the parties and it is to that expression of intent that one must look in identifying its object and purpose: Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984) pp. 130-131.

(f) Preliminary conclusions under Article 31 of the *Vienna Convention*

7.331 Following an analysis of the term "salted" in the concession contained in heading 02.10 of the EC Schedule pursuant to Article 31 of the *Vienna Convention*, the Panel concludes on a preliminary basis that:

(a) The "ordinary meaning" of the term "salted" is: to season, to add salt, to flavour with salt, to treat, to cure or to preserve. The ordinary meaning of the term "salted" is not necessarily limited to salting with common salt (NaCl).

(b) The factual context indicates that the ordinary meaning of the term "salted" is that the character of a product has been altered through the addition of salt.

(c) The "context" of the term "salted" does not clarify the "ordinary meaning" of the term "salted" in the concession contained in heading 02.10 of the EC Schedule although it does tend to indicate that the heading is not necessarily characterized by the notion of long-term preservation.

(d) There is evidence of "subsequent practice" on the part of the European Communities which indicates that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule.

(e) An interpretation of the term "salted" in the concession contained in heading 02.10 of the EC Schedule to include the criterion of long-term preservation could undermine the "object and purpose" of security and predictability, which lie at the heart of the WTO Agreement and the GATT 1994.

7.332 The foregoing indicates to the Panel that the concession contained in heading 02.10 of the EC Schedule means that salt has been added to a product so as to season, to add salt, to flavour with salt, to treat, to cure or to preserve. The ordinary meaning of the term "salted" is not necessarily limited to salting with common salt (NaCl). It also tends to indicate that the concession in question is not characterized by the notion of long-term preservation. Therefore, while the interpretation undertaken by the Panel pursuant to Article 31 of the *Vienna Convention* suggests that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule, we turn to supplementary means of interpretation of the concession contained in heading 02.10 of the EC Schedule pursuant to Article 32 of the *Vienna Convention* to seek confirmation that this is, in fact, the case.

(g) Supplementary means of interpretation: Article 32 of the *Vienna Convention*

(i) Preparatory work

Arguments of the parties

7.333 The **European Communities** considers the Modalities Agreement to be, at the very least, "preparatory work" because its sets out the parameters of the negotiations and, as such, it can be taken into account along with the "circumstances of conclusion" under Article 32 of the *Vienna Convention*.[537] The European Communities argues that the effect of taking the Modalities Agreement into account, is that the date for considering the scope of the relevant tariff headings in the EC Schedule as evidenced through the circumstances of its conclusion under Article 32 of the *Vienna*

[537] The EC relies on paras. 6.72 *et seq* of the Panel Report on *US – Gambling* to suggest that the Modalities Agreement may even qualify as "context" under Article 31(2) of the *Vienna Convention*: EC's oral statement at the second substantive meeting, para. 72.

Convention is 1 September 1986.[538] In this regard, the European Communities submits that agricultural tariffs were established on the basis of the Modalities Agreement, pursuant to which there was a significant reliance upon information dating from the commencement of the Uruguay Round.[539] Furthermore, according to the European Communities, the use of the starting date of negotiations as a basis for agreed changes has been common practice in the GATT/WTO system. The European Communities submits that such a date has the advantage of providing certainty and preventing parties from changing their law and/or practice in order to improve their negotiating positions. The European Communities contends that, in the absence of any other expression of intention by the parties, the parties to the Uruguay Round negotiations must be taken to have intended this date as the principal point at which the scope of individual tariff concessions should be defined.[540] The European Communities submits that, therefore, it is not plausible to argue that the common intention of the negotiating parties could be affected by unilateral acts, absent some evidence from the complainants (such as a footnote in the EC Schedule) to the contrary.[541] The European Communities submits that, consequently, in so far as EC law and practice on the scope of headings is to be taken into account as "circumstances of conclusion", they should be the law and practice as they stood on 1 September 1986.[542] According to the European Communities, in any event, the critical date should not be later than 15 December 1993 when the Uruguay Round negotiations formally terminated.[543] The European Communities submits that, throughout this period, both EC law and practice supported the principle of long-term preservation with respect to heading 02.10 of the EC Schedule.[544]

7.334 **Thailand** submits that the Modalities Agreement may theoretically be considered as "preparatory work" within the meaning of Article 32 of the *Vienna Convention.* However, Thailand questions the probative value of this document as a supplementary means of interpretation.[545] Thailand submits that paragraph 3 of the Modalities Agreement states that "[f]or agricultural products currently subject to ordinary customs duties only, the reduction commitment shall be implemented …only on the level applied as at 1 September 1986". According to Thailand, this statement merely requires that products subject to ordinary customs duties be bound at the level applied as at 1 September 1986.[546] Thailand argues that it is common to agree at the beginning of multilateral trade negotiations on a date in the past to be used to determine the tariff levels to which any agreement on tariff reductions would be applied. According to Thailand, Members, therefore, did agree in the Modalities Agreement to use the level of duties applied as at 1 September 1986. However, that agreement cannot be taken to mean that the scope of the EC Schedule should be determined as at the beginning of the Uruguay Round.[547]

7.335 **Brazil** does not consider that the Modalities Agreement is "preparatory work" under Article 32 of the *Vienna Convention*. Brazil notes in this regard that the introductory note to the Modalities Agreement states that "[t]he revised text is being re-issued on the understanding of participants in the Uruguay Round that these negotiating modalities shall not be used as a basis for dispute settlement proceedings under the MTO Agreement *(sic)*."[548] Brazil submits that, through this statement, WTO Members unequivocally expressed their intention not to use the Modalities Agreement as a basis for dispute settlement proceedings under the WTO Agreement and, given that the WTO dispute settlement system serves "to clarify the existing provisions of those agreements in

[538] EC's second written submission, para. 107.
[539] EC's second written submission, paras. 103 and 107 relying upon Exhibit EC-9.
[540] EC's second written submission, paras. 104-105.
[541] EC's reply to Panel question No. 58.
[542] EC's second written submission, para. 107.
[543] EC's second written submission, paras. 96 and 110.
[544] EC's second written submission, para. 118.
[545] Thailand's reply to Panel question No. 78.
[546] Thailand second written submission, para. 76.
[547] Thailand's comments on the EC's reply to Panel question No. 87.
[548] The Modalities Agreement is contained in Exhibit EC-9.

accordance with customary rules of interpretation of public international law"[549], Members determined that the Modalities Agreement may not be used as "preparatory work" within the meaning of Article 32 of the *Vienna Convention* for purposes of dispute settlement proceedings. In addition, Brazil points out that "preparatory work" is to be used in the interpretation of a treaty – in this case the EC Schedule – and not in the interpretation of the European Communities' import practice at the conclusion of the Uruguay Round.[550]

Analysis by the Panel

7.336 The Panel recalls that the European Communities argues that the effect of taking the Modalities Agreement into account is that the date for considering the scope of the relevant tariff headings in the EC Schedule as evidenced through the circumstances of its conclusion under Article 32 of the *Vienna Convention* is 1 September 1986.[551] As noted previously, this argument concerns the temporal scope of the term "circumstances of conclusion" in Article 32 of the *Vienna Convention*. As explained in greater detail below in paragraphs 7.340 *et seq*, we do not consider that the term is limited in temporal terms. Since the reason for the European Communities' reliance on the Modalities Agreement is to argue that the date for considering the meaning of heading 02.10 of the EC Schedule as evidenced through the "circumstances of its conclusion" under Article 32 is 1 September 1986, in light of our conclusions regarding the temporal scope of Article 32, we do not consider it is necessary to determine whether the Modalities Agreement should be taken into consideration in our interpretation of the EC Schedule as "preparatory work" within the meaning of Article 32 of the *Vienna Convention*.

(ii) Circumstances of conclusion of the EC Schedule

Substantive and temporal scope of "circumstances of conclusion"

Arguments of the parties

7.337 The **European Communities** submits that Article 32 of the *Vienna Convention* has its origins in the principle of good faith. According to the European Communities, Article 32 ensures that the "reality of the situation" upon which parties' common intent is based may be relevant in interpreting an agreement.[552] The European Communities argues that, whether a particular event is a relevant circumstance which should determine the interpretation of a treaty, is a question of fact to be determined in each case.[553] As noted previously, the European Communities submits that, in so far as EC law and practice on the scope of headings is to be taken into account as "circumstances of conclusion", they should be the law and practice as they stood on 1 September 1986.[554] According to the European Communities, in any event, the critical date should not be later than 15 December 1993.[555] The European Communities submits that it was on 15 December 1993 that the substantive market access negotiations pursuant to the Ministerial Declaration on the Uruguay Round were concluded. The European Communities submits that the subsequent period was for "verifying that the draft final schedules reflected accurately the agreed results of the negotiations".[556] The European Communities concedes that, strictly speaking, events occurring after 15 December 1993 may qualify as "circumstances of the conclusion".[557] The European Communities clarifies that it does not claim that the negotiating parties could not have agreed that changes in national law during the verification

[549] Article 3.2 of the DSU.
[550] Brazil's reply to Panel question No. 78.
[551] EC's reply to Panel question No. 58; EC's second written submission, para. 107.
[552] EC's second written submission, para. 62.
[553] EC's second written submission, para. 109.
[554] EC's second written submission, para. 107.
[555] EC's second written submission, paras. 96 and 110.
[556] EC's second written submission, paras. 110-111.
[557] EC's second written submission, para. 96.

phase would affect parties' obligations since the Appellate Body emphasized that the "circumstances of conclusion" could arise at any time up to the actual conclusion.[558] However, the European Communities submits that a party seeking to invoke such an event would need to prove that the relevant issue was raised during the verification period, e.g., through a specific request.[559]

7.338 In response, **Brazil** submits that dictionaries define the term "conclusion" as "the result or outcome of an act or process" or simply "a final result".[560] Brazil suggests that there would be no point to negotiations if 1 September 1986 was accepted as the date at which the "circumstances of conclusion" were to be determined. Brazil submits that there is no reason to assume that negotiating parties could not, and did not, make any changes in their classification nomenclatures from 1986 to 1994, when negotiations on tariff concessions were concluded.[561] Brazil submits that it is also wrong to state that the conclusion of the EC Schedule occurred on 15 December 1993. Brazil submits that this understanding diminishes, or even rejects, the importance of the period of verification of schedules as a stage in the process leading to the establishment of formal schedules.[562] Brazil argues that, in reality, the conclusion of negotiations occurs the moment parties to a negotiation have agreed to and sanctioned the result of such negotiation.[563] Brazil further submits that the Appellate Body unequivocally attached importance to the special process of "check and control" of Members' schedules of concessions, a process that ended on 25 March 1994.[564] Brazil also notes that the European Communities admits that the period for verification of schedules may qualify in the strict legal sense as circumstances of the conclusion but subject to the caveat that proof must be given that the issue was raised during the verification period. Brazil submits that such burden of proof does not exist and, in any event, does not make sense. Members could have verified each others' schedules and come to the conclusion that there were no issues to further discuss or raise during the verification process.[565]

7.339 **Brazil, Thailand** and the **European Communities** submit that actual knowledge during negotiations of a document or instrument is not necessary on the part of some or all negotiators in order for that document or instrument to qualify as "circumstances of the conclusion" under Article 32 of the *Vienna Convention*. Thailand explains that, from a practical perspective, it would be extremely difficult to prove actual knowledge among all negotiators. Brazil also submits that, since instruments or documents may be drafted during the negotiations of a treaty without the participation of all contracting parties, one cannot presume that such documents are not part of the historical background of the treaty simply because some States did not or were not able to participate in the drafting of such documents.[566] Brazil and the European Communities submit that, rather, in order for a document or instrument to qualify for consideration as "preparatory work" and/or "circumstances of conclusion" pursuant to Article 32 of the *Vienna Convention*, that document or instrument must have been in the public domain or accessible to WTO Members.[567]

Analysis by the Panel

7.340 In the Panel's view, for the purposes of Article 32 of the *Vienna Convention*, the "circumstances of conclusion" may provide insights into the historical background against which the

[558] EC's second written submission, para. 112.
[559] EC's second written submission, para. 96.
[560] Brazil's oral statement at the second substantive meeting, para. 64.
[561] Brazil's oral statement at the second substantive meeting, para. 66.
[562] Brazil's oral statement at the second substantive meeting, para. 67.
[563] Brazil's oral statement at the second substantive meeting. para. 68.
[564] Brazil's oral statement at the second substantive meeting. para. 69 referring to Appellate Body Report, *EC – Computer Equipment*, para. 109.
[565] Brazil's oral statement at the second substantive meeting, para. 70.
[566] Brazil's reply to Panel question No. 122; Thailand's reply to Panel question No. 122; EC's reply to Panel question No. 122.
[567] Brazil's reply to Panel question No. 122.

EC Schedule was negotiated. The historical background comprises the collection of events, acts and other instruments that characterize the prevailing situation in the European Communities.[568]

7.341 With respect to the events, acts and other instruments that may be taken into account as "circumstances of conclusion" under Article 32 of the *Vienna Convention*, in *EC – Computer Equipment*, the Appellate Body expressly recognized that the relevant Member's *legislation* on customs classification that existed at the time the tariff concessions were negotiated as well as that Member's *classification practices* during negotiations are part of the circumstances of the conclusion of the WTO Agreement and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*.[569]

7.342 The European Communities has raised the issue of the point in time when the "circumstances of conclusion" under Article 32 of the *Vienna Convention* should be ascertained. In our view, there is not necessarily a single point in time when the "circumstances of conclusion" should be ascertained. Rather, we consider that it relates to a period starting some time prior to the conclusion of the treaty in question and ending at the point of conclusion.[570]

7.343 Regarding the question of how far back in time a treaty interpreter may go in identifying the events, acts or other instruments that may qualify as "circumstances of conclusion" under Article 32, in our view, in theory, there is no temporal limitation in this regard. We consider that "relevance" is the more appropriate criterion to judge whether a particular event, acts or other instrument qualifies as

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[568] When describing the "circumstances of conclusion" under Article 32 of the Vienna Convention, Mustafa Yasseen states that: "They are the historical background that comprises the collection of events which led the parties to conclude the treaty in order to maintain or confirm the status quo, or to bring about an alteration made necessary by a new situation." Mustafa Yasseen, "L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités" in *Recueil des Cours de l'Académie de Droit International*, (1974) Vol. III, p. 90, para. 3. International law commentaries also provide support for the view that, in identifying the "circumstances of conclusion" of a treaty under Article 32 of the *Vienna Convention*, it is necessary to consider the "reality of the situation" and that this situation may vary from case to case. In particular, Mustafa Yasseen states that: "Treaties as a social phenomenon are the consequence of a series of causes. It is, therefore, useful to know the conditions of the parties and the reality of the situation that the parties wished to resolve, the importance of the problem they wanted to settle and the scope of the dispute they wanted to terminate through the Treaty being interpreted." Mustafa Yasseen, "L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités" in *Recueil des Cours de l'Académie de Droit International*, (1974) Vol. III, p. 90, para. 4. Similarly, Ian Sinclair states: "... the reference in Article 32 ... to the circumstances of the conclusion of a treaty may have some value in emphasising the need for the interpreter to bear constantly in mind the historical background against which the treaty has been negotiated. ... It may also be necessary to take into account the individual attitudes of the parties – their economic, political and social conditions, their adherence to certain groupings or their status, for example, as importing or exporting country in the particular case of a commodity agreement – in seeking to determine the reality of the situation which the parties wished to regulate by means of the treaty." Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984) p. 141.

[569] Appellate Body Report, *EC – Computer Equipment*, paras. 92 and 94.

[570] Mustafa Yasseen states that: "It is the circumstances in which the treaty was concluded; it could therefore be said that it is the circumstances of a certain period in time, that is to say the period during which the treaty was concluded. But does this mean that the possibility of historical research into an earlier period must be ruled out? We think not. Indeed, it is useful, and sometimes even necessary, to carry out such research in order to acquire a better understanding of the actual cirumstances in which the treaty was concluded. In any case, an overall examination of the treaty's historical background may be considered as a supplementary means of interpretation, given the series of events leading to its conclusion. Let us not forget that the list of supplementary means of interpretation contained in Article 32 of the Vienna Convention on the Law of Treaties is not exhaustive. If the circumstances in which the treaty was concluded are expressly mentioned, it is to underline their importance in the elaboration of the Treaty, and not to exclude the possibility of wider-ranging and more thorough historical research into a period preceding that of the conclusion of the treaty…. " Mustafa Yasseen, "L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités" in *Recueil des Cours de l'Académie de Droit International*, (1974) Vol. III, p. 92, paras. 10-11.

part of the "circumstances of conclusion".[571] As for how such relevance may be demonstrated, it is the Panel's view that it must be shown that the event, act or other instrument has or could have influenced the specific aspects of the ultimate text of a treaty that are in issue.[572]

7.344 Having stated that, in theory, there is no temporal limitation on what may qualify as "circumstances of conclusion" and that relevance is the more appropriate criterion for determining such qualification, we acknowledge that there may be some correlation between the timing of an event, act or other instrument (i.e. how far back in the past they took place, were enacted or were adopted) and their relevance to the treaty in question. It would be fair to state that, generally speaking, the further back in time that an event, act or other instrument took place, was enacted or was adopted relative to the conclusion of a treaty, it is less likely to have influenced the ultimate text of the treaty and, therefore, it is less likely that it is relevant to the interpretation of that treaty. Furthermore, the fact that Article 32 of the *Vienna Convention* refers to "circumstances of *conclusion*" indicates to us that the event, act or other instrument should be temporally proximate to the conclusion of a treaty in order for it to be taken into account for the interpretation of that treaty under Article 32 as "circumstances of conclusion". In our view, what is considered temporally proximate will vary from treaty provision to treaty provision.

7.345 With respect to the end date of the period of "conclusion", we note that the European Communities draws a distinction between the time when the text of the EC Schedule was finalized (i.e. on 15 December 1993) and the period during which the contents of that Schedule were verified by WTO Members (between 15 February until 25 March of 1994). The European Communities seems to suggest that the former rather than the latter should be taken as the end date of the period during which the "circumstances of conclusion" of the treaty can be assessed unless it can be shown that a party seeking to invoke a later event proves that it was raised during the verification period, e.g., through a specific request.[573] We refer to our reasoning in paragraphs 7.100-7.101 above and recall that, in paragraph 7.101, we found that the EC Schedule was concluded on 15 April 1994. That finding is equally applicable here. Therefore, it is our view that, in the context of the present case, events, acts and other instruments that took place, were enacted or were adopted at any time up until 15 April 1994 may be considered as "circumstances of conclusion" under Article 32 of the *Vienna Convention*, provided that they have been shown to be relevant.

7.346 In relation to the issue of whether knowledge on the part of all parties of an event, act or other instrument is necessary in order for that event, act or instrument to qualify as "circumstances of conclusion" under Article 32 of the *Vienna Convention*, it is our view that actual knowledge is not necessary. The Panel considers that, if actual participation in the conclusion of a treaty (which may be equated with actual knowledge) were to determine whether account may be taken of a particular event, act or other instrument to which only those participating were privy, this would imply that the results of the interpretative process may differ depending upon whether or not a party participated in negotiations in the lead up to the conclusion of the treaty. In the Panel's view, this result cannot be desirable if a coherent and consistent approach to the interpretation of a given treaty obligation is to

[571] We note that Ian Sinclair states that "no would be interpreter of a treaty, whatever his doctrinal point of departure, will deliberately ignore any material which can usefully serve as a guide towards establishing the meaning of the text with which he is confronted": Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984) p. 116.

[572] In support, we note that Mustafa Yasseen states that: "It is only logical that the circumstances in which the treaty was concluded should influence the way in which it was drafted. An examination of these circumstances can therefore shed a certain amount of light on the intention of the parties and thus help explain the formulas they adopted." Mustafa Yasseen, "L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités" in *Recueil des Cours de l'Académie de Droit International*, (1974) Vol. III, p. 90, para. 5.

[573] EC's second written submission, paras. 96, 107 and 110. In this regard, we recall that the European Communities argues that, as far as EC law and practice on the scope of headings is to be taken into account as "circumstances of conclusion", they should be the law and practice as they stood on 1 September 1986 and, in any event, the critical date should not be later than 15 December 1993.

be achieved. In our view, provided that parties have deemed notice of a particular event, act or instrument through publication, they may be considered to have had constructive knowledge and that such knowledge suffices for the purposes of Article 32 of the *Vienna Convention*.[574]

7.347 In light of the foregoing, we will consider EC law and the EC's classification practice during the Uruguay round negotiations to the extent that they are relevant to the conclusion of the EC Schedule pursuant to Article 32 of the *Vienna Convention*.

EC law

EC Regulation No. 535/94

Arguments of the parties

7.348 *With respect to the question of whether or not EC Regulation No. 535/94 qualifies as "circumstances of conclusion" under Article 32 of the Vienna Convention,* **Brazil** and **Thailand** submit that EC Regulation No. 535/94 is part of the circumstances surrounding the conclusion of the EC Schedule within the meaning of Article 32 of the *Vienna Convention* and should, therefore, be considered in interpreting the terms of the European Communities' concession under heading 02.10.[575] They submit that, from 15 February until 25 March of 1994, Members were given the opportunity to check and control the scope and definition of each other's tariff concessions.[576] They argue that, prior to the end of the verification process for tariff schedules during the Uruguay Round and the conclusion of the EC Schedule, the European Communities amended the CN as contained in Annex I to EEC Regulation No. 2658/87 through EC Regulation No. 535/94.[577] Brazil points out that the definition of the term "salted" for heading 02.10 contained in EC Regulation No. 535/94 was the only existing definition of "salted" for heading 02.10 in the CN at the time the EC Schedule was concluded.[578] According to Brazil and Thailand, WTO Members negotiated tariff concessions based on that definition of "salted" meat.[579] As for the significance of the fact that EC Regulation No. 535/94 only entered into force after the verification period had ended, Brazil submits that previous WTO and adopted GATT panels "have always considered that mandatory legislation of a Member, even if not yet in force or not applied, can be challenged by another WTO Member".[580] Brazil submits that, if mandatory legislation not yet in force can be challenged by another WTO Member, the European Communities' definition of "salted" meat in EC Regulation No. 535/94, that was public but not in force during the period of verification of schedules, could also have been challenged by a negotiating partner during the period of verification. Brazil explains that, even though the European Communities' definition of "salted" meat of heading 02.10 was not yet in force, thus not applicable to

[574] In support, we note that Ian Sinclair has stated that: "... recourse to *travaux préparatoires* does not depend on the participation in the drafting of the text of the State against whom the travaux are invoked. To hold otherwise would disrupt the unity of a multilateral treaty, since it would imply that two different methods of interpretation should be employed, the one for States who participated in the *travaux prèparatoires* and the other for States who did not so participate. One qualification should, however, be made. The *travaux préparatoires* should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them. *Travaux préparatoires* which are kept secret by negotiating States should not be capable of being invoked against subsequently acceding States." Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984) p. 144. We see no reason why these comments would not be equally applicable with respect to "circumstances of conclusion" under Article 32 of the *Vienna Convention*.

[575] Brazil's reply to Panel question No. 58; Thailand's first written submission, paras. 135-136.

[576] Brazil's reply to Panel question No. 56; Thailand's reply to Panel question No. 75; Thailand's second written submission, para. 78.

[577] Brazil's first written submission, para. 21; Thailand's first written submission, paras. 136-137.

[578] Brazil's first written submission, para. 98.

[579] Brazil's first written submission, para. 176; Thailand's second written submission, para. 79.

[580] Brazil refers to Panel Report on *Turkey – Textiles*, para. 9.37 and footnote 263; and GATT Panel Report on *US – Superfund*, paras. 5.2.1-5.2.2.

current trade, it would, nevertheless, be applicable to future trade. Therefore, according to Brazil, the mere knowledge by the European Communities' negotiating partners of what the European Communities considered to be "salted" meat of heading 02.10 was enough for the purposes of check and control of the scope and definition of tariff concessions.[581]

7.349 In response, the **European Communities** submits that all of the issues dealt with during the verification process concerned matters that were apparent in the texts of the schedules and none concerned aspects of national practice.[582] The European Communities argues that, therefore, parties must have assumed that national developments would not change the substance of concessions, at least unless they were specifically brought to the attention of negotiators.[583]

7.350 **Brazil** understands that EC Regulation No. 535/94 was not enacted as a response to requests made by WTO Members to the European Communities for clarification regarding heading 02.10 in the EC Schedule.[584] Brazil submits that, nevertheless, it is reasonable to expect that a Regulation defining "salted" meat for heading 02.10 of the EC Schedule, issued by the European Communities at the end of the Uruguay Round negotiations, set out the criteria adopted by the European Communities in its Schedule with respect to that product.[585] Thailand submits that EC Regulation No. 535/94 provided a definition of "salted" meat that set out the criteria for the classification of a product under heading 02.10.[586] Brazil submits that the definition of the term "salted" in EC Regulation No. 535/94 comprised the European Communities' understanding of what constitutes "salted" meat of heading 02.10 and negotiating partners accepted and understood that the tariff being negotiated for heading 02.10 in the EC Schedule applied to the products that fit the definition of "salted" meat as contained in the European Communities' CN.[587] Brazil argues that the tariff concession and corresponding definition were accepted by the other Members when they signed the Marrakesh Protocol.[588] According to Brazil, the evidence of such acceptance is the signature of the Marrakesh Protocol on 15 April 1994.[589]

7.351 In response, the **European Communities** submits that compelling legal and factual evidence existed at the time of the Uruguay Round negotiations pointing to a common understanding that "salted" in heading 02.10 referred to salt added for the purpose of preservation.[590] The European Communities argues that EC Regulation No. 535/94 is a further act, in the context of a series of legislative acts and judicial decisions, which confirm and elaborate on the principle of preservation as the appropriate interpretation of heading 02.10.[591] The European Communities submits that, given the compelling evidence that "salted" under heading 02.10 meant salting for long-term preservation, it is not plausible to pretend that the common intention of the negotiating parties could have been affected by EC Regulation No. 535/94 or by any other such unilateral acts, absent some evidence from the complainants to the contrary.[592]

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[581] Brazil's reply to Panel question No. 56.

[582] In support, the EC refers to the minutes of the Trade Negotiations Committee, held on 30 March 1994 (MTN.TNC/43, 1994) contained in Exhibit EC-37. The EC submits that, for example, the US complained that the Korean Schedule did not reflect the commitment made during the negotiations regarding the "chemical harmonization initiative", and that the EC did not intend to commence the implementation of its agriculture concessions until mid-1995.

[583] EC's comments on Brazil's reply to Panel question No. 81.

[584] Brazil's reply to Panel question No. 58.

[585] Brazil's rely to Panel question No. 77.

[586] Thailand's first written submission., para. 30.

[587] Brazil's reply to Panel question No. 77.

[588] Brazil's reply to Panel question No. 57.

[589] Brazil's reply to Panel question No. 81.

[590] EC's oral statement at the first substantive meeting, paras. 39-43.

[591] EC's second written submission, para. 8.

[592] EC's reply to Panel question No. 58.

7.352 **Thailand** submits that EC Regulation No. 535/94 was incorporated into the CN through EC Regulation No. 3115/94. Thailand notes that the preamble of EC Regulation No. 3115/94 refers, *inter alia*, to the need to "amend the combined nomenclature to take account of ... changes in requirements relating to statistics or commercial policy, in particular by virtue of Council Decision bringing into force simultaneously the acts implementing the results of the Uruguay Round of multilateral trade negotiations and Council Regulation concerning certain measures resulting from the conclusion of negotiations under Article XXIV:6 and other measures necessary for simplification purposes." Thailand asserts that, therefore, EC Regulation No. 3115/94 recognizes that EC Regulation No. 535/94 – defining the term "salted" under heading 02.10 – was one of the acts implementing the results of the Uruguay Round.[593] Thailand also notes that the content of EC Regulation No. 535/94 was enacted many times as a Council Regulation through the annual issuance of the European Communities' CN.[594] Thailand submits that EC customs authorities in the EC member States relied on this definition of "salted" to classify chicken meat, frozen and impregnated with a salt content of over 1.2% under 02.10 of the CN from 1996 - 2002, when EC Regulation No. 1223/2002 entered into force.[595]

7.353 In response, the **European Communities** disputes that EC Regulation No. 535/94 was an act implementing the Uruguay Round Agreements.[596] According to the European Communities, the mere fact that EC Regulation No. 535/94 was referred to in EC Regulation No. 3115/94, which implemented the annual revision of the European Communities' CN in 1994, does not mean that it was intended to implement the Uruguay Round Agreements since EC Regulation No. 3115/94 also consolidated changes made to the CN during 1994.[597] The European Communities argues that EC Regulation No. 535/94 is a unilateral act, which cannot determine the scope of a tariff concession, because the Appellate Body has insisted in *EC – Computer Equipment* that the commitment of a particular Member must reflect the "common intent" of all the parties.[598]

7.354 With respect to whether or not WTO Members can be taken to have had knowledge of EC Regulation No. 535/94 prior to conclusion of the EC Schedule, **Brazil** submits that the Regulation was in the public domain as of 11 March 1994 and all EC negotiating partners had the possibility of consulting the European Communities' understanding/definition of "salted meat" of heading 02.10 prior to the conclusion of the EC Schedule.[599] Similarly, **Thailand** submits that, at the conclusion of the WTO Agreement, negotiators could be deemed to have had knowledge of legislation in the European Communities, such as EC Regulation No. 535/94, which was published and in force at the time of the conclusion of the treaty.[600]

7.355 *Regarding the relevance of EC Regulation No. 535/94 for the interpretation of the EC Schedule in this case*, **Brazil** and **Thailand** submit that the definition of "salted" in EC Regulation No. 535/94 was necessary so as to distinguish the classification of, on the one hand, salted meat and edible meat offal falling within heading 02.10 from, on the other hand, fresh, chilled or frozen meat falling within heading 02.07.[601] According to Thailand, EC Regulation No. 535/94 acknowledges that products may possess characteristics associated with both headings 02.07 and 02.10. In particular, a product could be both salted and fresh, salted and chilled, or salted and frozen. According to Thailand, it was necessary to enact EC Regulation No. 535/94 in order to distinguish salted meat from meat in the other states and to properly classify such products.[602] Brazil and Thailand note that the

[593] Thailand's first written submission, paras. 33-35.
[594] Thailand's comments on the EC's reply to Panel question No. 113.
[595] Thailand's first written submission, para. 139.
[596] EC's first written submission, paras. 88-89.
[597] EC's first written submission, paras. 88-89.
[598] EC's first written submission, para. 206.
[599] Brazil's reply to Panel question No. 122.
[600] Thailand's comments on the EC's reply to Panel question No. 87.
[601] Thailand's first written submission, para.137; Brazil's first written submission, para. 172.
[602] Thailand's first written submission, para.137.

terms "preservation" and "long-term preservation" were not included in the definition of "salted" for heading 02.10 contained in EC Regulation No. 535/94.[603] Further, Thailand refers to the minutes of a meeting of the EC Customs Code Committee dated 25 January 2002 to argue that the EC Commission expressly acknowledged that the principle of long-term preservation was excluded from the final definition of "salted" meat for the purposes of classification under heading 02.10 in EC Regulation No. 535/94 and, subsequently, in Additional Note 7, which was introduced into the CN through EC Regulation No. 535/94.[604] Thailand notes that, according to ECJ jurisprudence, an Additional Note constitutes an authentic interpretation of a heading in the EC's CN as it becomes part of the heading to which it refers with binding effect. Therefore, Thailand considers that Additional Note 7 – introduced at the time of the conclusion of the WTO Agreement – constituted an authentic interpretation of the EC's concession under heading 02.10 as it became part of that heading with binding effect.[605]

7.356 The **European Communities** submits that EC Regulation No. 535/94 is part of a consistent pattern of treating preservation as the basic criterion for classification under heading 02.10.[606] The European Communities submits that, throughout the Uruguay Round negotiations, the European Communities' Explanatory Notes to the CN contained a number of provisions emphasizing that "salting" must be for preservation, which was a reflection of the ordinary practice of EC customs authorities.[607] Further, the European Communities argues that, in *Gausepohl*[608], the ECJ interpreted heading 02.10 as requiring salting for preservation. According to the European Communities, ECJ rulings are binding on the EC Commission and constitute the authoritative interpretation of the CN.[609] The European Communities submits that the effect of EC Regulation No. 535/94 and the *Gausepohl* judgement when read in conjunction is that the figure of a 1.2% salt content was conceived of as a minimum salt content above which it was possible that a meat product could be preserved by salting alone. The European Communities argues that, in other words, in order to be classified under heading 02.10, a product had to meet the criteria of EC Regulation No. 535/94 and be salted in order to ensure its preservation as required by heading 02.10 of the CN.[610] The European Communities submits that the specific salt content that would make a product salted would depend on the nature of the meat in question, its preparation, and other environmental factors.[611]

7.357 In response, **Brazil** submits that the 1.2% threshold in EC Regulation No. 535/94 was not a pragmatic minimum salt content rule below which a product was not salted for preservation. According to Brazil, no WTO Member looking at EC Regulation No. 535/94 could presume that it established a minimum salt content below which it could not be considered that a product was salted for preservation.[612] Further, according to Brazil, the European Communities itself has indicated that it does not know of any type of meat deeply and homogeneously salted with 1.2% salt, which is preserved for many or several months.[613]

7.358 The **European Communities** submits that, while Additional Note 7 may have contained a condition, nevertheless, as a matter of logic, it could have stood alongside a requirement of long-term preservation given that it was not, by its terms, exclusive.[614] Further, the European Communities rejects the argument that EC Regulation No. 535/94 excluded the principle of preservation because

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[603] Brazil's first written submission, para. 98; Brazil's reply to Panel question No. 77; Thailand's first written submission, para.137.
[604] Thailand's oral statement at the first substantive meeting, para. 27.
[605] Thailand's second written submission, paras. 80-81.
[606] EC's first written submission, para. 201.
[607] EC's first written submission, para. 203.
[608] This case is dealt with in paragraph 7.372 *et seq*.
[609] EC's reply to Panel question No. 45.
[610] EC's first written submission, paras. 88-89; EC's reply to Panel question No. 93.
[611] EC's first written submission, paras. 88-89; EC's reply to Panel question No. 93.
[612] Brazil's comments on the EC's reply to Panel question No. 108.
[613] Brazil's comments on EC's reply to Panel question No. 93.
[614] EC's second written submission, paras. 85-86.

the European Communities had made a policy decision to no longer interpret heading 02.10 in such a way.[615] The European Communities submits that the minutes referred to by Thailand reflect preparatory discussions for EC Regulation No. 1871/2003, not for any of the measures at issue, nor for EC Regulation No. 535/94. The European Communities adds that such minutes are not legislative acts of the European Communities, nor do they represent the reasons justifying legislative action by the European Communities, nor are they authoritative interpretations of EC acts.[616] The European Communities submits that, therefore, such documents provide no basis for interpreting EC law.[617]

Analysis by the Panel

7.359 The first question for determination by the Panel is whether EC Regulation No. 535/94 qualifies as "circumstances of conclusion" of the EC Schedule within the meaning of Article 32 of the *Vienna Convention.*

7.360 The Panel recalls that, when discussing supplementary means of interpretation under Article 32, the Appellate Body stated in *EC – Computer Equipment* that "[i]f the classification practice of the importing Member at the time of the tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, surely that Member's legislation on customs classification at that time is also relevant."[618] Accordingly, the mere fact that an act, such as EC Regulation No. 535/94, is unilateral, does not mean that that act is automatically disqualified from consideration under Article 32 of the *Vienna Convention*.

7.361 The Panel notes that EC Regulation No. 535/94 was adopted on 9 March 1994, was published on 11 March 1994 and came into force on 1 April 1994.[619] In other words, EC Regulation No. 535/94 was introduced, adopted and published during the verification period of the Uruguay Round negotiations and came into force just prior to the conclusion of the EC Schedule on 15 April 1994. In our view, since EC Regulation No. 535/94 was published prior to the conclusion of the EC Schedule, the WTO Membership may be considered to have had constructive knowledge of that Regulation at the time the EC Schedule was concluded for the purposes of Article 32 of the *Vienna Convention*. In this regard, we disagree with the European Communities that Members should have specifically raised EC Regulation No. 535/94 during the verification period in order for it to form part of the "circumstances of conclusion".[620]

7.362 Further, it appears to us that EC Regulation No. 535/94 was enacted in the context of the conclusion of the Uruguay Round negotiations. This is apparent from the preamble to EC Regulation No. 3115/94,[621] which constituted the 1994 annual revision to the CN and incorporated into the CN, *inter alia*, the amendments proposed by EC Regulation No. 535/94. In particular, the preamble provides that:

> "Whereas it is necessary to amend the combined nomenclature to take account of:
>
> – changes in requirements relating to statistics or commercial policy, in particular by virtue of Council Decision bringing into force simultaneously the *acts implementing the results of the Uruguay Round of multilateral trade*

[615] EC's reply to Panel question No. 45.
[616] EC's reply to Panel question No. 45.
[617] EC's second written submission, para. 87.
[618] Appellate Body Report, *EC – Computer Equipment*, para. 94.
[619] Article 2 of EC Regulation No. 535/94 provides that: "This Regulation shall come into force on the twenty-first day following its publication in the Official Journal of the European Communities.", i.e. on 1 April 1994.
[620] EC's second written submission, paras. 96 and 112.
[621] EC Regulation No. 3115/94 was adopted on 20 December 1994 and was published on 31 December 1994.

> *negotiations* and Council Regulation concerning certain measures resulting from the conclusion of negotiations under Article XXIV:6 and other measures necessary for simplification purposes;
>
> – the need to align or clarify texts;
>
> Whereas Article 12 of Regulation (EEC) No. 2658/87 provides for the Commission to adopt each year by means of a regulation, to apply from 1 January of the following year, a complete version of the combined nomenclature together with the corresponding autonomous and conventional rates of duty of the Common Customs Tariff, as it results from measures adopted by the Council or by the Commission;
>
> ..." (emphasis added)

7.363 In addition, Article 3 of EC Regulation No. 3115/94 states that:

> "Incorporated in Annex I to this Regulation are amendments resulting from the adoption of the following measures:
>
> ...
>
> – *Commission Regulation (EC) No 535/94 of 9 March*
>
> ..." (emphasis added)

7.364 In light of the foregoing, we consider that EC Regulation No. 535/94 is relevant to the conclusion of the EC Schedule and, therefore, qualifies as "circumstances of conclusion" of the EC Schedule within the meaning of Article 32 of the *Vienna Convention*.

7.365 The second question for determination by the Panel is the impact of the definition of "salted" in EC Regulation No. 535/94 on the interpretation of the concession contained in heading 02.10 of the EC Schedule.

7.366 We note that Article 1 of EC Regulation No. 535/94 provides that:

> "The following additional note shall be inserted in Chapter 2 of the Combined Nomenclature annexed to Regulation (EEC) No 2658/87:
>
> > For the purposes of heading No 0210, the term 'salted' means meat or edible meat offal which has been deeply and homogenously impregnated with salt in all parts, having a total salt content no less than 1.2% by weight."

Article 1 makes it clear that an effect of EC Regulation No. 535/94 was to insert an Additional Note into the CN. As is evident from Article 1, the Additional Note in question related to the definition of "salted" in heading 02.10 of the CN.

7.367 The preamble to EC Regulation No. 535/94 states that:

> "Whereas, to ensure uniform application of the Combined Nomenclature, provisions should be laid down for the classification of salted meat and edible meat offal falling within CN code heading 0210, in order to distinguish them from fresh, chilled or frozen meat and edible meat offal; whereas a total salt content of 1,2% or more by

> weight appears an appropriate criterion for distinguishing between these two types of products;
>
> ..."

This excerpt of the preamble to EC Regulation No. 535/94 suggests to us that, if the criteria contained in the definition of "salted" in EC Regulation No. 535/94 had been met, the meat product in question would be "distinguished" from "fresh, chilled or frozen meat and edible meat offal". In other words, that product would be classified under heading 02.10 rather than under other headings concerning "fresh, chilled or frozen meat and edible meat offal".

7.368 The criteria for qualification as "salted" under EC Regulation No. 535/94 and, therefore, under the Additional Note which it introduced into the CN, are referred to in Article 1 of EC Regulation No. 535/94 set out above in paragraph 7.366. We understand that the reference to "deep and homogenous impregnation with salt" in that Article would exclude, for example, meat that has been lightly packed with salt. In this regard, we note that the European Communities has submitted that the term "impregnated with salt" serves, *inter alia*, to distinguish products that have been simply sprinkled with salt.[622] Further, Article 1 indicates that meat must have a salt content of "not less than 1.2% by weight" in order to qualify as "salted" under heading 02.10 of the CN. In other words, EC Regulation No. 535/94 indicates that meat would be "salted" for the purposes of heading 02.10 if it contained *at least* 1.2% salt. In our view, the Regulation does not by its terms indicate that the reference to the 1.2% salt content is a minimum salt content above which it would be *possible* that a meat product could be considered "salted". Nor does the Regulation indicate that the minimum salt content would vary from meat to meat. Finally, the Regulation does not state that, for the purposes of heading 02.10, salting must be for long-term preservation.

7.369 In summary, we understand that EC Regulation No. 535/94 introduced an Additional Note into the CN. The effect of that Regulation, through the Additional Note that it introduced, was that if meat had been deeply and homogeneously impregnated with salt, with a minimum salt content of 1.2% by weight, it would meet the requirements of that Regulation and would qualify as "salted" meat under heading 02.10 of the CN.

7.370 The Panel considers that its interpretation of EC Regulation No. 535/94 is consistent with other evidence available to us. In particular, we have evidence to indicate that, during the period of 1996 - 2002, EC customs authorities considered that the products at issue – frozen boneless chicken cuts deeply and homogeneously impregnated with salt, with a salt content of 1.2% – 3% – qualified as "salted" products for the purposes of the concession contained in heading 02.10 of the EC Schedule.[623] Further, we note that the minutes of the meeting of the EC Customs Code Committee dated 25 January 2002, state in relation to Additional Note 7 as it existed following enactment of EC Regulation No. 535/94 that:

> "[I]n addition the criterion of salting for the purpose of long-term preservation has not been introduced into [Additional Note 7 to Chapter 2]."[624]

While non-binding in nature, we consider that the above-mentioned minutes provide compelling evidence that the principle of long-term preservation was not included in the definition of "salted" in EC Regulation No. 535/94.

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[622] EC's reply to Panel question No. 32. The Panel also notes that the European Communities has stated that it does not contest the fact that the products at issue are deeply and homogeneously impregnated with salt in all parts: Footnote 8, EC's oral statement at the second substantive meeting; EC's reply to Panel question No. 93.

[623] We refer to our conclusions regarding EC classification practice for the products at issue during 1996-2002 in paragraph 7.303.

[624] Exhibit THA-22.

7.371 We turn now to the question of whether or not the effect of EC Regulation No. 535/94 should be considered in the context of other EC acts and instruments.

Dinter and *Gausepohl* judgements

Arguments of the parties

7.372 *With respect to the question of whether or not the ECJ Dinter and Gausepohl judgements qualify as "circumstances of conclusion" under Article 32 of the Vienna Convention,* **Brazil** and **Thailand** submit that they do not so qualify.[625] Brazil submits that the EC Schedule is not about the European Communities' historical treatment of a certain product. Rather, it is about what was negotiated among Members during the Uruguay Round. Brazil further submits that, while the Appellate Body established that the importing Member's legislation on customs classification is relevant in interpreting tariff concessions in a Member's schedule, it did not establish that past ECJ cases are relevant for this purpose.[626]

7.373 In response, the **European Communities** submits that the *Dinter* and *Gausepohl* judgements form part of the European Communities' practice, to be considered under Article 32 of the *Vienna Convention* as "circumstances of conclusion" of its Schedule.[627] According to the European Communities, the Appellate Body's comments in *EC – Computer Equipment* to which Brazil refers, were made in the context of a particular set of circumstances and were not phrased in the form of an exclusive list.[628] The European Communities argues that the Appellate Body's reference to "legislation" as constituting the "circumstances of conclusion" must surely mean legislation as it is interpreted in the Member in question.[629]

7.374 With respect to the *Dinter* judgement, **Brazil** and **Thailand** argue that it existed prior to the launch of the Uruguay Round and, therefore, should be disqualified from consideration under Article 32 of the *Vienna Convention*.[630]

7.375 In response, the **European Communities** submits that, in *EC – Computer Equipment*, the Appellate Body criticised the panel for not having considered legislation that had been enacted in 1987 and which was *applicable* during the Uruguay Round. The European Communities submits that the *Dinter* judgement was applicable throughout the Uruguay Round.[631]

7.376 In relation to whether or not WTO Members can be taken to have had knowledge of the *Dinter* and *Gausepohl* judgements prior to conclusion of the EC Schedule, the European Communities notes that ECJ judgements are publicly accessible on the day of delivery. The European Communities also notes that ECJ judgements are published in the European Communities' Official Journal.[632] The European Communities submits that, if parties had knowledge of EC Regulation No. 535/94 during the Uruguay Round negotiations, they must also have had knowledge of the preservation criterion at the heart of EC law.[633]

7.377 In response, **Brazil** submits that a Member is not required to know another Member's entire case law at the time of tariff negotiations.[634] **Thailand** explains that negotiators could not have been

[625] Brazil's reply to Panel question No. 75; Thailand's reply to Panel question No. 75.
[626] Brazil's oral statement at the first substantive meeting, para. 57.
[627] EC's reply to Panel question No. 75.
[628] EC's second written submission, para. 68.
[629] EC's second written submission, para. 73.
[630] Brazil's second written submission, para. 84; Thailand's reply to Panel question No. 75.
[631] EC's second written submission, para. 76.
[632] EC's reply to Panel question No. 110.
[633] EC's reply to Panel question No. 122.
[634] Brazil's reply to Panel question No. 75.

expected to be aware of every ECJ judgement because each ECJ judgement is related to a specific factual situation. Thailand submits that, in contrast, amendments made by legislation are more generally applicable in a variety of situations, such as EC Regulation No. 535/94, which applies to all types of meat falling under heading 02.10.[635]

7.378 *Regarding the relevance of the ECJ Dinter and Gausepohl judgements for the interpretation of the EC Schedule in this case*, in relation specifically to the *Dinter* judgement, **Brazil** submits that it does not relate to heading 02.10, nor to subheading 0210.90.20[636], nor to the products at issue.[637] Further, **Thailand** submits that the remark made by the ECJ in that case that Chapter 2 "comprises poultry meat which has undergone a preserving process" was *obiter* to its final decision and, moreover, was reversed in the same year by Additional Note 6(a) to the European Communities' CN.[638] Brazil also refers to the comments made by the Advocate-General in that case during his analysis of the structure of Chapter 2. According to Brazil, the Advocate-General did not consider that all processes listed in heading 02.10 served a long-term preservation purpose. Rather, he considered smoking to be a preparation process. Brazil submits that this undermines the European Communities' contention that Chapter 2 has consistently been understood as applying to products, which, if not fresh or chilled, have been preserved.[639]

7.379 In response, the **European Communities** submits that the Advocate-General's opinion confirms the European Communities' position. The European Communities notes that the Advocate-General distinguishes between the addition of salt under Chapter 2 as "the better to preserve the product" as opposed to adding of salt by way of seasoning. According to the European Communities, the Advocate-General expressly stated that "salting" for the purposes of heading 02.10 clearly requires salting for preservation. The European Communities adds that, in any event, the case concerned seasoning with salt and pepper and not smoking. Moreover, the European Communities submits that, in its judgement, the ECJ confirmed that Chapter 2 "comprises poultry meat which has undergone a preserving process".[640]

7.380 With respect to the *Gausepohl* judgement, **Brazil** and **Thailand** submit that, in that case, the ECJ only provided its interpretation of heading 02.10 with respect to bovine meat. Therefore, in their view, that case cannot be viewed as the ECJ's interpretation for all meat falling under heading 02.10.[641] Thailand further submits that the findings on the importance of preservation were based on the specific wording of the Explanatory Notes in the European Communities' CN for swine meat.[642]

7.381 Brazil and Thailand also submit that the issue discussed in the *Gausepohl* case was subsequently addressed in EC Regulation No. 535/94 and, consequently, the reigning definition of "salted meat" of heading 02.10 when the EC Schedule was concluded was that contained in that Regulation.[643] Brazil and Thailand submit that, when it enacted EC Regulation No. 535/94, the European Commission chose not to apply the same standard referred to by the ECJ in *Gausepohl*. In particular, by means of EC Regulation No. 535/94, the EC Commission fixed a minimum 1.2% salt content required to classify meat as "salted" under heading 02.10, fully conscious that this percentage

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[635] Thailand's comments on the EC's reply to Panel question No. 87.

[636] We note that, due to changes in numbering in the HS, what was formerly subheading 0210.90.20 in the CN, is now subheading 0210.99.39.

[637] Brazil's oral statement at the first substantive meeting, para. 66.

[638] Thailand's oral statement at the second substantive meeting. para. 3.

[639] Brazil's second written submission, para. 90.

[640] EC's reply to Panel question No. 111.

[641] Brazil's oral statement at the first substantive meeting, paras, 78 and 80; Thailand's comments on the EC's reply to Panel question No. 113.

[642] Thailand's second written submission, para. 93.

[643] Brazil's second written submission, para. 91; Thailand's reply to Panel question No. 75.

was not sufficient to ensure "long-term preservation".[644] According to Brazil and Thailand, the EC Commission chose to apply the minimum salt content to all salted meat of heading 02.10 even though it itself had warned the ECJ about the different salt contents required to preserve different types and cuts of meat in the *Gausepohl* case.[645] In Brazil's and Thailand's view, the EC Commission purposely left out the "long-term preservation" criterion from EC Regulation No. 535/94 because, as advanced by the Advocate-General in *Gausepohl*, that is not a criterion that can be objectively assessed at the time of importation and may lead to discrimination among imports of the same type of meat, with the same salt content, but coming from different places.[646] Thailand submits that, therefore, as at the time of the conclusion of the EC Schedule, the European Communities itself recognized that the "purpose of long-term preservation" was not a relevant factor for determining whether a product should be considered as salted, and therefore, classified, under heading 02.10.[647] Brazil accepts that all parties in the *Gausepohl* case assumed that salting constitutes a meat preserving process.[648]

7.382 In response, the **European Communities** submits that, in the *Gausepohl* case, while there were significant doubts among the participants in the proceedings as to the possibility of fixing a salt content for which all meat could be considered preserved, none of the participants had any doubt that the process of salting mentioned under heading 02.10 must lead to preservation. The European Communities submits that the ECJ considered that, in all cases, it could be excluded that salting below 1.2% could lead to long-term preservation.[649] In other words, it considered that 1.2% salt content would be an appropriate minimum below which it would not be necessary to enquire whether the meat in question had been salted for preservation.[650] According to the European Communities, it is implicit in such a principle that the amount of salt required for such preservation would vary from meat to meat. If there were no such variation, then the necessary percentage could be calculated and published.[651] Further, noting that the ECJ found support for its interpretation of heading 02.10 to require salting for long-term preservation in an Explanatory Note relating to swine meat, the European Communities submits that that Explanatory Note states that the salt content "may vary considerably between different types and cuts of meat".[652] Finally, the European Communities submits that the *Gausepohl* judgement is relevant to the "classification practice" of not merely salted beef, but all salted meat, including chicken.[653]

7.383 **Brazil** and **Thailand** submit that Explanatory Notes, which are non-binding instruments, of a specific subheading cannot be applied *mutatis mutandis* to another subheading without an explicit provision indicating so.[654] Thailand submits that, as there is no such provision in the Explanatory Note relied upon by the ECJ in *Gausepohl*, the European Communities cannot assert that the concept of preservation is applicable to poultry falling under heading 02.10.[655] Brazil and Thailand submit that, in any event, the relevant Explanatory Note upon which the *Gausepohl* judgement was based provides that "the period of such preservation must considerably exceed the time required for

[644] Brazil's oral statement at the first substantive meeting, paras. 79-82; Thailand's oral statement at the first substantive meeting, paras. 24-27 referring to Exhibit THA-22.
[645] Brazil's oral statement at the first substantive meeting, paras. 79-82; Thailand's second written submission, para. 93.
[646] Brazil's oral statement at the first substantive meeting, paras. 79-82; Thailand's oral statement at the first substantive meeting, paras.24-26.
[647] Thailand's oral statement at the first substantive meeting, paras.24-26.
[648] Brazil's oral statement at the first substantive meeting, para. 70.
[649] EC's reply to Panel question No. 40.
[650] EC's reply to Brazil question No. 11.
[651] EC's reply to Panel question No. 47.
[652] EC's reply to Panel question No. 112.
[653] EC's second written submission, para. 74.
[654] Brazil's comments on the EC's reply to Panel question No. 112; Thailand's second written submission, para. 92.
[655] Thailand second written submission, para. 92.

transportation."[656] According to Brazil, nowhere is it stated that the period exceeding transportation is equal to "many" or "several" months, being the period of time the European Communities has apparently equated with long-term preservation. Brazil notes that, in *Gausepohl*, the "period considerably exceeding the time required for transportation" was only two days. Brazil submits that the European Communities' expert has attested that the products at issue can be preserved for that period and, therefore, may be considered as preserved for the long-term when transported from Switzerland to Germany, for example.[657] Since the European Communities has submitted that a salted/dried/smoked product can be further preserved by chilling/freezing and still fall under heading 02.10, and given that a product may be considered preserved for the long term when transported from Switzerland to Germany, Brazil submits that it is only fair that the same products would also be considered preserved for the long term when transported from Brazil to Germany, even if further preserved by chilling or freezing.[658]

7.384 The **European Communities** submits that, within the European Communities, the authoritative source of interpretation of the HS is the ECJ.[659] The European Communities submits that, should any conflict occur between EC legal instruments and ECJ judgements interpreting the HS, ECJ judgements would prevail.[660] The European Communities submits that, therefore, EC Regulation No. 535/94 cannot be viewed in isolation from the European Communities' institutional framework and, in particular from the *Dinter* and *Gausepohl* judgements in which the ECJ confirmed the consistent view in the European Communities that, in order to qualify as "salted" meat under heading 02.10, salting must be sufficient to ensure preservation.[661]

7.385 In response, **Thailand** submits that the ECJ itself has stated that an Additional Note "becomes part of the heading to which it refers and has the same binding effect, whether it constitutes an authentic interpretation of the [relevant] heading or supplements it."[662] Further, Thailand refers to the ECJ judgement in *Gijs van de Kolk-Douane Expéditeur BV*, to submit that, in a situation of "conflict" between an ECJ judgement and a subsequent EC Commission Regulation, the ECJ has made it clear that the subsequent Regulation will prevail.[663] Thailand submits that, in that case, when the ECJ was questioned as to whether its judgement in *Dinter* or the provisions of an Additional Note should prevail (in particular, Additional Note 6(a) of the CN), the ECJ stated that the Additional Note should prevail.[664] Thailand submits that, by analogy, the judgement in the *Gausepohl* case was modified by the provisions of Additional Note 7, which was introduced into the CN through the enactment of EC Regulation No. 535/94.[665]

7.386 The **European Communities** acknowledges that Additional Note 6(a) applies rather than the *Dinter* judgement regarding the appropriate criterion to be used to identify whether or not meat is "seasoned" for the purposes of Chapter 16 of the CN.[666] However, the European Communities submits that, there is nothing to suggest that Additional Note 6(a) reversed the ECJ's judgement in *Dinter*.[667] According to the European Communities, in *Gijs van de Kolk-Douane Expéditeur BV*, the

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[656] Brazil's comments on the EC's reply to Panel question No. 112 referring to Exhibit EC-32; Thailand's second written submission, para. 93.

[657] Brazil's comments on the EC's reply to Panel question No. 112 referring to Exhibit EC-32.

[658] Brazil's comments on the EC's reply to Panel question No. 112.

[659] EC's reply to Panel question No. 41.

[660] EC's reply to Panel question No. 113; EC's reply to Thailand question No. 1.

[661] EC's oral statement at the first substantive meeting, paras. 34-38.

[662] Thailand's oral statement at the second substantive meeting, para. 7 referring to Exhibit THA-31; Thailand's second written submission, para. 80.

[663] Thailand's oral statement at the second substantive meeting, para. 8.

[664] Thailand's oral statement at the second substantive meeting, para. 7; Thailand's second written submission, paras. 87-89.

[665] Thailand's oral statement at the second substantive meeting, para. 10.

[666] EC's reply to Panel question No. 115.

[667] EC's oral statement at the second substantive meeting, para. 69.

ECJ considered that the *Dinter* judgement had been delivered in different circumstances to those facing the ECJ when *Gijs van de Kolk-Douane Expéditeur BV* was decided. In particular, an ISO standard had been issued, which confirmed the objectivity of sensory testing, thereby rendering the ECJ's criticism of such a method of testing in *Dinter* moot. The European Communities further submits that the ECJ only upheld Additional Note 6(a) because it merely concerned the technical means for an objective assessment of the characteristics of a product, but did not alter the scope of the headings concerned. The European Communities argues that, in contrast, the insertion of a criterion that all meat products with a salt content exceeding 1.2% can be considered as "salted" under heading 02.10 even if such salting does not ensure preservation would significantly alter the scope of heading 02.10 as consistently interpreted by the ECJ in *Dinter* and *Gausepohl*.[668]

7.387 In response, **Brazil** submits that the *Gausepohl* judgement was also delivered in different circumstances. In particular, at the time the ECJ decided the *Gausepohl* case, Additional Note 7 to Chapter 2 of the CN, defining "salted meat" of heading 02.10, did not exist. Once that note was inserted in the CN, a "different circumstance" was created that would, for example, affect any judgement subsequent to *Gausepohl* regarding "salted meat" of heading 02.10.[669] **Thailand** submits that the legal effects of the ECJ's judgment in *Gausepohl* were modified by the provisions of Additional Note 7, which specified the criteria to be taken into account for the classification of products under heading 02.10.[670] Thailand further submits that EC Regulation No. 535/94 does not change the scope of the chapters, sections and headings of the HS nor the EC's CN nor the EC Schedule. According to Thailand, that Regulation merely specifies the objective criteria to be taken into account for classifying goods under heading 02.10.[671] Thailand further submits that EC Regulation No. 535/94 has been enacted many times as an EC Council Regulation through the annual issuance of the EC's CN.[672]

7.388 The **European Communities** submits that the relationship between judgements such as *Gausepohl*, which interprets the CN, and a later EC Commission Regulation inserting an Additional Note, is an issue of "hierarchy of norms" as opposed to a question of hierarchy between ECJ judgements and EC Commission Regulations.[673] The European Communities explains that the wording and structure of heading 02.10 compels a requirement of preservation as confirmed by the ECJ in *Gausepohl*. The European Communities submits that, in *Gausepohl*, the ECJ confirmed the scope of heading 02.10 in the CN (i.e. a Council Regulation). According to the European Communities, the later addition by the EC Commission of Additional Note 7 through EC Regulation No. 535/94 is a legal act which is inferior to the CN. The European Communities submits that the EC Commission is not entitled to modify, through an EC Commission Regulation, the content or the scope of a tariff heading laid down in the CN (i.e. a Council Regulation implementing the HS). Therefore, any EC Commission act must necessarily be read together at all times with the superior norm (i.e. the CN) and its interpretation by the ECJ. According to the European Communities, to the extent there was a conflict between the EC Commission act and the CN, the scope of heading 02.10 in the CN as interpreted by the ECJ would prevail.[674] In addition, the European Communities submits that EC Regulation No. 535/94 could not undo the ECJ's finding in the *Gausepohl* case because the HS is an international convention binding on the European Communities and precludes the

[668] EC's reply to Panel question No. 114.
[669] Brazil's comments on the EC's reply to Panel question No. 115.
[670] Thailand's reply to Panel question No. 114.
[671] Thailand's comments on the EC's reply to Panel question No. 114.
[672] Thailand's comments on the EC's reply to Panel question No. 113.
[673] EC's reply to Panel question No. 113.
[674] EC's reply to Panel question No. 113; EC's reply to Panel question No. 114.

EC Commission from altering the subject-matter of the tariff headings which have been defined on the basis of the HS.[675]

7.389 In response, **Brazil** submits that the European Communities' argument that Additional Note 7 to Chapter 2, inserted in the CN by means of EC Regulation No. 535/94 could not alter heading 02.10 as it is found in the HS and, therefore, must be read in the context of the long-term preservation structure of Chapter 2 of the HS is misleading. In particular, Brazil submits that the argument assumes that long-term preservation is what defines the structure of Chapter 2 and the processes of heading 02.10 of the HS, a view that Brazil does not subscribe to.[676] Brazil submits that, in *Gausepohl*, the ECJ was requested to construe EEC Regulation No. 2658/87 establishing the European Communities' CN pursuant to Article 177 of the EEC Treaty.[677] Brazil submits that, according to EEC Regulation No. 2658/87, the EC Commission can adopt a Regulation that inserts an Additional Note in a Chapter of the CN, such as EC Regulation No. 535/94.[678] According to Brazil, when the ECJ in *Gausepohl* was asked to construe the CN, "long-term preservation" was neither part of the CN nor the HS.[679] Brazil submits that, therefore, the ECJ in the *Gausepohl* case did not confirm the scope of heading 02.10 in the CN since confirmation implies validation of something that already existed. Brazil submits that EC Regulation No. 535/94 is in perfect harmony with what is provided under heading 02.10 of the CN. Brazil further submits that, while the ECJ has the authority to interpret an act of the EC Council, such as the CN, it does not have the authority to interpret the HS.[680]

Analysis by the Panel

7.390 The first question for determination by the Panel is whether the ECJ judgements, *Dinter* and *Gausepohl*, qualify as "circumstances of conclusion" of the EC Schedule within the meaning of Article 32 of the *Vienna Convention.* The Panel considers that there are two elements associated with this question as it relates to the *Dinter* and *Gausepohl* judgements. The first is whether, as a theoretical matter, court judgements can be considered under Article 32. The second is whether the timing of issuance of the ECJ judgements at issue, and more particularly the *Dinter* judgement, necessarily disqualifies it from consideration under Article 32.

7.391 Regarding the question of whether or not court judgements can be considered as "circumstances of conclusion" under Article 32 of the *Vienna Convention*, the Panel recalls that, in *EC – Computer Equipment*, the Appellate Body explicitly stated that the importing Member's classification practice during the Uruguay Round and that Member's "legislation" that was applicable at that time should have been taken into consideration under Article 32. As has been noted by the parties in this case, the issue arises as to whether the Appellate Body's list is exhaustive or, rather, is merely linked to the particular facts of that case, implying that other unlisted items may also qualify. The Appellate Body's report tends to indicate that the latter interpretation is the valid one – that is, the Appellate Body was merely making a pronouncement on the basis of the facts that were available to it in that case rather than seeking to provide an exhaustive list of items qualifying as "circumstances of conclusion" in all cases. This would suggest that a valid distinction cannot be drawn between, on the one hand, EC legislation and, on the other hand, ECJ judgements for the purposes of Article 32 of the

[675] EC's oral statement at the first substantive meeting, paras. 34-38; EC's reply to Panel question No. 41.

[676] Brazil's oral statement at the second substantive meeting. para. 57; Brazil's comments on the EC's reply to Panel question No. 93.

[677] Exhibit BRA-23, Article 1.1 of Regulation No. 2658/87.

[678] Exhibit BRA-6.

[679] Brazil's comments on the EC's reply to Panel question No. 113.

[680] Brazil's comments on the EC's reply to Panel question No. 113.

Vienna Convention.[681] Accordingly, the Panel considers that court judgements, such as the *Dinter* and *Gausepohl* judgements, may be considered under Article 32 of the *Vienna Convention*.

7.392 With respect to the timing of the ECJ judgements, we recall that Brazil and Thailand have submitted that the *Dinter* judgement should not be considered by the Panel under Article 32 of the *Vienna Convention* because it was issued in 1983, prior to the launch of the Uruguay Round.[682] We recall our conclusion in paragraph 7.344 above that, in theory, there is no temporal limitation on what may qualify as "circumstances of conclusion" under Article 32 and that "relevance" is the more appropriate criterion for determining such qualification. We also stated in that paragraph that there may be some correlation between the timing of an event, act or other instrument and its relevance to the treaty in question and that the fact that Article 32 of the *Vienna Convention* refers to "circumstances of *conclusion*" indicates that the event, act or other instrument in question must be temporally proximate to the conclusion of a treaty in order for it to be taken into account for the interpretation of that treaty under Article 32.

7.393 Contrary to what has been argued by Brazil and Thailand, it is our view that the fact that the *Dinter* judgement was issued in 1983 does not, in itself, suggest that it is temporally too remote from the conclusion of the EC Schedule to have influenced (or, at least, had the possibility of influencing) the conclusion of the heading at issue in this dispute. We say this in light of the fact that, as far as we are aware, except for the aspects that were dealt with in Additional Note 6(a) to the CN[683], the *Dinter* judgement remained applicable during the Uruguay Round negotiations. Nevertheless, we note that, in the *Dinter* judgement, the ECJ was called upon to examine the scope of heading 16.02 of the CN, dealing with seasoned meat. In the process of such an examination, the ECJ made general comments regarding Chapter 2 of the CN insofar as it relates to poultry. We do not consider that these general comments on their own render the *Dinter* judgement "relevant" to the specific aspects of the ultimate treaty text in issue, that is, the concession contained in heading 02.10 of the EC Schedule. For these reasons, the Panel will not consider the *Dinter* judgement, including the Advocate-General's opinion in that case, in our interpretation of the concession contained in heading 02.10 of the EC Schedule pursuant to Article 32 of the *Vienna Convention*.

7.394 As for the *Gausepohl* judgement, unlike the *Dinter* judgement, it did concern the interpretation of heading 02.10 of the CN, corresponding to the specific heading at issue in this dispute. Therefore, we consider it "relevant" to the specific aspects of the ultimate treaty text in issue in this case, namely the concession contained in heading 02.10 of the EC Schedule. Further, on the basis of information provided to us by the European Communities in this dispute, we note that the judgement was publicly available upon issuance, that is in May, 1993.[684] Accordingly, in our view, the WTO Membership may be considered to have had constructive knowledge of that judgement at the time the EC Schedule was concluded on 15 April 1994. Therefore, we conclude that the *Gausepohl* judgement qualifies as "circumstances of conclusion" within the meaning of Article 32 of the *Vienna Convention*.

7.395 The second question for determination by the Panel is the impact of the *Gausepohl* judgement on the interpretation of the concession contained in heading 02.10 of the EC Schedule. We refer to the key elements of the judgement immediately below.

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[681] This conclusion would seem to be particularly valid in relation to the present case where the ECJ judgements in question interpret EC legislation. In our view, it would be an odd situation if such legislation could be considered under Article 32 of the *Vienna Convention* but not court judgements, which interpret that legislation.

[682] Brazil's second written submission, para. 84; Thailand's reply to Panel question No. 75.

[683] We deal with Additional Note 6(a) to the CN in more detail below in paragraph 7.403 but note here that this Note was introduced into the CN through the enactment of Commission Regulation (EEC) No. 3678/83 of 23 December 1983, which is contained in Exhibit THA-34.

[684] See Exhibit EC-35.

7.396 We note that the summary of the ECJ's judgement in the *Gausepohl* case states that:

> "Heading 0210 of [the Combined Nomenclature]... must be interpreted as meaning that meat of bovine animals may be classified under that heading as salted meat only if it has been deeply and evenly impregnated with salt in all its parts for the purposes of long-term preservation so that it has a minimum total salt-content of 1.2% by weight."[685]

7.397 Referring to headings 02.01, 02.02 and 02.10, the ECJ stated that it was clear from the scheme of Chapter 2 that, "for tariff classification purposes, the meat covered by it is either fresh or chilled meat of bovine animals or meat that has undergone one of the various processes required for long-term preservation".[686] The ECJ stated that it follows that "meat of bovine animals to which a quantity of salt has been added merely for the purpose of transportation cannot be regarded as salted for the purposes of heading 0210".[687] The ECJ relied upon an Explanatory Note to tariff subheadings 0210.11.11 and 0210.11.19 for confirmation of that view. The ECJ acknowledged that the Explanatory Note was not legally binding and related to swine meat but stated that, nevertheless, it provided a useful indication as to the minimum objective criteria required for meat of bovine animals to be classified as "salted".[688] Regarding the salt content that is to be regarded as a minimum percentage for meat to be classified under heading 02.10, the ECJ stated that "[t]he documents before the Court show that various different figures have been adopted by the authorities of the Member States. They do however suggest that the minimum total salt content required for the long-term preservation of meat may be set at 1.2% by weight."[689]

7.398 The Panel notes that the ECJ's judgement in *Gausepohl* clearly recognizes the principle of long-term preservation with respect to heading 02.10 of the CN. However, we consider that there are certain ambiguities concerning the meaning and effect of the *Gausepohl* judgement that are important for the purposes of the present case. First, it is unclear to the Panel whether the key findings made by the ECJ set out above in paragraph 7.396, which refer explicitly to bovine meat, are applicable only to bovine meat or, rather, apply more broadly to meat in general, including poultry. Secondly, it is unclear to the Panel whether the 1.2% salt content referred to by the ECJ in its judgement 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. Thirdly, it is unclear from the judgement whether the 1.2% minimum salt content referred to in that judgement is a "lowest common denominator" minimum that applies to all meats or, rather, only applies to bovine meat. Finally, while the ECJ states in its judgement that salting must be used "as a method of preserving meat of bovine animals for a longer period [than for the purpose of transportation]", indicating that the period of long-term preservation must exceed the period required to transport the product in question, the ECJ does not provide any additional guidance in this regard.

7.399 In summary, we understand the ECJ's judgement in the *Gausepohl* case to mean that bovine meat that has been deeply and homogeneously impregnated with salt and has a minimum salt content of 1.2% by weight will be covered by heading 02.10 of the EC Schedule. Even if the judgement could be construed as applying more broadly to poultry, we have not been persuaded that the judgement indicates that the minimum salt content of 1.2% varies from meat to meat nor that the 1.2%

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[685] Exhibit EC-14: *Gausepohl-Fleisch GmbH v Oberfinanzdirektion Hamburg*, ECR [1993], p. I -3047 and p. I -3066, para. 16.

[686] Exhibit EC-14: *Gausepohl-Fleisch GmbH v Oberfinanzdirektion Hamburg*, ECR [1993], p. I -3066, para. 10.

[687] Exhibit EC-14: *Gausepohl-Fleisch GmbH v Oberfinanzdirektion Hamburg*, ECR [1993], p. I -3066, para. 11.

[688] Exhibit EC-14: *Gausepohl-Fleisch GmbH v Oberfinanzdirektion Hamburg*, ECR [1993], p. I -3067, para. 12.

[689] Exhibit EC-14: *Gausepohl-Fleisch GmbH v Oberfinanzdirektion Hamburg*, ECR [1993], p. I -3067, paras. 13-14.

salt content is merely a minimum above which it is possible that meat qualifies under heading 02.10, presumably subject to meeting other conditions.

7.400 We consider that our understanding of the ECJ's judgement in *Gausepohl* as far as it concerns the concession at issue in this case is consistent with other evidence available to us. As noted above, we have evidence to indicate that, during the period of 1996 - 2002, EC customs authorities considered that the products at issue – frozen boneless chicken cuts deeply and homogeneously impregnated with salt, with a salt content between 1.2% – 3% salt – qualified as "salted" products for the purposes of heading 02.10 of the EC Schedule.[690]

7.401 Further, we refer to the minutes of the meeting of the EC Customs Code Committee dated 25 January 2002, which state in relevant part that:

> "Additional Note 7 of Chapter 2 [introduced by EC Regulation No. 535/94] was introduced with a view to respecting the [*Gausepohl* judgement]. The judgement ruled the following:
>
> > 'Heading 0210 of [the Combined Nomenclature]... must be interpreted as meaning that meat of bovine animals may be classified under that heading as salted meat only if it has been deeply and evenly impregnated with salt in all its parts for the purposes of long-term preservation so that it has a minimum total salt content of 1.2% by weight.'
>
> However, Additional Note 7 to Chapter 2 introduced then into the Combined Nomenclature does not copy the writing of this reflect [sic] this judgement completely. In the afore-mentioned note reference was made to any kind of meat and not only to meat of bovine animal; in addition the criterion of salting for the purpose of long-term preservation has not been introduced into [Additional Note 7 to Chapter 2]."[691]

As noted previously, the minutes indicate that the principle of long-term preservation was excluded from the definition of "salted" in EC Regulation No. 535/94. They also tend to indicate that the *Gausepohl* judgement only related to bovine meat whereas EC Regulation No. 535/94 applies more generally to all meat.

7.402 Even if the ambiguities concerning the meaning and effect of the *Gausepohl* judgement concerning the concession at issue in this dispute referred to above in paragraph 7.398 did not exist, we consider that, in any event, at the time of conclusion of the EC Schedule, the relevant aspects of the *Gausepohl* judgement had been superseded through the enactment of EC Regulation No. 535/94. We explain our reasons for this conclusion immediately below.

7.403 The Panel accepts the European Communities' explanation that, as a general principle, ECJ judgements take precedence over EC Regulations in the event of conflict between the two.[692] However, we also note that the EC has acknowledged that the introduction of Additional Note 6(a) of the CN through enactment of an EC Commission Regulation[693] meant that an important aspect of the judgement delivered by the ECJ in *Dinter* – that is, the criterion used to identify whether or not meat

[690] We again refer to our conclusions regarding EC classification practice regarding the products at issue during 1996-2002 in paragraph 7.303.

[691] Exhibit THA-22.

[692] EC's reply to Thailand's question No. 1 following the first substantive meeting.

[693] Namely, Commission Regulation (EEC) No. 3678/83 of 23 December 1983, which is contained in Exhibit THA-34.

is "seasoned" for the purposes of Chapter 16 of the CN – was replaced by the criterion contained in Additional Note 6(a).[694] We have not seen any compelling reason why EC Regulation No. 535/94, which resulted in the introduction of Additional Note 7 of the CN, could not have superseded the *Gausepohl* judgement in a similar way. In fact, we have evidence before us indicating that this is what occurred.

7.404 First, as previously noted, EC Regulation No. 535/94 inserted into the CN an Additional Note, namely Additional Note 7. We note that Article 1(2)(c) of the CN provides that the CN shall be comprised of "additional section or chapter notes and footnotes relating to CN subheadings". Further, the ECJ has made it clear that Additional Notes become part of the headings to which they relate and have binding effect.[695] Therefore, we understand that Additional Note 7 became part of the CN. Accordingly, even if the ECJ's interpretation of heading 02.10 of the CN in the *Gausepohl* judgement may be considered to have acquired the status of a norm at the same level as the CN as has been asserted by the European Communities, in our view, it is clear that Additional Note 7, which was introduced by EC Regulation No. 535/94 and continued in force until its replacement through the enactment of EC Regulation No. 1871/2003, also had that status. Secondly, EC Regulation No. 535/94 was enacted following issuance of the *Gausepohl* judgement. This suggests that EC Regulation No. 535/94 should be read in isolation from that judgement. More particularly, we understand that the European Communities replaced the relevant aspects of the *Gausepohl* judgement (whether possessing the status of a CN norm or otherwise) through an amendment to the CN itself, which was accomplished through the subsequent enactment of EC Regulation No. 535/94. Thirdly, the minutes of a meeting of the EC Customs Code Committee dated 25 January 2002 suggest that the EC Commission consciously did not include a reference to long-term preservation in enacting EC Regulation No. 535/94.[696] This suggestion appears to be confirmed by the minutes of a subsequent meeting of the EC Customs Code Committee that took place in February 2002, which state that the Committee considered it necessary to amend Additional Note 7 to Chapter 2 "to *introduce* the condition of 'long-term preservation'".[697] The Panel questions why it would be necessary to make such an amendment if the principle of long-term preservation reflected in *Gausepohl* applied in any event.

7.405 In conclusion, the Panel considers that the aspects of the *Gausepohl* judgement that are relevant to this case were superseded through the enactment of EC Regulation No. 535/94. Therefore, in the Panel's view, our interpretation of the concession contained in heading 02.10 of the EC Schedule is not affected by the *Gausepohl* judgement.

EC Explanatory Notes

Arguments of the parties

7.406 The **European Communities** points to a 1981 Explanatory Note to heading 02.06 of the EC Common Customs Tariff and a 1983 Explanatory Note for subheadings 0210.11.31 and 0210.11.39 of the EC Common Customs Tariff, which, it submits, form part of the European Communities' practice, to be considered under Article 32 of the *Vienna Convention* as "circumstances of conclusion" of its

[694] EC's reply to Panel question No. 115.

[695] Case 38-75, *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrchten en accijnzen*, 19 November 1975, ECR [1975], page 01439, at para. 10 contained in Exhibit THA-31.

[696] See paragraph 7.401 above where aspects of these minutes have been excerpted.

[697] The minutes of a meeting that took place in January 2002 (contained in Exhibit THA-22) state that: "Additional Note 7 to Chapter 2 of the CN (which was introduced/amended by Regulation 535/94) 'does not copy the writing of this reflect this [*Gausepohl*] judgement [*sic*] completely. ... in addition the criterion of salting for the purpose of long-term preservation has not been introduced.'" The minutes of a meeting that took place in February 2002 indicate that the Committee agreed to: "Study the possibility to amend Additional Note 7 to Chapter 2 to ... introduce the condition 'long-term preservation' as reflected in [the Gausepohl judgement]".

Schedule.[698] The European Communities submits that these Notes indicate that, at the time of the Uruguay Round, the notion of preservation was intrinsic to the European Communities' understanding of the meats in heading 02.10. According to the European Communities, that the specific Notes refer to pigmeat is irrelevant for the purposes of this dispute given that they incontrovertibly show that the European Communities interpreted the term "salted" at the time of the Uruguay Round as referring to salting for preservation, irrespective of the specific product the Notes concerned.[699] The European Communities further submits that, had EC Regulation No. 535/94 meant that preservation was not needed in order to qualify as "salted" under heading 02.10, one would logically have expected the modification and/or removal of the European Communities' Explanatory Notes, which referred to the concept of preservation. However, this was not the case. The European Communities submits that, therefore, the concept of preservation was vital for the interpretation of heading 02.10 during and at the end of the Uruguay Round.[700]

7.407 In response, **Brazil** and **Thailand** consider that the Explanatory Notes to the CN cannot be considered under Article 32 of the *Vienna Convention* because they existed prior to the launch of the Uruguay Round.[701] In addition, Brazil submits that the Explanatory Notes cannot be considered under Article 32 of the *Vienna Convention* given the limited list of items falling within that Article as identified by the Appellate Body in *EC – Computer Equipment*. Brazil further submits that a Member is not required to know another Member's entire set of non-binding instruments, such as Explanatory Notes to the CN, at the time of tariff negotiations.[702]

7.408 In addition, Brazil and Thailand submit that the Explanatory Notes to the CN are not legally binding instruments and the ECJ itself has on occasion considered their content not to be in accordance with actual provisions of the CN.[703] Brazil and Thailand also submit that Additional Notes, such as Additional Note 7 to Chapter 2, which was incorporated into the CN through the enactment of EC Regulation No. 535/94, take a higher position than Explanatory Notes in the hierarchy of EC classification rules.[704] Therefore, according to Thailand, if the Additional Note contains a clear rule, the Explanatory Notes cannot modify its meaning.[705] Further, Brazil and Thailand argue that the Explanatory Notes pointed to by the European Communities do not relate to heading 02.10 nor to subheading 0210.90.20 nor to the products at issue.[706] More particularly, Thailand submits that they relate to swine meat, namely hams and shoulders and they, therefore, cannot be applied by analogy to poultry meat falling under subheading 0210.90.20.[707] Thailand

[698] EC's reply to Panel question No. 75.
[699] EC's reply to Thailand's question No. 2 following the first substantive meeting.
[700] EC's oral statement at the first substantive meeting, paras. 34-38.
[701] Brazil's second written submission, para. 83; Thailand's reply to Panel question No. 75.
[702] Brazil's reply to Panel question No. 75.
[703] Brazil's reply to Panel question No. 75; Brazil's oral statement at the second substantive meeting. para. 55; Thailand's oral statement at the first substantive meeting, paras. 30-34; Thailand's second written submission, para. 82 referring to "EC Customs Classification Rules: Should Ice Cream Melt?", *Michigan Journal of International Law*, (1994), Vol. 15, No. 4 contained in Exhibit THA-18, page 1284. and Case C-130/02, *Krings GmbH V Oberfinanzdirektion Nürnberg*, 4 March 2004 [not yet reported], para. 28 contained in Exhibit THA-32.
[704] Brazil's second written submission, para. 83; Thailand's oral statement at the first substantive meeting, paras. 30-34; Thailand's second written submission, para. 83.
[705] Thailand's oral statement at the first substantive meeting, paras. 30-34; Thailand's second written submission, paras. 82-83 referring to Case 149-73, *Otto Witt KG v Hauptzollamt Hamburg-Ericus*, 12 December 1973, ECR [1973] page 01587, para. 3 contained in Exhibit THA-33.
[706] Brazil's oral statement at the first substantive meeting, para. 66; Thailand's second written submission, para. 82.
[707] Thailand's second written submission, para. 92.

submits that the normal practice in the European Communities is not to apply provisions of one Explanatory Note to another, unless the Note states that it shall apply *mutatis mutandis*.[708]

7.409 The **European Communities** also refers to an Explanatory Note of December 1994 to subheadings 0210.11.11 and 0210.11.19 of the CN. The European Communities submits that the importance of the Note lies in the fact that it assumes the existence of the principle of long-term preservation with respect to heading 02.10.[709]

7.410 **Brazil** and **Thailand** submit that the Explanatory Note in question relates to salted meat of domestic swine and not to all "salted meat" of heading 02.10 and that, therefore, it cannot be applied to poultry meat.[710] According to Brazil, had the European Communities desired to apply the provisions on salted meat of domestic swine to all meat covered under heading 02.10 it would have done so through a general Explanatory Note to heading 02.10 rather than through an Explanatory Note to a particular subheading.[711]

Analysis by the Panel

7.411 The first question for determination by the Panel is whether Explanatory Notes to the CN and to its predecessor, the Common Customs Tariff, qualify as "circumstances of conclusion" of the EC Schedule within the meaning of Article 32 of the *Vienna Convention*. For the reasons referred to in paragraph 7.391 above, the Panel does not consider that the fact that the Explanatory Notes were not explicitly mentioned by the Appellate Body in *EC – Computer Equipment* as a source under Article 32 means that such Notes cannot be taken into account under that Article. In our view, since the Explanatory Notes are considered in interpreting the CN, even if they are not, strictly speaking, part of the CN, they could qualify under Article 32 of the *Vienna Convention*.

7.412 However, even if these Explanatory Notes qualify for consideration under Article 32 of the *Vienna Convention* whether as "circumstances of conclusion" in the case of the 1981 and 1983 Explanatory Notes or more generally under Article 32 in the case of the December 1994 Explanatory Note, we note that they appear to be non-binding.[712] The ECJ has also stated that, while Explanatory Notes may play an important interpretative role in cases of uncertainty, they cannot amend provisions of the CN.[713] In contrast, the ECJ has made it clear that Additional Notes become part of the headings to which they relate and have binding effect.[714] On the basis of the foregoing, we understand that Additional Notes to the CN take precedence over Explanatory Notes in the hierarchy of EC classification rules. Therefore, we consider that, to the extent that there was any inconsistency between the Explanatory Notes in question and EC Regulation No. 535/94, which introduced Additional Note 7, Additional Note 7 would prevail.

7.413 The Panel recalls its finding in paragraph 7.369 that, according to EC Regulation No. 535/94, if any meat is deeply and homogeneously impregnated with salt and has a minimum salt content of 1.2% by weight, it will meet the requirements of that Regulation and will qualify as "salted" meat under the concession contained in heading 02.10 of the EC Schedule. We do not consider that the notion of long-term preservation is reflected in that Regulation. Therefore, even if the Explanatory

[708] Thailand's reply to Panel question No. 75; Thailand's second written submission, para. 92.
[709] EC's oral statement at the second substantive meeting, para. 70.
[710] Brazil's second written submission, para. 93; Thailand's second written submission, para. 92.
[711] Brazil's second written submission, para. 94.
[712] This is apparent from Article 1(2)(c) of the CN, which provides that the CN comprises, *inter alia*, "preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings". No mention is made of Explanatory Notes in Article 1(2)(c) of the CN.
[713] Case 149-73, *Otto Witt KG v Hauptzollamt Hamburg-Ericus*, 12 December 1973, ECR [1973] page 01587, para. 3 contained in Exhibit THA-33.
[714] Case 38-75, *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrchten en accijnzen*, 19 November 1975, ECR [1975], page 01439, at para. 10 contained in Exhibit THA-31.

Notes relied upon by the European Communities may be considered to reflect the principle that salting under heading 02.10 is for the purposes of preservation, as the European Communities asserts they do on the basis of the terms of the CN and ECJ jurisprudence, the Panel understands that Additional Note 7, which does not reflect this principle, takes precedence. Therefore, we will disregard those Explanatory Notes in our interpretation of the concession contained in heading 02.10 of the EC Schedule.

Other Additional Notes

Arguments of the parties

7.414 **Thailand** notes that, in 1983, prior to the launch of the Uruguay Round, the European Communities introduced Additional Note 6(c) to the CN [later renumbered as Additional Note 6(b)] which stated that: "However, products falling within subheadings 02.06….to which seasoning has been added during the *process of preparation* continues to fall within the said subheadings provided that the addition of seasoning has not changed their character of product falling within heading 02.06." According to Thailand, this Additional Note was included in the EC Common Customs Tariff from 1983 and has remained (albeit with slightly modified wording) in the European Communities' CN until today. According to Thailand, the content of the Additional Note is relevant to demonstrate that the European Communities has consistently considered that products falling under heading 02.10 are subject to a process of preparation, from before the launch of the Uruguay Round to the present day.[715] Thailand submits that, if the European Communities had not specifically omitted the requirement that products had to be salted to ensure their preservation from Additional Note 7, Additional Note 7 would have been contradictory with Additional Note 6(b).[716]

7.415 The **European Communities** notes that, prior to the Uruguay Round, its nomenclature was based on the CCCN and the European Communities was bound to observe its terms. The European Communities submits that heading 02.06 of the CCCN effectively contains the same wording as HS heading 02.10, and both of them enshrine the principle of preservation. The European Communities argues that the same CCCN-based nomenclature had been in use in the European Communities since 1960 if not earlier. Consequently the principle of long-term preservation was well-entrenched in the European Communities and confirmed as early as 1983 in the ECJ's judgement in the *Dinter* case. According to the European Communities, any other measures could have only restated the preservation requirement but not modified it.[717]

Analysis by the Panel

7.416 Thailand refers to Additional Note 6(c) in an attempt to refute the assertion that the European Communities has consistently held the belief that heading 02.10 (being the successor to heading 02.06 to which the Note refers) entailed the notion of preservation. Given our conclusions in paragraph 7.413 above, we do not consider it necessary to address Thailand's arguments in this regard.

Classification practice prior to 1994

Arguments of the parties

7.417 The **European Communities** submits that the United States and probably other WTO Members considered that the term "salted" in heading 02.10 referred to salting for preservation.[718]

[715] Thailand's second written submission, paras. 90-91; Thailand's oral statement at the second substantive meeting. paras. 11 and 26.
[716] Thailand's oral statement at the second substantive meeting, para. 12.
[717] EC's reply to Panel question No. 109 referring to Exhibit EC-34.
[718] EC's second written submission, para. 6.

With regard to the United States, the European Communities refers to a US customs ruling of November 1993 dealing with fresh and frozen meat to which 3% salt had been added by means of tumbling. According to the European Communities, the ruling found that the product fell under headings 02.01 or 02.02 (depending on whether it was fresh or frozen) rather than under heading 02.10. In support of the decision, the customs authorities cited the Explanatory Note in the European Communities' CN requiring that the period of preservation "must considerably exceed the time required for transportation".[719]

7.418 With respect to the ruling cited by the European Communities, the **United States** notes that US customs authorities described the product at issue there as "similar to fresh beef sprinkled and packed in salt," whereas the products at issue in this case are described as "deeply and evenly impregnated" with salt. The United States submits that it is not clear how similar the products at issue in that ruling are to the products at issue in this dispute.[720]

7.419 **Brazil** and **Thailand** also submit that the products at issue in the 1993 United States' customs ruling was boneless beef sprinkled with 3% salt, whereas the products at issue in this dispute are chicken cuts deeply and homogeneously impregnated with salt of 1.2% or more by weight. Brazil and Thailand submit that, given the products at issue in the US customs ruling were prepared differently from the products at issue in this dispute, the ruling provides no guidance for this dispute.[721] Brazil submits that, therefore, the 1993 US customs classification ruling does not qualify as "classification practice" of other countries within the meaning of the "circumstances of [the] conclusion" of the EC Schedule. Brazil also submits that there are several other classification rulings by US customs authorities that place frozen, smoked and/or cured pork meat under heading 02.10. According to Brazil, although smoked or cured, the meat also had to be frozen to ensure preservation of the product and, yet, it was still classified under heading 02.10.[722] Thailand submits that, in any event, the Panel is being asked to determine the European Communities' obligations under its Schedule. Thailand argues that, therefore, the US Schedule is not relevant.[723]

7.420 The **European Communities** submits that the US customs ruling of November 1993 explicitly described the tumbling process used to absorb the salt for the meat in question. The European Communities recalls that, despite being subjected to this process, the meat was described in the ruling as "similar to fresh beef sprinkled and packed in salt". The European Communities further recalls that the meat was classified alongside fresh and frozen beef under headings corresponding to heading 02.07, and not under heading 02.10. The European Communities notes that the products at issue in this case had likewise gone through a tumbling or equivalent injection process resulting in a salt content of 1.2% – 3 %. The European Communities further notes that it was meat resulting from this process that the ruling described as "similar to fresh beef sprinkled and packed in salt."[724]

Analysis by the Panel

7.421 The Panel recalls that, in *EC – Computer Equipment*, the Appellate Body indicated that Members' classification practices during the Uruguay Round negotiations are part of the "circumstances of conclusion" of the WTO Agreement and may be used as a supplementary means of interpretation under Article 32 of the *Vienna Convention*. The Appellate Body also indicated that it is most useful to examine the classification practice of all WTO Members. However, in this case, the Panel has been provided with limited evidence of classification practice from one WTO member –

[719] EC's oral statement at the first substantive meeting, para. 33.
[720] US reply to Panel question No. 86.
[721] Brazil's oral statement at the second substantive meeting, para. 71; Thailand's second written submission, paras. 54-55.
[722] Brazil's oral statement at the second substantive meeting, para. 71 referring to Exhibit BRA-39.
[723] Thailand's oral statement at the second substantive meeting, paras. 30-31.
[724] EC's oral statement at the second substantive meeting, para. 74.

namely the United States – during the Uruguay Round negotiations. Such evidence concerns products other than those at issue in this dispute. The Panel does not consider that this limited evidence has any probative value regarding the interpretation of the concession contained in heading 02.10 of the EC Schedule for the purposes of this dispute and, therefore, it will be disregarded.

7.422 The Panel notes that we have dealt with classification practice after 1994 in section VII.G.3(c)(i) above as "subsequent practice" under Article 31(3)(b) of the *Vienna Convention*. Even if such practice does not qualify as "subsequent practice" under Article 31(3)(b), we consider that it may, nevertheless, be taken into consideration under Article 32 of the *Vienna Convention*.[725] If so, our conclusions regarding the relevance of subsequent practice for the interpretation of the concession contained in heading 02.10 of the EC Schedule apply equally here.

(iii) Summary and conclusions regarding "supplementary means"

7.423 The Panel recalls that, following its analysis of the concession contained in heading 02.10 of the EC Schedule pursuant to Article 31 of the *Vienna Convention*, the Panel concluded that the products at issue appeared to be covered by that concession. The Panel sought to confirm that conclusion through a reference to supplementary means of interpretation of the concession in question pursuant to Article 32 of the *Vienna Convention*. We considered EC Regulation No. 535/94, the *Dinter* and *Gausepohl* ECJ judgements, EC Explanatory Notes, an EC Additional Note and classification practice prior to the conclusion of the EC Schedule. In the Panel's view, the relevant aspects of the supplementary means of interpretation, most particularly, EC Regulation No. 535/94, indicate that meat that has been deeply and homogeneously impregnated with salt and has a minimum salt content of 1.2% by weight would qualify as "salted" meat under the concession contained in heading 02.10 of the EC Schedule. Therefore, the Panel concludes that the supplementary means of interpretation considered under Article 32 of the *Vienna Convention* confirm the preliminary conclusions we reached in paragraphs 7.331 and 7.332 above following an analysis under Article 31 of the *Vienna Convention*.

(h) Conclusion regarding the meaning of the term "salted" in the concession contained in heading 02.10 of the EC Schedule

7.424 In light of the analysis of the term "salted" in the concession contained in heading 02.10 of the EC Schedule pursuant to Articles 31 and 32 of the *Vienna Convention*, the Panel concludes that that term includes frozen boneless salted chicken cuts that have been deeply and homogeneously impregnated with salt, with a salt content of 1.2% or more.[726]

[725] Ian Sinclair states that: "It should of course be stressed that paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice – that is to say, concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the Convention". Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2nd edition (1984) p. 138.

[726] The EC does not appear to dispute that the products at issue contain a minimum of 1.2% salt and are deeply and homogeneously impregnated with salt in all parts. However, the EC submits that the products at issue do not meet the criteria set out in EC Regulation No. 535/94 because that Regulation sets a minimum salt content below which it cannot be considered that a product is salted for preservation: EC's reply to Panel question No. 93. As noted above in paragraph 7.368, the Panel does not consider that EC Regulation 535/94 sets a minimum salt content below which it cannot be considered that a product is salted for preservation. This view appears to be supported by EC classification practice, according to which the products at issue were classified under heading 02.10 during 1996-2002.

(i) Conclusions regarding the application of Article II of the GATT 1994 in this case

7.425 The Panel recalls that, in paragraph 7.79 above, we stated that, if we were to conclude that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule, there is no question that the treatment accorded to those products under the measures at issue is less favourable than that provided for in the EC Schedule because undisputed pricing data indicates that the duty levied on the products at issue can and has exceeded 15.4% *ad valorem*, being the bound duty rate for products covered by heading 02.10.

7.426 It is the Panel's view that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule. Therefore, such products are entitled to treatment provided for by that concession. Since the products at issue are not being accorded such treatment, the European Communities is in violation of Article II:1(a) and Article II:1(b) of the GATT 1994.

7.427 In reaching this conclusion, the Panel recalls that a fundamental object and purpose of the WTO Agreement and the GATT 1994 is that the security and predictability of reciprocal and mutually advantageous arrangements must be preserved. In the Panel's view, a Member's unilateral intention regarding the meaning to be ascribed to a concession that Member has made in the context of WTO multilateral trade negotiations cannot prevail over the common intentions of all WTO Members as determined through an analysis undertaken pursuant to Articles 31 and 32 of the *Vienna Convention*.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 The Panel *concludes* that:

(a) Frozen boneless chicken cuts that have been impregnated with salt, with a salt content of 1.2% - 3% (the products at issue) are covered by the concession contained in heading 02.10 of the EC Schedule;

(b) EC Regulation No. 1223/2002 and EC Decision 2003/97/EC result in the imposition of customs duties on the products at issue that are in excess of the duties provided for in respect of the concession contained in heading 02.10 of the EC Schedule; and

(c) Accordingly, the European Communities has acted inconsistently with the requirements of Articles II:1(a) and II:1(b) of the GATT 1994 and, thus, nullified or impaired benefits accruing to Brazil.

8.2 Therefore, the Panel *recommends* that the Dispute Settlement Body request the European Communities to bring EC Regulation No. 1223/2002 and EC Decision 2003/97/EC into conformity with its obligations under the GATT 1994.

ANNEX A

**EXECUTIVE SUMMARY BY THAILAND
AFTER THE FIRST SUBSTANTIVE MEETING**

(21 October 2004)

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I. INTRODUCTION

1. The basic legal issue in this case is that, as a result of the EC's classification of frozen salted chicken cuts with a salt content of 1.2% by weight or more in a manner inconsistent with the correct interpretation of headings 0210 and 0207 in the EC's Schedule of Concessions, the EC provides to Thai exports of frozen salted chicken cuts treatment less favourable than that accorded to that product in the EC's Schedule of Concessions. The EC's measure is therefore inconsistent with the basic obligations set out in Article II:1(a) and Article II:1(b) of the GATT.

2. Tariff concessions are the cornerstone of the multilateral trading system. Article II of the GATT requires WTO Members to limit their ordinary customs duties or tariffs on a particular good as described in its Schedule of Concessions up to the maximum level specified therein. As recognised by the Appellate Body, "[a] basic object and purpose of GATT 1994 as reflected in Article II, is *to preserve the value of tariff concessions negotiated by a Member with its trading partners,* and bound in that Member's Schedule." (Emphasis added)[1]

3. Thus, a Member's obligation under Article II is to provide on products from other Members tariff treatment "no less favourable" than that described and bound on that product in its Schedule. A tariff concession is comprised of at least four essential elements: (i) the numerical heading, (ii) the description of the product, (ii) the maximum bound tariff level and, (iv) the method of valuation of the good for customs purposes. A Member's tariff concession would be rendered meaningless if that Member were able to alter unilaterally any of those elements in such a manner as to provide "less favourable treatment" to the products of other Members.

4. Thailand submits that the terms of the EC's concession cover chicken cuts deeply and homogenously impregnated in all parts with a total salt content of 1.2% or more by weight. The EC argues that this chicken meat is "salted" within the meaning of its tariff concession *only if the salt was added for the purpose of long-term preservation*. The EC argues that if long-term preservation is achieved through freezing, the Thai chicken meat can no longer be deemed to be "salted" and should not benefit from the EC's concession.

5. The basic interpretative issue is whether the term "salted" describes the *physical characteristics of the products benefiting from the tariff concession* - as claimed by Thailand - or whether that term refers to the *objective or purpose for which the product has been salted* – as argued by the EC. The EC's argument is entirely novel and would mean that in order to determine the customs classification of a product, it would no longer be sufficient to examine the physical characteristics of the product. Instead, it would also be necessary to examine for what *purpose* the product was given its physical characteristics. The EC's novel approach is not supported by the term "salted", is completely foreign to the Harmonised System, deviates from the normal practice of customs classification of Members and would, if introduced into WTO law, create great uncertainty in the determination of the scope of the tariff concessions.

6. There are also important practical reasons why classification must depend on the physical characteristics of the product: a customs officer clearing products upon import would not be in the best position to determine whether the characteristics of the product presented achieve a certain purpose or objective. The EC's first written submission to the Panel, citing judgments of the European Court of Justice, recognises this basic principle, stating that it is the "objective

[1] Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items* ("*Argentina – Textiles and Apparel*"), WT/DS56/AB/R, para. 47.

characteristics and properties" of products at the time of customs clearance that is the "decisive criterion" for the purposes of customs classification.[2]

II. BACKGROUND

A. FACTUAL BACKGROUND

7. During the Uruguay Round, the EC bound the products that fit the description of frozen boneless poultry cuts under subheading 0207.41.10 at the rate of 1024 ECU/T and designated those products as subject to the special safeguard provisions of Article 5 of the Agreement on Agriculture. The EC also bound the products that fit the description of salted meat under subheading 0210.90.20 at the *ad valorem* rate of 15.4%, but did not designate those products as being subject to the special safeguard provisions. In 1994, when the EC finalised its Schedule of Concessions, the prevailing view of the EC as defined in its own domestic Customs classification law ("Combined Nomenclature" or "CN") was that the product "salted meat" was meat that had been "deeply and homogeneously impregnated in all parts with a minimum salt content of 1.2%."[3] Therefore, Thailand's understanding was that the product that the EC had bound in its Schedule LXXX as salted meat of heading 0210.90.20 was consequently the product which met the EC's own definition of salted meat as stated in its own laws at that time.

8. In 1996, Thailand started exporting salted chicken to the EC in response to requests from European food processors for salted chicken meat that could be used directly in the manufacture of processed chicken products. These chicken products were deeply and homogenously impregnated with a minimum salt content of 1.2%. Due to the geographic distance between Thailand and the EC and the fact that the duration of transportation by ship takes between 21-28 days, Thai salted chicken exports by ship also have to be frozen. Even though the Thai salted chicken exports had always been frozen, the EC did not classify these products as frozen chicken. The EC considered it sufficient that the Thai exports met the EC's own definition of salted meat as set out in its Combined Nomenclature and, consequently, the EC's Schedule LXXX. As a result, from 1996 to mid-2002, Thai frozen salted boneless chicken cuts were classified by the EC as 'salted meat' under heading 0210.90.20 at the *ad valorem* tariff rate of 15.4%.

9. In November 2001, a Member of the European Parliament drew the attention of EC Agriculture Commissioner Fischler to an increase in EC imports of salted chicken and asked whether the EC could "unilaterally change the import duty on salted chicken fillet by raising the stipulated salt content of 1.2%".[4]

10. Commissioner Fischler replied that:

> [T]he Commission follows with great interest the evolution of imports on the market for all types of meat … The Honourable Member assumes that the meat in question is lightly salted and the salt may be shaken off. This fact would not be inconformity with the definition in the Combined Nomenclature which reads: 'For the purposes of heading 0210, the terms "meat and edible meat offal, salted, in brine, mean meat and edible meat offal, deeply and homogeneously impregnated in all parts having a total salt content of not less than 1.2% by weight." *The Commission is however not aware*

[2] As set out in the *Dinter* and *Gausepohl* judgements of the European Court of Justice, referred to in the EC's First Written Submission, para. 82.

[3] Commission Regulation (EC) No. 535/94 of 9 March 1994, published in the Official Journal of the European Communities No. L 68, 11 March 1994, p. 15. ("Regulation 535/94") Exhibit THA-3.

[4] Written Question E-3046/01 by Albert Maat (PPE-DE) to the Commission, 15 November 2002/C147/081. Exhibit THA-4.

> *that imported salted poultry meat does not comply with this definition*. The Commission has drawn the attention of Member States to monitor closely the compliance of these poultry meat imports with the relevant Community provisions in customs or veterinary legislation. *Furthermore, the options to deal with any problems that may arise regarding the products in question are being examined at present by the various departments of the Commission.* (Emphasis added.)[5]

11. In response to protectionist concerns, however, the EC adopted Regulation 1223/2002, which alters the description of the product by classifying "boneless chicken cuts, frozen and impregnated with salt in all parts with a salt content of 1.2 to 1.9%" under the subheading of 0207.14.10. As a result, chicken that previously met the definition of "salted meat" by virtue of its minimum salt content of 1.2% in all parts is now classified as "frozen chicken." Prior to Regulation 1223/2002, when the same chicken product was classified as salted meat, it was accorded tariff treatment at an *ad valorem* rate of 15.4%. Following Regulation 1223/2002, this same product - now classified as frozen chicken – is accorded the bound tariff rate of 102.4€/100 kg/net.[6] Based on 2003 chicken prices, the specific tariff rate is equivalent to an *ad valorem* rate of 58.9% -- much higher than the 15.4% *ad valorem* rate. On the basis of the average annual price of salted chicken exported from Thailand to the EC from 1997 to 2002, the equivalent *ad valorem* rate was 43.9%. This tariff rate is much higher than the bound rate of 15.4% that the EC committed to in its Schedule of Concessions for salted meat.

12. Nothing in the WTO Agreement allows a WTO Member to address an anomalous influx of imports by changing the description of a product so that it falls under a different tariff heading with a higher tariff level. Nevertheless, it is clear from exchanges in the European Parliament and other fora that this was precisely the EC's goal in its classification of Thai chicken. In this case, by modifying the description of frozen salted chicken, so that it is now classified as frozen chicken rather than salted meat, the EC has raised the tariff rate on that product from 15.4% to the *ad valorem* equivalent of 58.9% (based on the price of chicken in June 2003)[7] and effectively rendered its tariff concession on salted meat meaningless.

B. EC REGULATIONS AND COMMISSION DECISION

1. Regulation No. 2658/87 of 23 July 1987 as amended by Regulation No. 535/94 of 9 March 1994[8]

13. The applicable EC customs regime at the time of the conclusion of the Uruguay Round was set out in the Combined Nomenclature published in Annex I to Council Regulation 2658/87 on the tariff and statistical nomenclature and on the common customs tariff. Article 12 of Regulation 2658/87 provides that the Commission shall adopt each year no later than 31 October, by means of a Regulation, a complete version of the Combined Nomenclature together with the corresponding autonomous and conventional rates of duty. The most important element of the annual update is the amendment to Annex I to Regulation 2658/87, which contains the complete Combined Nomenclature.

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[5] *Ibid.*

[6] Under Schedule LXXX the tariff rate provided for products under subheading 0207.41.10 is 1024 ECU/T, whereas under the EC's Combined Nomenclature, the tariff rate provided for products under subheading 0207.14.10 (the successor of heading 0207.41.10) is 102.4 € /100 kg/net.

[7] Thai chicken exports to the EC stopped in June 2003 as a result of the avian flu problem. In June 2003, the price of chicken was 1738.78€/tonne. Exhibit THA-2.

[8] Council Regulation (EEC) No. 2658/87, of 23 July 1987, on the tariff and statistical nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Communities No. L 256, 7 September 1987, p. 1 ("Regulation No. 2658/87"). Exhibit THA-6 (only relevant portion).

14. The structure of the Combined Nomenclature was based on that of the Harmonized System. Prior to the conclusion of the Uruguay Round, the Combined Nomenclature was amended by Regulation 535/94 which inserted the following additional note to Chapter 2 of the CN (originally additional note 8, renumbered in 1995 as additional note 7):

> For the purposes of heading 0210, the term "salted" means meat or edible meat offal which has been deeply and homogeneously impregnated with salt in all parts, having a total salt content not less than 1.2% by weight.

15. Regulation 535/94 provides that "… to ensure uniform application of the CN, provisions should be laid down for the classification of *salted meat* and edible meat offal falling within CN code heading 0210, *in order to distinguish them from fresh, chilled or frozen meat and edible meat offal; whereas a total salt content of 1.2% or more by weight appears to be an appropriate criterion for distinguishing between these two types of products*" (emphasis added). At this point, therefore, the EC considered that a product with a salt content of 1.2% satisfied the criterion to be met for a product to be classified as salted meat under heading 0210 and served to distinguish that product from products that were fresh, chilled or frozen.

16. The verification process of tariff schedules among all Uruguay Round negotiating parties took place from 15 February to 25 March 1994.[9] It was during this period of verification of tariff schedules, that, by way of Regulation 535/94, the EC clarified the scope of its tariff concession under heading 0210, in particular, with respect to the term "salted." This additional note was published in Regulation 535/94 on 11 March 1994 and remained valid in the EC Combined Nomenclature until 13 November 2003.[10]

2. Regulation No. 3115/94 of 29 December 1994

17. The definition of "salted" as set out in Regulation 535/94 was incorporated into Regulation 2658/87 through Regulation 3115/94.[11] The Preamble of Regulation 3115/94 states the need to:

> … amend the combined nomenclature to take account of:
>
> - changes in requirements relating to statistics or commercial policy, in particular by virtue of *Council Decision bringing into force simultaneously the acts implementing the results of the Uruguay Round of multilateral trade negotiations* and Council Regulation concerning certain measures resulting from the conclusion of negotiations under Article XXIV:6 and other measures necessary for simplification purposes,
>
> - the need to align or clarify texts; (emphasis added.)

18. Regulation 3115/94 was enacted in order to meet the requirements of Article 12 of Regulation 2658/87 which provides for the Commission to adopt each year a complete version of the Combined Nomenclature.

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[9] Informal Meeting of Heads of Delegation of 20 January 1994, Statement of the Chairman, MTN.TNC/W/131, 21 January 1994. Exhibit THA-7.

[10] Regulation 535/94 was only replaced on 14 November 2003 by Regulation 1871/2003, which entered into force on the 20th day following the day of its publication in the Official Journal on 25 October 2003.

[11] Commission Regulation (EC) No. 3115/94 of 20 December 1994, amending Annexes I and II to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the common customs tariff, published in the Official Journal of the European Communities, No. L 345, 31 December 1994, p. 1. ("Regulation 3115/94"). Exhibit THA-8.

3. Regulation No. 1223/2002 of 8 July 2002[12]

19. Regulation 1223/2002, concerning the classification of certain goods, states that its adoption is necessary to ensure the uniform application of the Combined Nomenclature pursuant to the general rules for the interpretation of the Combined Nomenclature laid down in Regulation 2658/87.[13]

20. Article 1 of Regulation 1223/2002 sets forth that goods described in column 1 of the table set out in the Annex to the Regulation should be classified under the CN code indicated in column 2, by virtue of the reasons set out in column 3. The Annex to Regulation 1223/2002 is reproduced below:

Description of Goods	CN Code	Reasons
(1)	(2)	(3)
Boneless chicken cuts, frozen and impregnated with salt in all parts. They have a salt content by weight of 1.2 to 1.9%. The product is deep-frozen and has to be stored at a temperature of lower than - 18°C to ensure a shelf-life of at least one year.	0207 14 10	Classification is determined by the provisions of the General Rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 0207, 0207 14 and 0207 14 10. The product is chicken meat frozen for long-term conservation. The addition of salt does not alter the character of the product as frozen meat of heading 0207.

21. Article 2 of Regulation 1223/2002 further established that binding tariff information (BTI) issued by customs authorities of EC Member States, which was not in accordance with the provisions of the Regulation, could continue to be invoked for a period of three months. Regulation 1223/2002 entered into force on 29 July 2002 and is binding in its entirety and directly applicable in all EC Member States.[14]

4. Commission Decision of 31 January 2003 addressed to the Federal Republic of Germany[15]

22. On 12 February 2003, the Commission of the EC adopted Commission Decision of 31 January 2003 ("Decision") concerning the validity of certain BTIs issued by Germany. The Decision noted that Regulation 1223/2002 was adopted to clarify and confirm the classification of the products described as frozen poultrymeat of heading 0207, under CN subheading 0207.14.10 "[b]oneless chicken cuts, frozen and impregnated with salt in all parts. They have a salt content by

[12] Commission Regulation (EC) No.1223/2002 of 8 July 2002 concerning the classification of certain goods in the Combined Nomenclature. Official Journal of the European Communities L 179, 9 July 2002, p.8 ("Regulation 1223/2002"). Exhibit THA-9.

[13] Recital (2) of Regulation 1223/2002.

[14] On 13 August 2002, the EC issued a Corrigendum regarding recital (5) of Regulation No. 1223/2002. Recital (5) of Regulation No. 1223/2002 stated that the measures provided for in Regulation No. 1223/2002 were in accordance with the opinion of the Customs Code Committee. Pursuant to the Corrigendum, recital (5) now provides that "[t]he Customs Code Committee has not issued an opinion within the time limit set by its Chairman." Official Journal of the European Communities, L 217, 13 August 2002, p.8. Exhibit THA-10.

[15] Commission Decision of 31 January 2003 concerning the validity of certain binding tariff information issued by the Federal Republic of Germany. Official Journal of the European Communities No. L 36, 12 February 2003. Exhibit THA-11.

weight of 1.2 to 1.9%. The product is deep-frozen and has to be stored at a temperature of lower than -18° to ensure conservation for at least one year."

23. According to the Decision, following the publication of Regulation 1223/2002, all BTIs previously issued by Member States classifying the products concerned as salted meat of heading 0210 ceased to be valid. Pursuant to Regulation 1223/2002, some Member States later issued BTIs for frozen chicken cuts containing 2 to 2.7% of salt, under heading 0207. Nevertheless, there were a number of cases in which Germany was issuing BTIs classifying frozen boneless chicken cuts containing between 1.9 and 3% by weight of salt, under heading 0210.

5. Regulation No. 1871/2003 of 23 October 2003

24. On 25 October 2003, the EC published Commission Regulation (EC) No.1871/2003 of 23 October 2003, amending Annex I to Council Regulation (EEC) 2658/87.[16] Recital 3 of Regulation 1871/2003 maintains that classification in Chapter 2 of the Combined Nomenclature depends essentially on the process employed to ensure the long-term preservation of a given product. Recital 4 states that, according to the Harmonized System explanatory notes to Chapter 2, "fresh meat remains classified as fresh meat if it has been packed with salt as a temporary preserving agent during transport and that this reasoning equally applies to frozen meat." Recital 4 adds that for the purposes of heading 0210 (which comprises the EC's concession under heading 0210.90.20), salting must be sufficient to ensure long-term preservation for purposes other than transportation.

25. Recitals 5 and 6 reiterate that salting, within the meaning of heading 0210, is a process used to ensure long-term preservation and noted that additional note 7 to Chapter 2 of the CN should be amended accordingly. Therefore, Article 1 of Regulation 1871/2003 provides that the additional note 7 to Chapter 2 of the Combined Nomenclature is replaced by the following:

> For the purposes of heading 0210, the terms ‘meat and edible meat offal, salted, in brine' mean 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.

6. Regulation No. 2344/2003 of 30 December 2003

26. In light of these changes, the EC adopted Article 1 of Regulation 2344/2003, which, amends Annex I to Regulation 2658/87, including the amendment made by Regulation 1789/2003. Regulation 2344/2003 came in to force on 1 January 2004 and is binding in its entirety and directly applicable in all EC Member States.

C. EXPORTS OF POULTRY FROM THAILAND TO THE EC

27. Thailand began exporting salted chicken to the EC in 1996 in response to specific requirements of importers. Salted chicken is not sold to the average consumer. Rather, it is sold to the food processing industry. The salted chicken is used in the manufacturing of processed chicken products, such as chicken nuggets. For this end-use, salted chicken helps the manufacturers reduce preparation time and costs. The salt serves to reduce moisture loss during the cooking process, and results in meat with better processing properties.

[16] Commission Regulation (EC) No. 1871/2003, of 23 October 2003, amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Union No. L 275, 25 October 2003, p. 5 ("Regulation No. 1871/2003"). Exhibit THA-13. All references to the recitals are made to this document.

III. LEGAL ARGUMENTS

A. THE EC'S CLASSIFICATION OF FROZEN SALTED CHICKEN IS INCONSISTENT WITH THE CORRECT INTERPRETATION OF THE RELEVANT HEADINGS IN SCHEDULE LXXX

28. The EC's Schedule LXXX is an annex to the GATT and must be interpreted in accordance with the Vienna Convention on the Law of Treaties. As the Appellate Body confirmed in *EC – Customs Classification of Certain Computer Equipment*:

> A Schedule is made an integral part of the GATT 1994 by virtue of Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention.[17]

29. Applying Articles 31 and 32 of the Vienna Convention, Thailand submits that the scope of the EC's concessions under 0210 includes the Thai chicken product at issue here.

30. The ordinary meaning of the terms of Schedule LXXX provides a clear description of the products falling under headings 0210 and 0207, respectively. Heading 0210 covers "meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal." The ordinary meaning of "meat" includes poultry. The ordinary meaning of "salted" is "impregnated with, containing or tasting of salt."[18] The term "salted "is followed by the terms "in brine, dried, or smoked." The definitions of these terms are the following:

- in brine: "water, saturated or strongly impregnated with salt or to soak in or to saturate in brine"[19];
- dried: "to make or to become dry by wiping, evaporation, draining, etc., or to preserve (food, etc) by removing the moisture"[20];
- smoked: "to cure or darken by the action of smoke."[21]

31. The common element in these terms and in the term "salted" denotes an additional process to the natural state of the meat. That process could be either salting the meat, putting it in brine, drying it or smoking it. In other words, the common element is that the product undergoes a process that changes its natural condition by preparing it.

32. In contrast, heading 0207 covers "meat and edible meat offal of the poultry of heading 0105, fresh, chilled or frozen." The heading 0105 covers "live poultry, that is to say, fowls of the species *Gallus domesticus*, ducks, geese, turkey and guinea fowls." Domestic chicken is a fowl of the species *Gallus domesticus*.

(a) The ordinary meaning

33. The ordinary meaning of "fresh" refers to food "…not preserved by salting, tinning, freezing, etc."[22], "recently made, produced or harvested; not stale or spoiled" and "not preserved, as by canning

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[17] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*") WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 84.

[18] *The Concise Oxford Dictionary,* 9th Edition, Oxford University Press 1995, p. 1218.

[19] *Ibid*., p. 163.

[20] *Ibid*., p. 147.

[21] *Ibid*., p. 1313.

[22] *Ibid*., p. 541.

or freezing."[23] The ordinary meaning of "chilled" is to "preserve by cooling."[24] The ordinary meaning of frozen is to "…preserve (food) by refrigeration below freezing point"[25] or "to preserve (food for example) by subjecting to freezing temperatures".[26]

34. Based on the ordinary meaning of these three terms, heading 0207 covers poultry meat that is either fresh, chilled or frozen, which are the various stages in which the poultry meat may be maintained so that it is in its original natural state or may be easily returned to its original state. As noted, "[f]reezing is one of the easiest and least time-consuming methods of food preservation. Most foods retain their natural color, flavour, texture better than when other methods of food preservation are used" (such as canning).[27] There is no indication from the ordinary meaning of the terms in the headings that the state of freshness or the state of preservation by cooling is a more important criterion to determine classification than the state of preparation. Furthermore, even assuming preservation were the relevant criterion, there is certainly no reference to *long-term* preservation or conservation as being the decisive factor to determine the eventual classification of the product.

35. The term "frozen" refers to the preservation of the product by cooling or refrigeration. The verb "preserve" means "to maintain (a thing) in its existing condition"[28] or "to prevent (organic bodies) from decaying or spoiling."[29] In the light of these definitions, a "frozen" product that can be maintained in or returned to its original state without any change in its physical or chemical characteristics. If a product is frozen, it can easily be thawed in order to return the product to its original state.

36. In contrast to freezing, the salting of a product entails a process which alters the original state of the product. Meat of heading 0210 is "meat … salted, in brine, dried, smoked." Chicken that has been subject to one of these preparation processes: salt impregnation, salt-water immersion, removal of moisture or darkening caused by smoke falls under 0210.

37. Moreover, the processes listed in heading 0207 can be clearly distinguished from those in heading 0210. A process is defined in the *New Shorter Oxford English Dictionary* as, *inter alia*, "[a] thing that goes on or is carried on; a continuous series of actions, events or changes; a course of action, a procedure; *esp*. a continuous and regular action or succession of actions occurring or performed in a definite manner; a systematic series of actions or operations directed to some end, as in manufacturing, printing, photography, etc." Heading 0207 covers products that are "fresh, chilled, or frozen." If a product is fresh it cannot be said to have undergone a process. Chilling and freezing may be considered as processes. Of the three states (fresh, chilled or frozen) listed in the note to heading 0207, chilling and freezing relate to a process to ensure the purpose of preservation. However, all of the processes in heading 0207 relate to the temperature of the product. The note to heading 0207 states:

> This heading covers only fresh, chilled or frozen meat and edible offal of domestic poultry which, when live are classified in heading 01.05.

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[23] *The American Heritage College Dictionary*, 3rd edition, Houghton Mifflin Company, 1993, p. 545.
[24] *The Concise Oxford Dictionary*, 9th edition, Oxford University Press, 1995, p. 228.
[25] *Ibid*., p. 539.
[26] *American Heritage College Dictionary*, 3rd edition, Houghton Mifflin Company, 1993, p.544.
[27] B.J. Willenberg, Department of Food Science and Human Nutrition, University of Missouri-Columbia, http://muextension.missouri.edu/xplor/hesguide/foodnut/gh1501.htm, last accessed 3 August 2004. Exhibit THA-14.
[28] *The Concise Oxford Dictionary*, 9th edition, Oxford University Press 1995, p. 1081.
[29] *American Heritage College Dictionary*, 3rd edition, Houghton Mifflin Company, 1993, p. 1082.

38. In contrast, the processes in heading 0210 relate to the preparation of the product rather than its temperature. The note to heading 0210 states:

> This heading note applies to all kinds of meat and edible meat offal which have been *prepared as described in the heading*, other than pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted (heading 02.09). The heading includes streaky pork and similar meats interlarded with a high proportion of fat, and fat with an adhering layer of meat, *provided they have been prepared as described in the heading.* (Emphasis added).

39. Chicken is salted by placing the meat in a drum-shaped container to which the salt is added. The container with the meat is slightly shaken ("tumbled") until the salt is dissolved. The meat is then left in the solution for a specified period of time. This process causes the meat to be salted to the very core of the product. Once the meat is salted in this manner, it cannot be completely washed off or otherwise thoroughly de-salted. The salt has two main effects on poultry: "[i]t dissolves protein in muscle, and the salt and protein reduce moisture loss in cooking. This makes the meat juicier, more tender and improves the flavour. The low levels of salt enhance the other natural levels of poultry."[30] High levels of salt are known to increase the water-binding properties of a meat product.[31] Thus, a frozen boneless chicken cut, once thawed and cooked, will taste the same as a fresh boneless chicken cut once cooked. However, a chicken cut that is salted, put in brine, dried or smoked would taste quite different once cooked after having undergone such a process.

40. Following the advent of refrigeration, there are more modern ways of preserving food than the use of salt. Therefore, today, salt is used primarily to flavour or to prepare food. Indeed, the EC has acknowledged that that "the exclusive use of salting of meat products for preservation is now relatively rare,"[32] and that "[p]roducts preserved by salting (or a combination of salting, drying and smoking) remain popular today *primarily by virtue of their taste and other characteristics*, regardless of the fact that *they are preserved by methods which have been surpassed* (at least technologically) by freezing" (emphasis added).[33] Thailand agrees with these EC statements.

41. Thailand emphasises that this dispute concerns tariff treatment under Article II of the GATT, therefore, requires an examination of the EC's concession in heading 0210 and an assessment of whether the product at issue has the physical characteristics of the product described in the EC's Schedule of Concessions. While the production processes that impart these characteristics and the end-uses of the product might be relevant to a determination of the likeness of products under GATT Article III, they are not relevant to the issue in this dispute.

42. Once a product is salted, it cannot be completely unsalted by immersion in water. The essential character of the chicken product is changed as a result of the salting. This also limits its end-uses. The salted chicken exported by Thailand to the EC is sold to the food processing industry in the EC and is intended for use in the manufacture of value-added chicken products. The importers in the EC market regard salted and unsalted chicken as completely different products.

43. The EC has stated that "[t]he addition of salt does not alter the character of the product as frozen meat under 0207." If this rationale were to be adopted by other countries, it would mean that a product such as Danish slab bacon which is smoked and cured but nevertheless frozen for export

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[30] Dr. Alan Sam, Food Safety Feature, United States Department of Agriculture, December 1999, http://www.fsis.usda.gov/OA/pubs/bastebrine.htm, last accessed 3 August 2004. Exhibit THA-15.

[31] Effects of Preblending, Reduced Fat and Salt Levels on Frankfurter characteristics, *Journal of Food Science*, Volume 52, No.5, p. 1149 -1151, at 1151. Exhibit THA-16.

[32] EC's First Written Submission, para. 39.

[33] *Ibid*., para. 41.

purposes would have to be classified as frozen rather than smoked. Thailand has also submitted evidence that other salted meat products, such as Parma ham, prosciutto and jamón serrano must be conserved at a temperature below that of ambient temperature, namely at a chilled level. In other words, these products may be salted and dried but they are also chilled.

44. Moreover, the ordinary meaning of the term "salted" does not imply that the product must be salted for the purpose of preservation. Despite the fact that this purpose is not found in the ordinary meaning of "salted" and that the EC's own definition of salted for the purpose of heading 0210 (as stated in Regulation 535/94) did not refer to preservation, or long-term preservation, the EC nevertheless introduced in Regulation 1871/2003 the requirement that salting, of heading 0210, "…is a process used to ensure long-term preservation." The introduction of such a requirement is baseless and without any textual support in heading 0210.

45. The EC must be presumed to have been aware of the percentage of salt required to preserve a product for the purpose of long-term preservation. In its first definition of the terms "salted, in brine" under heading 0210 in Regulation 535/94, the EC established stipulated a minimum salt content of 1.2% deeply and homogeneously impregnated in all parts. At this low level, the product cannot be preserved by salting alone, as the Preamble in Regulation 535/94 acknowledges in stating that "provisions should be laid down for the classification of *salted meat* and edible meat offal falling within CN code heading 0210, *in order to distinguish them from fresh, chilled or frozen meat and edible meat offal; whereas a total salt content of 1.2% or more by weight appears to be an appropriate criterion for distinguishing between these two types of products*." If it were necessary to establish a minimum level of salt to classify a product as salted rather than frozen, it is clear that the EC assumed that such a product would enter the EC either in a salted and fresh state, or in a salted and chilled state, or in a salted and frozen state. Otherwise, there would be no need to distinguish these products from each other.

46. The Appellate Body has stated that one of the corollaries of the "general rule of interpretation" in Article 31 is that "interpretation [of a treaty] must give meaning and effect to all the terms of a treaty." An interpreter may not adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[34] The EC's interpretation of requiring "salting" to be carried out for the purpose of long-term preservation reduces the ordinary meaning of the term "salted" in heading 0210 and the EC's tariff concessions under that heading (when a product is both frozen and salted) to inutility.

47. Moreover, the EC has failed to demonstrate that WTO Members agreed that only meat salted for the purpose of long-term preservation would fall within the definition of "salted." The Appellate Body has said that the "[t]he duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties … [p]rinciples of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[35] There is no basis to impute the concept of preservation into the definition of "salted."

48. In addition, the EC itself acknowledges that the ordinary meaning of "salted" in heading 0210 can either refer to meat that has been "preserved by salt" *or* to meat for which "it's (sic) flavour has been altered by the addition of salt".[36] There may be purposes for salting other than those cited by the EC. However, the only common denominator between these meanings is that salt must be included in

[34] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, page 23.

[35] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (US)*, WT/DS50/AB/R, adopted 16 January 1998, para. 45.

[36] EC's First Written Submission, para. 121.

the product. As acknowledged by the EC, the ordinary meaning of "salted" does not resolve the question of which meaning should be preferred[37] and the choice of which of the two possible meanings it cites for "salted" in heading 0210 must be resolved through an analysis of the "context."

(b) The context

49. The context of the headings in the EC's schedule of concessions also supports Thailand's arguments. Heading 0210.90 of the EC's Schedule of Concessions covers all salted meat other than "meat of swine" and "meat of bovine animals." In turn, the subheading 0210.90.20 covers salted meat other than "meat of swine" and "meat of bovine animals" and "horsemeat, salted in brine" and meat "of sheep and goats" as there are specific sub headings for such meat. "Salted meat" of chicken is not excluded from the terms of heading 0210.90.20 under this contextual analysis. Applying the principle *expressio unius est exclusio alterius*, this heading must be construed as including other types of meats not expressly excluded (*e.g.*, chicken). Therefore, this context confirms that the ordinary meaning of "salted meat" covers chicken.

50. Second, the structure of the headings at the 4-digit level indicates that the first 8 headings refer to different types of meat and offal that are fresh, chilled or frozen. There is one heading, namely that of 0209, pig fat, which covers not only fresh, chilled or frozen, but also salted, in brine, dried or smoked. The last heading covers meat and edible meat offal, salted, in brine, dried or smoked. Therefore, the products are either classified as fresh, chilled or frozen (the first 8 headings) or as salted, in brine, etc (heading 0210); only heading 0209, specifically lists all the various states. However, the heading 0210 does not list all the states. It only lists the states of salted, in brine, dried or smoked. This indicates that, for heading 0210, the type of preparation is the determining factor for the classification of that product.

51. The EC alleges that an interpretation of the term "salted" in its context must mean exclusively that meat is salted for the purpose of long-term preservation.[38] The context the EC examines is the surrounding terms in heading 0210 of "in brine", "dried", and "smoked". From these three terms, the EC attempts to infer that the common denominator is that of preservation. However, these terms also go to the *preparation* of the product. An examination of the context of the other tariff headings, such as headings 0812 and 0814 in the EC's Schedule LXXX shows that when preservation is the relevant criterion, it is expressly stated. Thus, when the EC considers that a product must be classified on the basis of its preservation characteristics, that objective characteristic of preservation is specifically listed in the tariff heading itself. Heading 0210, in contrast, makes no reference at all to a preservation requirement.

(c) The object and purpose

52. The Appellate Body has stated that the object and purpose of the Article II of the GATT, is *to preserve the value of tariff concessions negotiated by a Member with its trading partners,* and bound in that Member's Schedule. It is therefore essential that the description of the products falling under a particular subheading be maintained as they were established at the time of the negotiation of the concession. Accordingly, not only the numerical headings and the tariffs levels, but also the description of the products which give that tariff binding its complete scope and content must be respected in order to preserve the value of a concession.. A Member is not permitted, as the EC has done here, to undermine its concessions in its Schedule by changing the description of products falling under a particular heading.

[37] *Ibid.*, para. 122.
[38] *Ibid.*, para. 13.

(d) The Harmonized System and the Explanatory Notes

53. In *EC – Computer Equipment*, the Appellate Body made clear that a proper interpretation of Schedule LXXX must include a consideration of the Harmonized System and its Explanatory Notes. The EC's customs classification law, as set out in its Combined Nomenclature[39] is based on the Harmonized System. In the present case, therefore, the Panel should examine the Harmonized System and its Explanatory Notes in order to conduct a proper examination of the terms of Schedule LXXX.

54. Article 1 of the Harmonized System Convention defines the Harmonized System as comprising, *inter alia*, the General Rules for the Interpretation of the Harmonised System. Article 3.1(a) obliges Contracting Parties to ensure that its "Customs tariff and statistical nomenclatures shall be in conformity with the Harmonised System." Thus, if the Panel were to consider the Harmonized System, it would need to rely upon the General Rules for the Interpretation of the Harmonized System because they are an integral part of the Harmonized System.

55. In addition, the EC and Thailand as Contracting Parties to the Harmonized System Convention have accepted, *inter alia*, the following obligations under Article 3 of the Harmonized System Convention:

> (i) [they] shall use all the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes;
>
> (ii) [they] shall apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter and Subheading Notes, and *shall not modify the scope of the* Sections, Chapters, *headings or subheadings of the Harmonized System* … (emphasis added)

56. The EC has also agreed to apply the General Rules for the Interpretation of the Harmonized System[40], including, in particular, General Rule of Interpretation l, which provides that:

> The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only: for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions: …

(i) Terms of headings HS 0207 and HS 0210

57. The classification of products under HS 0207 and 0210 must be examined according to the terms of the headings.[41] The terms in the headings 0207 and 0210 in Schedule LXXX and the Harmonized System are identical. Under HS heading 0210, the term "salted" is not qualified in any way. In particular, there is no quantitative specification in the heading as to the threshold level of salt that must be met to classify the product as salted.

[39] *See* Regulation 2658/87.

[40] General Rules for the Interpretation of the Harmonized System. Exhibit THA-20.

[41] Therefore, as the titles of the Section (i.e. Live animals, animal products) and of the Chapter (i.e. Meat and edible meat offal) are provided for ease of reference only and have no legal status, they are not taken into account here for the purposes of classification.

(ii) Chapter Notes to Chapter 2

58. The Section Note to Section 1 covering "Live Animals, Animal Products" (the Section within which Chapter 2 falls) is not useful in the present case for the proper classification of the product at issue.

59. The first item in the General Note to Chapter 2 provides that the Chapter covers meat and meat offal in the following states: (i) fresh; (ii) chilled; (iii) frozen; and (iv) salted, in brine, dried or smoked. The state of "fresh" may include meat and meat offal that is packed with salt as a temporary preservative. The fact that the salt in this case is used as "packing" means that the salt has not impregnated the product and may be easily washed off. Meat that has been temporarily packed with salt does not have its essential characteristics modified. This temporary packing with salt is completely different from the process of adding salt so that it is deeply and homogenously impregnated with salt in all parts.[42] In Regulation 1871/2003, the EC extrapolates from the reasoning in the first item in the Chapter Note to the effect that if the addition of salt in fresh meat means that the meat must be classified as fresh, then the addition of salt in meat that is frozen means that the meat must be classified as frozen. However, this is inconsistent with the EC's own definition of "salted" in Regulation 535/94 meaning a product that is "deeply and homogenously impregnated with salt in all parts and having a total salt content of not less than 1.2% by weight." It is also inconsistent with the rationale in item 1 of the Chapter Note stating that fresh meat that has been packed with salt as a temporary preservative must be classified as fresh meat. Thai chicken exports are not 'packed' with salt as a temporary preservative. They are deeply and homogenously impregnated with salt in all parts at a minimum of 1.2% in order to prepare the product. Therefore, once the salt is added as more than a temporary preservative, it must be classified as something other than "fresh" or "frozen". It must be classified as "salted."

(iii) Heading notes to 0207 and 0210

60. The note to heading 0207 (which the EC claims the product at issue falls under) provides, in part, that:

> This heading covers *only* fresh, chilled or frozen meat and edible offal of domestic poultry which, when live, are classified in heading 01.05 (…) (Emphasis added.)

61. Chapter 2 covers the classification of meat in different states or which have undergone different processes: fresh, chilled, frozen, salted, in brine, dried or smoked. However, the note to heading 0207 makes clear that it applies *only* to meat in *three* of them – i.e., fresh, chilled or frozen. In other words, heading 0207 clearly excludes meat that is salted, in brine, dried or smoked.

62. Applying the principle of treaty interpretation, *expressio unius est exclusio alterius*, the note to heading 0207 expressly includes meat that is fresh, chilled or frozen out of *all* the possible different states of meat covered by Chapter 2. Therefore, heading 0207 expressly excludes meat that is salted, in brine, dried or smoked. Thailand submits that by adding meat that is salted to fall under the

[42] Indeed, Commissioner Fischler recognised the difference between the usage of salt for temporary purposes which could be easily washed off and the usage of salt for longer-lasting duration. As quoted above, in his reply to the Member of Parliament referring to the imports of salted chicken from Thailand, among others, he stated: "… [t]he Honourable Member assumes that the meat in question is lightly salted and the salt may be shaken off. This fact would not be in conformity with the definition in the Combined Nomenclature which reads: 'For the purposes of heading 00210, the terms 'meat and edible meat offal, salted, in brine, mean meat and meat offal deeply and homogeneously impregnated in all parts having a total salt content of not less than 1.2% by weight'. The Commission is however not aware that imported salted poultry meat does not comply with this definition … " *See* Exhibit THA-4.

classification of heading 0207, the EC is specifically *modifying the scope of the HS heading 0207*. By modifying the scope of the HS heading, it is consequently modifying the scope of heading 0207 in Schedule LXXX.

63. Heading 0207 specifically excludes meat that is salted, in brine, dried or smoked because they have undergone a process of preparation. This interpretation is supported by the note to heading 0210, which states that " "This heading applies to *all kinds of meat* and edible meat offal which have been *prepared as described in the heading*" (emphasis added). Therefore, any meat that is prepared as described in the heading must be classified under heading 0210.

64. There is no textual justification in the Chapter or heading notes in the HS to support the EC's position that the method of conservation or preservation alone should determine proper classification of a product. The Chapter and heading notes confirm the ordinary meaning of salted to mean a product that contains salt, and not a product that is preserved by the method of salting. Applying General Rule of Interpretation 1, which provides that classification shall be determined according to the terms of the headings and the relevant notes, salted chicken, which is frozen, must be classified under only one heading 0210, specifically under subheading 0210.90 of the Harmonized System nomenclature.

65. Thailand also emphasises that the HS does not characterise "preservation and preparation" as "processes." Rather, they are the *purposes* for which a particular *process* is undertaken. For example, a product may be smoked by a particular process in order to achieve the purpose of preparation. Thus, the *Explanatory Note* t o Chapter 2 makes a reference to "prepared or preserved by any process". The *Chapter Note* to Chapter 16 makes a reference to "prepared or preserved by the processes specified in Chapter 2 or 3 or heading 05.04." This means that the *purposes* of preservation and preparation may be achieved by the *processes* which are specified in Chapter 2, Chapter 3 and in heading 05.04.

66. Insofar as the purpose of the process is relevant to the scope of the EC's concession on 0210 in Schedule LXXX, the purpose of the processes in 0207 (chilling or freezing) would be that of preservation. The purpose of the processes to which products falling under heading 0210 are subject would be that of preparation. This is confirmed by the EC's own Additional Note 6 which states that: "products falling within heading No. 0210 to which seasoning has been added during the *process of preparation* remain classified therein, provided that the addition of seasoning has not changed the character of the product"(emphasis added). This Additional Note 6, which clearly refers to products in heading 0210 as having undergone a process for the purpose of preparation, has been included in the EC's Combined Nomenclature since at least 1992 until 2003. This definition is still in the 2003 version of the Combined Nomenclature.

(iv) General Rule of Interpretation 3

67. General Rule of Interpretation 3(a) states that the heading which provides the most specific description of the product shall be preferred to headings providing a more general description. In this case, salting, unlike freezing, modifies the characteristics of a product. Salted chicken has a different flavour and texture that cannot be removed and makes it suitable for the manufacture of processed chicken products. In contrast, frozen and unfrozen chicken are the same product and once a product has been frozen it can be easily thawed to return to its original state. The EC has acknowledged this in the context of an anti-dumping investigation on imports of Salmon from Norway, Chile and the Faeroe Islands, where it noted that "freezing of salmon was [not] sufficient to alter the basic characteristics of the product" and that "[r]ather than adding value to the product that was appreciated

by certain users, it was considered that one of the main reasons for freezing the product was to facilitate its transport to the Community."[43]

68. In addition, General Rule of Interpretation 3(b) is not applicable to an edible meat product as it relates to "mixtures, composite goods consisting of different materials or made up of different components." Rule 3(c) provides that when the classification of goods cannot be resolved by reference to Rule 3(a) or Rule 3(b) they shall be classified under the heading which occurs last in numerical order among those that equally merit consideration.

69. However, the minutes of the EC's Customs Code Committee state that the "… product corresponds at the same time to the wording of the heading 0207 (frozen) and to the wording of the heading 0210 (salted)." In its First Written Submission, Thailand indicated that it did not consider that Rule 3(c) is applicable in this case because the product at issue is only classifiable under heading 0210 as salted meat and not under the heading of 0207 for frozen chicken. Nonetheless, if the Panel were to consider that the product is *prima facie* classifiable under both 0207 and 0210, then the application of Rule 3(c) would be warranted. In that event, between the two headings that equally merit consideration in the view of the EC's Customs Code Committee, heading 0210 occurs last in numerical order. Therefore, the Panel could find on this basis alone that the product frozen salted chicken is classifiable under heading 0210.

(e) EC Court Judgments

70. The EC relies on the *Gausepohl* case, in which Court of Justice held that for meat of bovine animals to be classified under heading 0210, the product had to be (i) deeply and evenly impregnated with salt in all its parts; (ii) for the purposes of long-term preservation; and (iii) with a minimum total salt content of 1,2% by weight. However, when the EC codified the findings of the *Gausepohl* case in Additional Note 8 through Regulation 535/94 (later renumbered as Additional Note 7), which was published prior to the *conclusion* of the Uruguay Round, it retained the first and third of these criteria, but specifically omitted the second criterion that the product had to be for the purpose of long-term preservation. This was not just an unintended omission; the EC deliberately decided to exclude the notion of long-term preservation. Therefore, as of the time of the *conclusion* of the treaty, the EC itself recognised that the "purpose of long-term preservation" was not a relevant factor for determining whether a product should be considered as salted, and therefore, classified, under 0210. This confirms that the EC was of the view at that time that products had to be classified on the basis of the objective physical characteristics. This is presumably why the Commission "partly altered its position in the course of the oral procedure by suggesting a minimum salt content required for meat to be classified under heading 0210, namely 1.2% of the weight."[44] The logic of the *Gausepohl* case also contradicts the EC's claim that the purpose of preservation was so self-evident that it saw no need to include specific reference to this criterion in Regulation 535/94.

71. Moreover, EC documents submitted by Thailand directly contradict the EC's position. The Minutes of the EC's Customs Code Committee of 25 January 2002 expressly acknowledged that the element of long-term preservation was excluded from the final definition of "salted" meat for the purposes of classification under heading 0210 in Regulation 535/94 and subsequently in Additional Note 7.[45]

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[43] Council Regulation (EC) No. 930/2003 of 26 May 2003, terminating the anti-dumping and anti-subsidy proceedings concerning the imports of farmed Atlantic salmon originating in Norway and the anti-dumping proceedings concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands, published in the Official Journal of the European Communities No. L 133, 29 May 2003, p.01. para. 19. ("Regulation 930/2003") Exhibit THA-21.

[44] EC's First Written Submission, Exhibit EC-14, Opinion of the Advocate General Tesauro, para. 7.

[45] Exhibit THA-22.

72. Under EC law, Additional notes, such as "Additional note 7", become part of the heading to which they refer. As explained by the European Court of Justice,

> [… an Additional Note] decided upon by the Council, becomes *part of the heading to which it refers* and *has the same binding effect* whether it constitutes an authentic interpretation of the heading or supplements it.[46] (emphasis added).

73. The EC has also specified quantitative levels that must be met for a product to be considered as "dried or smoked." Additional Note 2(E) in Chapter 2 provides that:

> For the purposes of subheadings 0210 11 31, 0210 11 39, 0210 12 19 and 0210 19 60 to 0210 19 89, products in which the water/protein ratio in the meat (nitrogen content x 6,25) is 2,8 or less shall be considered as 'dried or smoked.' The nitrogen content shall be determined according to ISO method 937-1978.

74. The structure of Additional Note 2(E) is the same as that of Additional Note 7, in that the classification of a product as "dried or smoked" or "salted" is dependent on a neutral and objective criterion – here, a specific water/protein ratio. In both instances, these criteria for determining whether a product would fall under heading 0210 could be easily assessed by a Customs Officer at the border. In addition, there is no requirement in Additional Note 2(E) that the product must be dried or smoked for the purposes of long-term preservation.

2. The supplementary means of interpretation under Article 32 confirm that frozen salted chicken should be classified under the HS heading 0210

75. In *EC – Computer Equipment*, the Appellate Body recognised that the classification practices of the respondent "during the Uruguay Round negotiations is 'part of the circumstances' of [the] conclusion of the *WTO Agreement* and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*."[47] The Appellate Body further noted that "…[i]f the classification practice of the importing Member at the time of the tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, surely that Member's legislation on customs classification at that time is also relevant."[48]

76. Thus, the latest relevant time that the meanings of the headings of EC's Schedule LXXX should be assessed is 15 April 1994, namely the date on which the Schedule was annexed to the Marrakech Protocol and the EC thereby assumed its commitments under the Uruguay Round. As the Appellate Body stated in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the key date for the interpretation of the treaty at issue was 1994, which was the time at Members assumed their obligations under the WTO Agreement. In particular, the Appellate Body examined the term "exhaustible natural resources" in GATT Article XX(g) in the light of the wording of the Preamble of the WTO Agreement.[49]

77. The EC's customs classification legislation at the time of the conclusion of the Uruguay Round stated that for the purposes of heading 0210, the term "salted" means meat or edible meat offal which has been meat deeply and homogenously impregnated with salt in all parts with a total salt content not less than 1.2% by weight. The 1.2% threshold was specifically added to *distinguish* the classification of *salted meat* and edible meat offal falling within heading 0210 from *fresh, chilled or*

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[46] Case 38-75, Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrchten en accijnzen, 19 November 1975, ECR 1975, page 01439, at para. 10.

[47] Appellate Body Report, *EC – Computer Equipment*, para. 92.

[48] *Ibid.*, para. 94.

[49] Appellate Body Report, *US – Shrimp*, para. 129.

frozen meat. The definition is silent as to the requirement that the product be salted for the purpose of long-term preservation.

B. THE EC'S CLASSIFICATION OF THE PRODUCT AT ISSUE RESULTS IN TREATMENT LESS FAVOURABLE FOR FROZEN SALTED CHICKEN THAN THAT BOUND IN THE EC'S SCHEDULE OF CONCESSIONS AND IS THEREFORE INCONSISTENT WITH ARTICLE II:1(A) AND ARTICLE II:1(B) OF THE GATT

78. In *Argentina – Textiles and Apparel*, the Appellate Body made clear that the "application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994, *to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule*."[50] (Emphasis added).

79. The change from an *ad valorem* rate to a specific duty in this case is WTO-inconsistent to the extent that it results in the application of duties over the bound rates and where there was no ceiling provided to ensure that the bound rate is not exceeded.

80. Thailand has demonstrated that the specific rate of 102.4€/100 kg/net would only be equivalent to the *ad valorem* rate of 15.4% if the price for boneless chicken were 6.65 €/kg. Once the price of chicken is lower than 6.65€/kg, then the specific tariff rate of 102.4 €/100kg/net would exceed the *ad valorem* bound rate of 15.4% and would therefore, result in "less favourable treatment" being provided.

81. Thailand first began exporting chicken in 1996 to the EC. During the period between 1997 and mid-2002, the average price of chicken has been 2.3€/kg.[51] Thus, the application of the specific duty of 102.4€/100 kg/net - given the price of chicken in June 2003 and the average price of chicken from 1997 to 2002, has always led - to the application of an ordinary customs duty in excess of the bound rate of 15.4% *ad valorem*, provided for in the EC's Schedule of Concessions. This is "treatment less favourable" within the meaning of GATT Article II:1(a).

82. The EC measure is inconsistent with Article II:1(b) of the GATT because the consequence of the classification of chicken set out in Regulation 1223/2002 and the Decision of 31 January 2003 leads to the same product being subject to the application of duties higher than the EC's *ad valorem* bound rate of 15.4%. The EC is free to use whatever system of customs classification it wishes, *as long as duties remain at or below the bound rates, for that product.* Because the EC's classification of frozen boneless chicken cuts as provided in Regulation 1223/2002 and elaborated in the Decision of 31 January 2003 leads to the application of duties higher than the bound rate for frozen salted chicken, the EC is in violation of its Article II obligations.

IV. CONCLUSION

83. The EC's basic argument in this case is that Thailand is exporting an "artificial product" that was "created only to avoid the tariff levels which the [EC] negotiated" during the Uruguay Round. The EC argues that it negotiated a low tariff for heading 0210 because it did not expect any trade in that product[52] and that its purpose during the Uruguay Round was "to achieve a desirable level of protection for frozen chicken."[53] To achieve this purpose, the EC apparently focussed on tariffs for products classified under heading 0207. However, the EC cannot now use the classification process to correct what it may now view as omissions or *lacunae* in its negotiated schedules.

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[50] Appellate Body Report, *Argentina – Textiles*, para. 55.
[51] *See* Exhibit THA-2.
[52] EC's First Written Submission, para. 163.
[53] *Ibid*., para. 54.

84. Thus, the EC's argument that the addition of salt is a mere artifice designed to avoid the higher tariff for frozen cuts is legally irrelevant.[54] As long as the product meets the description of the tariff heading, the reasons why the exporter makes the product fall under that heading are irrelevant. The motives of the exporter are simply irrelevant to the issue of determining the correct customs classification of a product. As the EC acknowledges, the purpose of the Harmonized System was to ensure "greater uniformity among countries in customs classification."[55] For that reason, the paramount consideration in determining the correct classification of a product has always been the objective physical characteristics of the product at issue. The Panel should not allow the EC's attempts to draw negative inferences from rational commercial behaviour to distract it from properly analyzing the classification of this product based solely on its objective physical characteristics, in the light of the EC's concession.

85. Thailand requests the Panel to find that the EC is acting inconsistently with its obligations under Article II:1(b) and II:1(a) of the GATT by according "less favourable treatment" to the chicken product in question than that provided for in the EC's Schedule of Concessions. Thailand requests the Panel to recommend, in accordance with Article 19.1 of the DSU, that the DSB request the EC to bring the measure at issue into conformity with the GATT.

[54] *Ibid*., para. 19.
[55] *Ibid*., para. 61.

ANNEX B

SUBMISSIONS BY THIRD PARTIES

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ANNEX B-1

THIRD PARTY SUBMISSION OF CHINA
EXECUTIVE SUMMARY

(30 September 2004)

I. INTRODUCTION

1. China's third party submission deals with the following three issues:

(1) The Appellate Body in *EC – Customs Classification of Certain Computer Equipment*, ("*EC – Computer Equipment*") has established the rules for interpreting the meaning of tariff concessions. Such rules are also applicable in this case;

(2) The EC's interpretation of heading 0210 of its Combined Nomenclature (the "CN") lacks clear textual basis either in the Schedule LXXX or the *Harmonized System* and its *Explanatory Notes*; and

(3) The EC's classification practice and legislations during the Uruguay Round negotiations as supplementary means of interpretation of Schedule LXXX.

II. RULES FOR INTERPRETING TARIFF CONCESSIONS

2.1 In *EC – Computer Equipment*, the Appellate Body established that the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"). Specifically, the Appellate Body in *EC – Computer Equipment* stressed the following rules for interpreting tariff concessions.

2.2 Pursuant to Article 31 of the *Vienna Convention*, the meaning of a term of a treaty is to be determined in accordance with the ordinary meaning to be given to this term in its context and in the light of the object and purpose of the treaty.

2.3 With respect to the context of Schedule LXXX, a proper interpretation of Schedule LXXX should have included an examination of the *Harmonized System* and its *Explanatory Notes*.

2.4 Pursuant to Article 32 of the *Vienna Convention*, if after applying Article 31 of the *Vienna Convention*, meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, a treaty interpreter may have recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

2.5 With respect to "circumstances of the conclusion" of a treaty, the classification practice of an importing member as well as that member's legislation on customs classification during the Uruguay Round is relevant in interpreting tariff concessions in a Member's Schedule

2.6 China believes that the above rules are also applicable in this case.

III. NO TEXTUAL BASIS OF THE EC'S INTERPRETATION OF HEADING 0210

3.1 Under the EC's Commission Regulation (EC) No. 1223/2002 of July 8, 2002 ("Regulation No. 1223/2002"), boneless chicken cuts, frozen and impregnated with salt in all parts, having a salt content by weight of 1.2 to 1.9% is classified under heading 0207.14.10 of the CN.

3.2 The ordinary meanings of the term "salted", as discussed by the parties to the dispute in their respective written submissions, does not clearly indicate that the salting process under heading 0210 must be intended for preservation purpose only.

3.3 In "context" examination for interpretation of Schedule LXXX, China notes that the explanatory notes to heading 0210 and chapter 2 of the *Harmonized System* and its *Explanatory Notes* are relevant to this case.

3.4 In explanatory note to heading 0210, there is no clear indication that salting under heading 0210 must be for long-term preservation purpose.

3.5 The only place in Chapter 2 of the *Harmonized System* and its *Explanatory Notes* that salting relates to preservation is in the explanatory note to Chapter 2.

3.6 The EC's Commission Regulation No. 1871/2003 of October 23, 2003 ("Regulation No. 1871/2003") provides that, according to the explanatory note to Chapter 2, the reasoning applied to fresh meat applies equally to frozen meat, i.e., fresh meat remains classified as fresh meat even if it has been packed with salt as a temporary preserving agent during transport.

3.7 The reasoning in Regulation No. 1871/2003 finds no clear textual basis in the *Harmonized System* and its *Explanatory Notes*.

3.8 First, the *Harmonized System* and its *Explanatory Notes* do not contain same or similar languages annex to terms "frozen" as the term "fresh".

3.9 Second, even if this reasoning applies equally to frozen meat, the only situation that chicken meat that has been both frozen and salted could be classified under heading 0207 is that the frozen chicken meat is "packed with salt as a temporary preservative during transport" rather than "impregnated with salt in all parts" with a minimum salt content of 1.2%.

IV. EC'S CLASSIFICATION PRACTICE AND LEGISLATION DURING THE URUGUAY ROUND NEGOTIATIONS

4.1 At the time of the Uruguay Round, the applicable classification legislation of the EC was Council Regulation (EC) No. 2658/87. Prior to the end of the verification process of Schedule LXXX, the EC published its Commission Regulation (EC) No. 535/94 on March 9, 1994 ("Regulation No. 535/94") to amend Annex I to Regulation No. 2658/87.

4.2 Regulation No. 535/94 defined the term of "salted" of heading 0210 of the CN as "meat or edible meat offal which has been deeply and homogeneously impregnated with salt in all parts, having a total content not less than 1.2% by weight".

4.3 Regulation No. 535/94 also stipulated that a total salt content of 1.2% or more by weight was an appropriate criterion for distinguishing between salted meat and fresh, chilled or frozen meat.

4.4 Regulation No.535/94 was published within the verification period of Schedule LXXX, and entered into force on April 1, 1994 - right before the conclusion of the Uruguay Round negotiations.

It may be reasonable to expect that a regulation, promulgated by a member at the end of the Uruguay Round negotiation, has set out the criteria for classifying salted meat as adopted by that member during the Uruguay Round negotiations.

4.5 China notes that the definition of "salted" of heading 0210 as established by Regulation No. 535/94 remained in force in the CN until the adoption of Regulation No. 1223/2002.

ANNEX B-2

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

(29 September 2004)

I. INTRODUCTION

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

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

II. DISCUSSION

3. As Brazil and Thailand explained in their submissions, the key term at issue in this dispute is "salted." Whether the products Brazil and Thailand export to the EC may benefit from the concession the EC made for heading 0210, which covers "other salted meat," depends on the meaning of the term "salted." Thus, in view of the obligations contained in paragraphs 1(a) and (b) of Article II of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the issue is whether the EC made a concession in the Uruguay Round with respect to the tariff treatment of "salted meat" under heading 0210 that covers the products Brazil and Thailand export.

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

5. In 2002, the EC published Regulation 1223/2002, which stated that, for purposes of heading 0207, "The addition of salt does not alter the character of the product as frozen meat of heading 0207." In 2003, the European Commission "clarified and confirmed" that frozen boneless chicken cuts with a salt content by weight of 1.2% to 1.9% were to be classified under heading 0207, not 0210, and required Germany to withdraw a decision that salt contents of 1.9% to 3.0% were classifiable under heading 0210. Later that year, the EC published Regulation 1871/2003, which amended the note in chapter 2 of its CN defining "salted meat" for the purpose of heading 0210 to add the conditions that "it is the salting which ensures long-term preservation."

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

7. Without taking a view on who is correct, the United States wishes to emphasize that the evidence of the meaning of the terms in the EC's CN before the EC concluded Schedule LXXX must be relevant to understanding what tariff concession the EC granted and, therefore, what the EC's obligations are under Article II of the GATT 1994. The Appellate Body noted in *European Communities – Customs Classification of Certain Computer Equipment* that the "only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*."[3] The United States agrees that the term "salted" in heading 0210 must be examined pursuant to the customary rules of interpretation of public international law reflected in Article 31(1) of the *Vienna Convention*; that is, "in accordance with the ordinary meaning to be given to the term ... in [its] context and in the light of [the treaty's] object and purpose." The United States believes that the meaning the EC gave to the word "salted" prior to the conclusion of its Schedule is relevant evidence of the ordinary meaning of that term. In other words, the meaning that the EC itself assigned to the term "salted" would appear to be evidence of what the EC itself accepts as being within the scope of the ordinary meaning of the term.

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

9. As Brazil points out, "there is nothing in the ordinary meaning of the term 'salted' that suggests that it is exclusively a process used to ensure [long-term] preservation."[4] On the other hand, it is clear that the ordinary meaning of "salted" does include the meaning contained in the 1994 CN note. Even the EC acknowledges that one meaning of "salted" is that the meat's "flavour has been altered by the addition of salt."[5]

10. Alternatively, the Panel could consider the 1994 CN note defining the term "salted," as well as the classification practice of the EC during the Uruguay Round of these products, as part of "the circumstances of [the] conclusion" of the WTO Agreement that may be used as a supplementary means of interpretation pursuant to the customary rules of interpretation reflected in Article 32 of the *Vienna Convention*. As the Appellate Body observed in *European Communities – Customs Classification of Certain Computer Equipment*, "we consider that the classification practice in the

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

[2] EC First Submission, para. 88.

[3] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* (*EC – Computer Equipment)*, WT/DS62/AB/R, WT/DS67/AB/R, 68/AB/R, adopted June 5, 1998, para. 84.

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

[5] EC First Submission, para. 121.

European Communities during the Uruguay Round is part of 'the circumstances of [the] conclusion' of the WTO Agreement and may be used as a supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention."[6] Further, "If the classification practice of the importing Member at the time of the tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, surely that Member's legislation on customs classification at that time is also relevant."[7] Accordingly, recourse may be had to the 1994 CN note and the EC's classification practice to confirm the ordinary meaning of "salted" or to determine its meaning if its meaning is otherwise ambiguous or obscure.

III. CONCLUSION

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

[6] Appellate Body Report, *EC – Computer Equipment*, para. 92.
[7] Appellate Body Report, *EC – Computer Equipment*, para. 94.

ANNEX C

RESPONSES TO QUESTIONS BY THE PANEL AND OTHER PARTIES

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ANNEX C-1

RESPONSES BY BRAZIL TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(14 October 2004)

FOR BRAZIL:

1. In its Panel request, Brazil identifies "the measures at issue" as EC Regulation 1223/2002 and EC Commission Decision of 31 January 2003. Is Brazil challenging these measures as independent and autonomous measures? If not, please explain.

In the request for the establishment of a Panel, Brazil identified the following as the specific measures at issue:

(1) Commission Regulation (EC) No. 1223/2002, published in the Official Journal of the EC on 9 July 2002, concerning the classification of certain goods in the Combined Nomenclature (CN); and

(2) EC Commission Decision of 31 January 2003, published in the Official Journal of the EC on 12 February 2003, concerning the validity of certain binding tariff information (BTI) issued by the Federal Republic of Germany.

These are the measures being challenged.

Nonetheless, Brazil considers that certain measures, namely Regulations No. 1871/2003 and No. 2344/2003, came to pass as a result of the changes in classification and tariff treatment brought about by Regulation No. 1223/2002 and Commission Decision of 31 January 2003. To be exact, because Regulation No. 1223/2002 and EC Commission Decision modified – or gave a new interpretation to – the scope and definition of products falling under subheading 0207.14.10 so as to include "other salted meat" of subheading 0210.99.39; the EC was required to adjust the then existing definition of "salted meat" of heading 0210 in its Combined Nomenclature to avoid conflict with the new interpretation of the definition and scope of subheading 0207.14.10. This change in the definition of "salted meat" of heading 0210 occurred by means of Regulations No. 1871/2003 and No. 2344/2003. These measures were published in the EC's Official Journal a little over a month after Brazil made its formal request for the establishment of a Panel.

Brazil considers that if Regulation No. 1223/2002 and Commission Decision of 31 January 2003 are found to be inconsistent with the EC's obligations under Article II of the GATT 1994 and the Panel recommends that the EC bring these measures into conformity; Regulations No. 1871/2003 and No. 2344/2003, which stem from Regulation No. 1223/2002 and Commission Decision, would consequently also have to be brought into conformity.

In line with our understanding, the Panel in *Argentina – Footwear* concluded that measures not listed in the panel request or legal acts that occur subsequent to the listed measure may properly fall within a Panel's terms of reference if they are "closely related" to a measure listed in the Panel request.[1] The Implementation Panel in *Australia – Salmon*[2] and the Panel in *Japan – Film*[3] also

[1] WT/DS121/R, paras. 8.23 to 8.46.
[2] WT/DS18/RW, para. 7.10.
[3] WT/DS44/R, para. 10.8.

considered "closely related measures", "implementing measures" or measures which have a "clear relationship" to be within the terms of reference.

Moreover, the Panel in *EC – Bananas III*[4] established that the identification of the general banana "regime" was sufficient to permit the complainants' challenge against "subsequent" legislation. Regulations No. 1871/2003 and No. 2344/2003 were issued after the establishment of the Panel in the present case, therefore, these regulations could not have been mentioned in the request for establishment of the Panel. Paragraph 8.34 of the panel report in *Argentina – Footwear (EC)* mentions that: "*Argentina's procedural objections concern modifications of the definitive safeguard measure which is a situation quite similar to the "subsequent EC legislation, regulations and administrative measures ... which implement, supplement and amend [the EC banana] regime" and were found to be within that panel's terms of reference."*

Regulations No. 1871/2003 and No. 2344/2003 "further refine and implement the basic regulation"[5]: EC Regulation No. 1223/2002. Therefore, in order to secure a positive solution to the dispute, as required by article 3.7 of the DSU, these Regulations also fall within the Panel's terms of reference and shall also be brought into conformity if found to be in violation of the WTO Agreement.

2. Brazil is requested to provide proof of its assertion in paragraph 3 of its first written submission that it commenced exporting salted chicken to the EC in 1998 in response to requests from the European processing industry.

Brazil is providing in Exhibit BRA-29 correspondences, invoices, bills of lading and purchase orders of sales of salted chicken meat from Brazil to the EC dated as far back as 1998. Brazil stresses that all documents contained in Exhibit BRA-29 and all information therein (including names of importers and processors) are highly sensitive and **confidential** and should be treated as such during and after these proceedings.

We understand that the EC does not dispute that Brazil effectively started exporting salted chicken to the EC, in 1998, under heading 0210. We understand that the EC is questioning whether there is "demand" in Europe for the product salted chicken meat. In that regard and in addition to Exhibit BRA-29, Brazil is submitting Exhibit BRA-30 with letters from European companies attesting why they prefer salted chicken meat over unsalted chicken meat. We note that the last two letters in Exhibit BRA-30 show precisely the opposite situation: European companies that sell chicken meat for direct consumption and cannot use salted meat for that end-use. Brazil again emphasises that all letters and information contained in Exhibit BRA-30, specially names of importers and processors, are **confidential** and should be treated as such during and after these proceedings.

3. With reference to paragraphs 50, 177 and 178 of its first written submission, Brazil is requested to provide copies of BTIs that prove that the specific products at issue in this dispute (i.e. frozen boneless chicken cuts with a salt content of more than 1.2%) were classified under heading 0210.90.20 up until the enactment of EC Regulation 1223/2002.

To the best of Brazil's knowledge, binding tariff information (BTI) means tariff information issued by customs authorities of EC Member States that is binding on the administration of all Community Member States.[6] Once BTIs are issued, they are introduced into a data-base run by the EC Commission and are legally valid in all Member States, regardless of the issuing Member State. The holder of a BTI, the person in whose name the binding information is issued, must be able to

[4] WT/DS27/R, para. 7.27.
[5] *Id*.
[6] Article 5.1 of Commission Regulation (EEC) No. 2454/93, of 2 July 1993, laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code.

prove that for tariff purposes the goods declared correspond in every respect to those described in the information.[7] BTIs are generally valid for a period of six years, counting from the date they are issued.[8]

Considering the above, Brazil notes that BTI is information that EC authorities and BTI holders (importers) have easy access to; it is not information that non-EU producers/exporters or the Brazilian Government can easily obtain. Brazil stresses that the Communities are the only Party to this dispute that has full and immediate access to the BTIs issued by its Member States and that, under Article 13 of the DSU, the Panel has the right to request this information from the EC. In *Canada – Aircraft*, the Appellate Body concluded that Members are "*under a duty and an obligation to 'respond promptly and fully' to requests made by panels for information under Article 13.1 of the DSU*." [9] In addition, the Appellate Body made clear that adverse inferences could and should be drawn in case of refusal to cooperate: "*a refusal to provide information requested by the panel may lead to inferences being drawn about the inculpatory character of the information withheld*."[10]

Nonetheless, in seeking to provide the Panel a proper response, Brazil was able to attain copies of some BTIs issued for frozen boneless chicken cuts with a salt content of more than 1.2% from Brazil that were classified under subheading 0210.99.39.[11] Furthermore, Brazil points out that Thailand submitted as Exhibits THA-24(b) and THA-24(c) BTIs for frozen salted chicken with a salt content of over 1.2% under subheading 0210.99.39 that also came from Brazil.

Moreover, Brazil again recalls that the EC has not denied that BTIs classifying the product at issue under heading 0210 have been issued since Brazil started exporting it to the European market.

We also recall that at the first meeting of the Panel with the parties, Brazil asked the EC for means of accessing BTIs issued by the Member States. The EC delegation did not offer any indication of what Brazil could do, or would have to do, to obtain such information.

4. In paragraph 102 of Brazil's first written submission, Brazil relies upon scientific literature which it says indicates that when used "in conjunction with other preserving processes, such as refrigeration, dissection (*sic*) and smoking (…) salt exerts a good microbicidal effect at concentrations as low as 1-3%". Could Brazil comment on the fact that the reference to "smoking" in this quotation indicates that smoking, being one of the terms contained in heading 0210 of the EC Schedule, is used as a preservative.

Brazil has previously provided that it is possible for some meat, prepared by salting, drying or smoking, to also be preserved by those processes.[12] We have also submitted that salting is a preparation process that may serve many purposes, including – but not limited to – preservation.[13] In addition, preservation is not an absolute and unequivocal concept. A product may undergo a process that allows preservation for entirely different time spans: from a few hours to indefinite duration. Therefore, and within our understanding, preparation by smoking may in some cases also serve to preserve meat for varying spans of time but that is certainly not the only or main reason why meat is smoked.

[7] Article 12.3.4 of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code.
[8] Article 12.4 of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code.
[9] WT/DS70/AB/R, para. 187.
[10] *Id*, para.204.
[11] Exhibit BRA-31.
[12] Brazil's First Written Submission, para. 40.
[13] Brazil's First Written Submission, para. 23.

In Exhibit BRA-16, we have submitted some literature regarding the process of smoking and its characteristics. In particular, we have provided that "*smoking is understood as the process of applying smoke to food products, in which the smoke is produced by the incomplete combustion of some previously selected woods. Smoked products can be defined as being those products which (…) are submitted to smoking process in order to confer them a characteristic aroma and flavor, in addition to a longer shelf life, by means of partial dehydration. The smoking process is not solely used with the purpose of preserving food, but also as part of a technology capable of conferring on smoked products organoleptic characteristics such as a pleasing color, flavor, and aroma. (…). They obtain an aroma and taste which are characteristic of smoked meat products*".[14] We have also provided that "*even though the majority of smoked meat products present greater stability and a longer shelf-life (…); still, in order to prevent alterations, other means of preservation are required."*[15] We have also cited in our oral statement that some smoked processes are **insufficient** to inhibit outgrowth of certain poisonous organisms and to avoid risk some smoked fish must remain frozen from the time of production to cooking and/or consumption.[16]

But perhaps more important and revealing is the fact that some EC Member States concede that salting and/or smoking is what gives meat its character even when freezing is required to preserve the product. In that sense, Brazil is submitting as Exhibit BRA-32 extract from the minutes of an EC Customs Code Committee meeting that unequivocally show that Denmark and other Member States consider that bacon, which is salted/smoked **and** frozen, should "remain" classified in heading 0210, even when frozen. If, as proposed by the EC, freezing is what confers the character (and classification) of a product then why is salted/smoked bacon that requires freezing to be classified under heading 0210? We know why. Bacon is classified under heading 0210 because the salting/smoking process is what gives the product its character and not the fact that it was frozen.

5. With respect to the 1991 US tariff classification ruling on the classification of mechanically de-boned chicken meat from Canada referred to by Brazil in paragraph 79 of its first written submission:

(a) Brazil is requested to provide further explanation of how this ruling supports the view that the products at issue which are *both* frozen and salted should be classified under heading 0210 rather than heading 0207 of the EC Schedule.

As provided in our First Submission, the 1991 US ruling relates to mechanically deboned chicken meat, which is marketed "*either fresh **or** frozen **and** with **or** without cure*".[17] In other words, the products at issue in that case were: cured fresh meat; fresh meat without cure; cured frozen meat; and frozen meat without cure. The ruling provided that fresh chicken meat, **not cured**, and frozen chicken meat, **not cured**, should be classified under subheadings 0207.39.0020 and 0207.41.0000, respectively, of the Harmonised Tariff Schedule of the US (HTSUS).[18] Based on this ruling, it is safe to say that the authority considered that only fresh or frozen chicken meat that had **not** been cured fell under heading 0207. The ruling further established that chicken that **has been cured** (whether fresh or frozen) should be classified under subheading 0210.90.2000 of the HTSUS.[19]

This ruling was provided as an example that **unprepared** poultry meat falls under heading 0207 and **prepared** poultry falls under heading 0210. We understand that the same reasoning applies

[14] Literature on the Action of Salt in Meat. João Andrade Silva at page 175. Exhibit BRA-16.
[15] Literature on the Action of Salt in Meat. John C. Forrest at page 247. Exhibit BRA-16.
[16] Brazil's Oral Statement at the First Substantive Meeting, para. 42.
[17] Paragraph 2 of Ruling NY 869661. Exhibit BRA-15.
[18] Paragraphs 3 and 5 of Ruling NY 869661. Exhibit BRA-15.
[19] Paragraph 7 of Ruling NY 869661. Exhibit BRA-15.

in the instant case. Salted chicken cuts are prepared poultry meat and should be classified under heading 0210, irrespective of whether it is fresh, chilled or frozen.

(b) With respect to the definition of "curing" in Annex 2 of the EC's first written submission, does Brazil agree with that definition? Further, does Brazil agree that, given the definition of "curing", the ruling suggests that salted meats falling within heading 0210 must be preserved?

Brazil does not agree with the EC's interpretation that the term "cure" can only refer to a treatment designed to preserve meat.[20] The term "cure", for example, also means "to prepare or alter esp. by chemical or physical processing for keeping or use".[21] Brazil understands that, much like salting, curing was an ancient form of preservation of foodstuff; but, nowadays, its exclusive use for preservation is relatively rare.[22] We do not affirm this because we "think" this is so. We affirm this because scientific literature says so.

Below we provide several passages, from several authors, that confirm that even though curing was originally used for preservation, this is no longer its chief purpose. Today, curing is less known for its preservative effect than for imparting special properties on meat, such as: flavor, colour, yield, etc. By and large, for cured products to be preserved they must be held in cool or refrigerated conditions.

What is in a Cure?

The most frequently used curing agents are sodium chloride, nitrate, nitrite, sugar, spices, glycerin, etc., where salt is the fundamental curing agent.[23] In fact, "*salt (…) is the only ingredient necessary for curing*".[24]

The Modern Use of Cure / Curing Process

"*From a historical point of view, **curing** of meat may be defined as the process of adding salt (ClNa) to meat with the purpose of preservation. The exact origin of the cure is lost in time. (…) The term '**curing**' of meat eventually **came to mean the addition of salt**, sugar, nitrate and/or nitrite. (…) With the arrival of an efficient commercial refrigeration and the almost universal domestic refrigerator, the need to **preserve** meat **by curing** has **greatly decreased** and **other factors**, such as flavor, color and yield **are** today **of greater** importance than the preserving effect obtained.*"[25]

This view is shared by other authors that state that: "*With the arrival of modern food preservation methods, particularly those based on low temperatures, salting **lost** much of its importance as a food preservation process; however, the application of salt, separately or together with other substances, is still largely used in order to **cure** the product, which is **characterized by food organoleptic modifications**, greatly pleasing to consumers.*",[26] and that "*(…) the objective of the **process of curing is not to preserve meat** in a similar state as that of the fresh product. It is more, the*

[20] EC's First Written Submission, para. 117.

[21] *The Merriam Webster's Collegiate Dictionary – Tenth Edition*, Merriam-Webster, Incorporated, 1993, p. 284 (emphasis added).

[22] EC's First Written Submission, paras. 37 and 39.

[23] Literature on the Action of Salt in Meat. José Evangelista at page 409. Exhibit BRA-16.

[24] Literature on the Action of Salt in Meat. Montana Meat Processors Convention at page 11. Exhibit BRA-16.

[25] Literature on the Action of Salt in Meat. James F. Price at pages 393 and 394. Exhibit BRA-16.

[26] Literature on the Action of Salt in Meat. José Evangelista at page 408. Exhibit BRA-16.

value of the cured meat depends on the different organoleptic quality it acquires as a consequence of that process."[27]

Today's Cured Products Cannot Be Preserved Without Cooling / Refrigeration

US meat processors also concur that meat curing no longer serves to preserve meat. In particular, they provide that "*meat **curing** was used originally almost entirely as a means of preserving meat during times of plenty to carry over to times of scarcity. (…) The almost universal availability of home refrigerators has, however, greatly altered the reasons for **curing**. Today, **cured meat products** are generally mild-cured and **must be stored under refrigeration***."[28]

Specifically with respect to preservation, the literature provides that "*(…) in current practice, where 2 to 3% of salt is added so that the **cured** product presents a pleasing taste, the salt **lacks a significant preserving effect** in products with a humidity content of 60% or more*",[29] and that "*during storage, **cured meats** **are usually altered** mainly by changes experienced in color, followed by the consequent rancidity of fat oxidation and, in third place, **by the action of microorganisms***".[30]

For the Panel to assume and narrowly interpret that "curing" in the 1991 US ruling meant for purposes of preservation, it would have to ignore the above mentioned literature and the fact that, in that case, the salt and sodium nitrite concentrations in the cure varied according to customers' needs[31] and not to the need of preservation.

FOR THE COMPLAINANTS:

9. Why did the parties decide to bring this dispute to the WTO rather than the World Customs Organization?

Brazil decided to bring the present dispute to the WTO, and not the WCO, because it understands this to be a case of less favourable tariff treatment, within the meaning of Article II of the GATT 1994, and not a reclassification case per se. In particular, this is a case of duties being imposed on imports of salted chicken meat in excess of the duty provided for that product in Schedule LXXX. As Brazil pointed out during the first meeting with the parties, this is precisely the position taken by the EC during the proceedings of *EC – Computer Equipment*: "*(…) the EC considered that (…) the case was about duty treatment and **not** about product classification. A decision of the WCO **could not** affect the balance of concessions of the respective parties agreed upon during the Uruguay Round. (…) Customs classification, thus, was **only** the background for such tariff negotiations, but **not** its subject matter. If it were different, tariff negotiations would be carried out in the framework of the WCO and not in the WTO. (…)*".[32]

In examining whether the EC has violated Article II of the GATT 1994, the Panel will have to assess the meaning and scope of the tariff concession for "salted meat" of heading 0210 in Schedule LXXX. This is done according to the rules of treaty interpretation in the Vienna Convention. As context within the rules of the Vienna Convention, the Harmonized System and its Explanatory Notes are a relevant part in the holistic exercise of interpretation. However, the meaning and scope of tariff

[27] Literature on the Action of Salt in Meat. R.A. Lawrie at pages 301 and 302. Exhibit BRA-16.
[28] Literature on the Action of Salt in Meat. Montana Meat Processors Convention at page 10. Exhibit BRA-16.
[29] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 723. Exhibit BRA-16.
[30] Literature on the Action of Salt in Meat. R.A. Lawrie at pages 301 and 302. Exhibit BRA-16.
[31] Paragraph 2 of Ruling NY 869661. Exhibit BRA-15.
[32] *EC – Computer Equipment*, Panel Report, WT/DS62/R, WT/DS67/R, WT/DS68/R, para. 5.13 (emphasis added).

concessions at the WTO are not necessarily the same as the meaning and scope of HS headings and subheadings.

Furthermore, and to the best of Brazil's knowledge, decisions by the HS Committee of the WCO – decisions arising from dispute settlement included – are not binding and Brazil knows of no effective mechanisms that guarantee implementation or enforcement of decisions in that forum. We remind the Panel that Members ultimately bring cases to the WTO so as to obtain relief for trade that is being curtailed in a manner that is inconsistent with the obligations assumed at the WTO.

As a last note, Brazil recalls that prior to its request for consultations at the WTO, it sought guidance and clarification from the WCO with respect to the meaning of headings 0207 and 0210, in view of the case at issue. At that time, the WCO provided no clarifications with respect to the interpretation of these headings and simply directed Brazil to the WCO dispute settlement provision found in the HS Convention.[33]

10. The complainants are requested to indicate in specific terms which products they are claiming have been accorded less favourable treatment under Article II of the GATT 1994? In particular, are the products at issue: (a) frozen, boneless, salted chicken cuts; (b) frozen, boneless, salted chicken cuts with a salt content of 1.2% or more; (c) frozen, boneless, salted chicken cuts with a salt content between 1.2% – 1.9%; (d) frozen, boneless, salted chicken cuts with a salt content between 1.2% – 3%; and/or (e) any other category of chicken cuts. In addition, could the complainants indicate whether or not the products at issue have been deeply and homogenously impregnated with salt.

The products that have been accorded less favourable treatment under Article II of the GATT 1994 are frozen, boneless, salted chicken cuts, deeply and homogeneously impregnated with salt in all parts with a total salt content of not less than 1.2% by weight. This is the product at issue: "salted meat" of heading 0210, as defined by the EC in Additional Note 7 of Chapter 2 of the Combined Nomenclature prior to the conclusion of Schedule LXXX.

That this product is deeply and homogeneously impregnated with salt is a fact that has not been disputed by the parties and has actually been acknowledged by the EC. In Exhibits THA-22 and THA-23, Thailand presented minutes of meetings of the EC Customs Code Committee on the tariff classification of salted and frozen poultry meat. In the minute of the meeting of 25 January 2002, the Committee reported with respect to poultry meat from Brazil and Thailand that the issue "*concerns more specifically imports of chicken breast meat, boneless, frozen and with 1.2% to 1.4% by weight of added salt. According to the information received, the **salting meets the criteria established by the Additional Note 7 of Chapter 2 of the CN**.*"[34] More precisely, in the extract from the minutes of the meetings held from 18 to 19 February 2002, the Committee assured that "*Member States who had carried out **analysis** of the products **confirmed** that the salt was **evenly distributed throughout the meat** and the salt content was not less than 1.2% by weight, i.e., the **salting met the criteria laid down in Additional Note 7 to Chapter 2**. Hence, the frozen and salted products in question were classifiable under heading 0210.*"[35]

There is, therefore, no doubt that when frozen, boneless, salted chicken cuts from Brazil and Thailand were imported into the EC they were deeply and homogeneously impregnated with salt in all parts with a total salt content of not less than 1.2% by weight.

[33] Exhibit BRA-28.
[34] Exhibit THA-22 (emphasis added).
[35] Exhibit THA-23 (emphasis added).

11. The complainants are requested to indicate whether or not they are seeking to specifically challenge EC Commission Regulations 1871/2003, 1789/2003 and 2344/2003 in these proceedings. If so, they are requested to indicate the basis for such a challenge making reference to their respective Panel requests.

As provided in our response to question no. 1 above, the cited in the request for the establishment of the panel are Regulation No. 1223/2002 and EC Commission Decision of 31 January 2003.

Still, Brazil understands that Regulations No. 1871/2003, No. 1789/2003 and No. 2344/2003 follow and actually result from the classification and tariff changes promoted by Regulation No. 1223/2002 and EC Commission Decision of 31 January 2003. Once Regulation No. 1223/2002 and Commission Decision of 31 January 2003 changed the scope and definition of the products falling under subheading 0207.14.10 so as to include "other salted meat" of subheading 0210.99.39, the EC was forced to change the then existing definition of "salted meat" of heading 0210 as provided in its Combined Nomenclature. This change in the definition of "salted meat" of heading 0210 came about through Regulations No. 1871/2003 and No. 2344/2003.

In sum, even though these Regulations were not cited in the request for establishment of the panel, Brazil understands, as a logical consequence, that if Regulation No. 1223/2002 and EC Commission of 31 January 2003 are found to be inconsistent with Article II of the GATT 1994 and the EC is asked to bring these measures into conformity; the new definition for the term "salted meat" of heading 0210, as introduced by Regulation No. 1871/2003 and currently found in Regulation No. 2344/2003, would also have to be brought into conformity. As pointed out in the response to question one, these measures "further refine and implement the basic regulation" – EC Regulation Nº 1223/2002 – and are therefore within the Panel's terms of reference.

12. Assuming that freezing has a permanent and irreversible impact upon meat, is there some way to distinguish that impact from the impact that salting, brining, drying and smoking have on meat?

For the sake of argument, if we were to assume that "*freezing has a permanent and irreversible impact upon meat*", what distinguishes it from salting, brining, drying or smoking is that, different from those other processes, freezing does not alter the basic characteristics of meat.

This conclusion is not only supported by common sense – since frozen salted meat when thawed will still be salted meat used for the same purposes as prior to freezing – but also by the discussion incurred by the EC in another instance, an anti-dumping and anti-subsidy proceeding concerning imports of salmon from Norway, Chile and the Faeroe Islands.[36]

In that case, the issue raised was whether fresh and frozen salmon should be distinguished for the purpose of that investigation. After assessing the various types and presentations of salmon, the EC Commission considered that " *(…) freezing of salmon was [not] sufficient to alter the basic characteristics of the product. Rather than adding value to the product that was appreciated by certain users, it was considered that one of the main reasons for freezing the product was to facilitate its transport to the Community.*"[37]

From the above, it seems that the Commission considers that freezing does not have a permanent and irreversible impact upon meat, at least not to the extent that will change the basic characteristics of the product. Salting/brining/drying/smoking, on the other hand, do. We have

[36] Exhibit BRA-26.
[37] Recital (19) of Regulation No. 930/2003. Exhibit BRA-26.

provided in paragraphs 81 to 89 of our First Written Submission, in paragraph 26 of our Oral Statement, and in Exhibit BRA-16 specific information, with literary support, on the action of salt and the changes it promotes on meat.

13. Brazil and Thailand suggest in their oral statements for the first substantive meeting (paragraph 16 in the case of Brazil and paragraphs 8 and 53 in the case of Thailand) that, for the purposes of the Panel's analysis under Article II of the GATT 1994, the decisive criterion for characterising the products at issue are the objective characteristics of the product at the time of importation. What role, if any, do Brazil and Thailand consider that production processes, end-uses and the perspective of end-users should play in the characterisation of the products at issue for the purposes of the Panel's analysis under Article II?

Brazil considers that production processes, end-uses, and the perspective of end-users should not play a role in the characterisation of the product frozen salted chicken cuts for the purposes of an Article II analysis.

Here, we take a moment to remind the Panel members that the issue before them is not whether Brazil's exports to the EC of frozen salted chicken cuts, which are evenly and deeply impregnated with over 1.2% of salt, are identical to or interchangeable with frozen chicken cuts that are not salted. They are **not**, but that is beside the point here. The question before the Panel is whether frozen salted chicken cuts, which are **in fact** evenly and deeply impregnated with over 1.2% of salt, correspond to the scope and definition of "salted meat" of heading 0210 in EC's Schedule LXXX. If they do, then the EC's treatment of the product under heading 0207 is a violation of Article II of the GATT 1994.

In its question, the Panel articulates that for Brazil and Thailand the decisive criterion for characterising the product at issue are the "objective characteristics" of the product at the time of importation. That assertion is correct. But, **more importantly**, it is the EC that considers the "objective characteristics" of a product to be a decisive criterion for classification.[38] According to the EC, this criterion serves a dual purpose, it ensures: legal certainty and ease of verification by customs authorities.[39]

When, prior to the conclusion of the Uruguay Round, the EC defined the objective characteristics of "salted meat" in Regulation No. 535/94; the EC was, in fact, providing legal certainty that meat deeply and evenly impregnated with salt in all parts with a total salt content of more than 1.2% was "salted meat" for the purposes of heading 0210.

To a large extent, Brazil has included the arguments cited in the question simply to pre-empt or rebut the EC's allegation that the salted chicken cuts and the chicken cuts *in natura* are identical or interchangeable. In the event the Panel finds that it needs to address this issue, Brazil stands by the evidence it provided showing that the two products are neither identical, nor interchangeable.

14. The complainants are requested to provide details regarding the processes to which the products at issue are subjected prior to being exported to the EC. In particular, please provide details including supporting material regarding:

(a) the physical processes that are applied to the products at issue;

(b) the effects of these processes on the products at issue;

[38] Exhibit EC-12, pages 969 and 977 (paragraph 10); Exhibit THA-18, page 1276; and Exhibit BRA-27.

[39] Exhibit EC-12, pages 982 and 983 (paragraph 6); Exhibit BRA-27 (fourth paragraph after point 3).

(c) the time taken to complete these processes; and

(d) the costs and benefits that such processes entail.

(a) the physical processes that are applied to the products at issue

Brazil would start by emphasising that the information provided in this answer, especially that contained in Exhibit BRA-33, is sensitive to the Brazilian industry and is to be treated as **confidential** in all phases of these proceedings.

Brazilian producers and exporters of salted chicken meat essentially use two salting methods: dry salting (manual / tumbling) or brine (immersion / injection). The most common method used by Brazilian producers is the dry salting. Below, the Panel will find information regarding these two salting methods.

Dry salting – After chicken meat has been cleaned and put in the production line, cuts are selected, weighed and left to rest in a cooling chamber, at a controlled temperature, for a certain period. Cooling is done throughout this process to facilitate salt penetration at subsequent stages. Very low temperatures, however, deter salt penetration; while very high temperatures facilitate microbial development.[40] After the chicken cuts have rested, salt is applied on the surface of the meat. The contact of the dry salt with the meat is done by manual friction of salt on the meat surface to cause superficial dilacerations of the connective tissue.[41] These dilacerations cause an increase in the osmotic pressure and favour salt penetration.[42] Mere sprinkling or depositing salt in the meat surface does not produce an effective penetration.[43] After chicken cuts have been manually salted, they are directed to a tumbling barrel (tumbler). Meat is then tumbled/massaged for a certain period to promote even and thorough salt impregnation. After tumbling, the salted cuts are once again left to rest in a cooling chamber, at a controlled temperature, for a certain period. As observed, cooling throughout the salting process facilitates salt impregnation. The product is then put in a freezing tunnel, packaged and put in cardboard boxes for shipment. In general, this salting process takes approximately 30 to 40 hours.

Brazil is providing as Exhibit BRA-33 a more detailed description, with pictures, of the dry salting process carried out by one Brazilian producer of salted chicken meat. Brazil reiterates that all information contained in Exhibit BRA-33 shall receive confidential treatment.

Brine – Brine is a simpler method of salting. It may be done by immersion in a saline solution for a certain period or by intra-muscular or intra-arterial long needle injection to faster distribute the brine in the tissues' inner portion.[44] We further point out other factors that may also influence salt penetration: thickness of meat (better/quicker penetration in thinner pieces); temperature applied during the process; and, the size of salt crystals.[45]

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[40] Literature on the Action of Salt in Meat. Miguel Cione Pardi at pages 724 and 725; João Andrade Silva at page 184. Exhibit BRA-16.

[41] Literature on the Action of Salt in Meat. Miguel Cione Pardi at pages 723 and 724; João Andrade Silva at page 184. Exhibit BRA-16.

[42] Literature on the Action of Salt in Meat. João Andrade Silva at page 184. Exhibit BRA-16.

[43] Id.

[44] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 725; João Andrade Silva at page 184. Exhibit BRA-16.

[45] Literature on the Action of Salt in Meat. Miguel Cione Pardi at pages 724 and 725; João Andrade Silva at page 184. Exhibit BRA-16.

(b) the effects of these processes on the products at issue

The effects of salt on meat are many. However, from a purely commercial perspective, salting is good because it reduces "drip loss". "Drip loss" is the inability of the muscle tissue to retain water; it occurs from the moment chicken is slaughtered until after meat is thawed for usage. "Drip loss" represents weight loss of the product, which may translate into lower quality meat (reduction in softness and juiciness) and possible reduction in prices of the product sold. Accordingly, "drip loss" is a substantial economic problem for the chicken industry. In particular, the process of freezing and thawing greatly increases "drip loss". Frozen chicken meat (salted or not) will have to be thawed prior to usage, be it for direct consumption or for the further processing industry. If salting reduces "drip loss", it is quite reasonable that importers / further processing industry would prefer salted over unsalted meat. This is one of the main reasons why European clients request and import salted chicken meat from Brazil, because the presence of salt reduces "drip loss".[46]

Obviously the salting also affects the organoleptic characteristics of the product, which are a crucial element defining the basic characteristics of the product (flavor and texture). Salt also promotes other changes, such as in the meat's water activity and protein, which make it more suitable and appropriate for the further processing industry. This is evident from the scientific literature provided by Brazil in Exhibit BRA-16 and is also attested by the declarations contained in Exhibit BRA-30.

(c) time taken to complete these processes

As indicated in section "a" above, the salting process may take from 30 to 40 hours.

(d) the costs and benefits that such processes entail

The benefits of the salting process have been outlined in section "b" above. The costs associated with the process include: raw material (chicken cuts and salt); the acquisition and maintenance of the necessary equipment (tumblers); allocation of facilities necessary to conduct the several stages of the process (refrigerating room for example); labour used in the manual part of the process; utilities; and, also the expenses incurred by the increase of time of production by 30 to 40 hours.

15. Are the processes applied to the products at issue when they are exported to the EC from Brazil and Thailand the same as those processes applied to the products at issue when they are exported to other countries?

The salting processes applied by Brazilian producers may vary depending on the producer. Usually, salting occurs by tumbling or by needle injection.[47] However, each producer/manufacturing plant applies only one of these processes on chicken meat to obtain salted chicken cuts. Therefore, the salting process of any given producer would not change according to the intended export market.

The three major export markets for chicken meat products from Brazil are: the Middle East, Asia, and Europe. The market profile and product demand in these three regions is different. In particular, two major reasons drive exports of salted chicken cuts from Brazil to the European market.

The first one is that the EC is the only market where the Brazilian product is significantly used for further processing. As the EC itself admits, the salted chicken cuts are used by the further processing industry. Although the Communities have deceitfully argued that the salted cuts and the *in natura* cuts are interchangeable, this is simply not true. The interchangeability alleged by the EC may

[46] Exhibit BRA-30.
[47] We observe that tumbling or needle injection is just one step of the salting process.

occur only in the further processing market. The salted product cannot be sold to the final consumer or to the "foodservice industry" (supermarkets, restaurants, hotels, etc.). Almost all of Brazil's other mentioned major markets – in the Middle East and Asia – import non-prepared, cuts or whole, chicken for the foodservice industry.

The second reason is that the structure of the Schedules of the other major importers of Brazilian poultry make imports of the salted chicken cuts unattractive, even if the product were to be used by the further processing industry. Brazil refers the Panel to the table contained in Exhibit BRA-37. That table shows that, of the other 17 relevant markets of WTO Members for the Brazilian poultry industry only three, like the EC, have a higher tariff concession for heading 0207 as compared to heading 0210: Czech Republic, Japan, and South Africa. The situation is essentially the same for Saudi Arabia and Russia, which are not WTO Members yet. By and large, these markets do not use the imported product in the further processing industry to any significant extent. The vast majority, if not all of the *in natura* poultry imported from Brazil go to the foodservice industry of those countries. The same happens in Bahrain, Cuba, Hong Kong, Paraguay, Singapore, and the United Arab Emirates, which have bound identical tariffs for headings 0207 and 0210. The other eight importers (Angola, Argentina, China, Egypt, India, Oman, Qatar, and Korea) have in their Schedules higher tariffs for heading 0210 than for 0207.

16. The complainants are requested to provide details of their classification practice in relation to imports and exports of the products at issue.

Brazil does **not** import salted chicken cuts. Thus, there is no classification practice in relation to imports of this product. In fact, 2002 and 2003 import statistics show that the only chicken products imported into Brazil during that period were dehydrated chicken meat from the US under subheading 0210.99 and frozen chicken hearts from Argentina under subheading 0207.14.

With respect to Brazil's inconsistent export classification practice of frozen salted chicken the following observations are in order.

Firstly, there are no export duties assessed on exports of frozen salted chicken meat nor on frozen chicken meat *in natura*. In situations where duties do not have to be assessed, authorities are usually less rigorous when it comes to classification and will not always ascertain whether goods declared by a producer/exporter correspond to what is actually being exported. Thus, because in most cases imports are subject to duties, import classification practice turns out to be a more reliable and accurate source of classification information. It is an unfortunate but true situation. On the other hand, producers of salted chicken meat are concerned with selling their products. To do so, they will produce and sell according to customer demand. They are not particularly alert to classification issues when this has no impact whatsoever on their commercial operations or profits, which is the case of export classification in Brazil. For instance, Brazilian producers have exported the product at issue, frozen salted chicken, and described it as spiced/spicy chicken, which – if one were strictly concerned with classification – would fall under heading 1602 and not under heading 0210. Because importers are the ones paying duties, they are the ones "tuned into" such requirements. That is precisely why import classification is more accurate than export classification. There is a natural classification mechanism of "checks and balances" that is done by customs authorities and importers. In Brazil, export statistics mostly reflect the classification attributed by the exporter (or by its customs agent) to the product that is being shipped abroad. Customs authorities at the border are not as attentive as with imports, and certainly would not conduct tests to check whether the frozen chicken cuts are *in natura* or whether they are, in fact, evenly and deeply impregnated with over 1.2% of salt.

Second, we do not believe that Brazil's classification practice is relevant for the interpretation of Schedule LXXX. Here, we note that the classification practice we are talking about is "*any*

subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation".[48]

In the present case, the rules of interpretation are being applied to interpret the EC's tariff concessions for heading 0210 under Schedule LXXX. In other words, the treaty language being examined is that of Schedule LXXX. Schedule LXXX is the **EC's** Schedule of Commitments and not Brazil's, Thailand's or any other Member's Schedule of Commitment. It is the understanding of the scope and meaning of the tariff concessions assumed by the EC in Schedule LXXX that is precisely at issue here. Even though *all* Members must agree on the scope of a tariff concession made by the EC in Schedule LXXX, that tariff concession applies only to the EC. There may well be situations where Schedules of different Members are identical in all respects, including with regard to their domestic legislation. But this is not the case here. How then can the classification of other WTO Members, even those that do not trade frozen salted chicken cuts, be relevant to the interpretation of Schedule LXXX?

In this case, the EC's subsequent 4-year classification practice under heading 0210 of salted chicken meat secured the common agreement parties had at the time Schedule LXXX was concluded that for purposes of the EC's tariff concession for heading 0210, "salted meat" was "*meat (…) which has been deeply and homogeneously impregnated with salt in all parts, having a total salt content not less than 1.2% by weight*".[49]

17. Could the complainants comment on the fact that Explanatory Notes to Chapters 2 and 16 of the Harmonized System characterise both preservation and preparation as "processes".

In providing examples of meat that falls under Chapter 16 and not under Chapter 2, the HS Explanatory Notes to Chapter 2 explicitly list "*meat (…) otherwise prepared or preserved by any process not provided for in this Chapter (…).*[50] Accordingly, the HS Explanatory Notes to Chapter 16 also provide that "*This Chapter does not cover meat (…) prepared or preserved by the processes specified in Chapter 2(…)*".[51] From the language of these notes, it is clear that processes under both Chapters are grouped either as preparation or as preservation processes. We call attention to the fact that the **only** heading under Chapter 2 that explicitly applies to meat "prepared" by certain processes (salted, in brine, dried or smoked) is heading 0210.[52]

We note that the fact that the terms "preserved" and "prepared" are both characterised as "processes" in no way prejudices their meanings or makes them similar. A process is simply a "continuous and regular action or succession of actions, taking place or carried on in a definite manner" (see answer to question 67). To preserve a product is a process, to prepare a product is a process, to package a product is a process, to clear a product through customs is a process. The fact that all these actions are "processes" does not make them in any way similar or even related.

Furthermore, if as proposed by the EC, Chapter 2 of the HS was structured exclusively according to methods of preservation, there would be no need for the explicit reference in the notes to Chapter 2 and to heading 0210 of preparation processes and the term "prepared". Yet, these notes clearly and intentionally provide for preparation processes (different from preservation processes) and further establish that salting, brining, drying and smoking are such processes.

[48] Article 31.3 (b) of the Vienna Convention.
[49] Exhibit BRA-6.
[50] Exhibit BRA-24 (emphasis added).
[51] EC's First Written Submission, para. 142 (emphasis added).
[52] Exhibit BRA-24.

18. The complainants are requested to comment on the advice provided by the WCO Secretariat as set out in paragraph 29 of the EC's oral statement during the first substantive meeting concerning the classification of fish under Chapter 3 of the Harmonized System.

To begin with, Brazil understands that a letter of advice or opinion provided by the WCO Secretariat as a response to an inquiry made by a customs authority does not constitute an official WCO position or interpretation of the Harmonized System nomenclature. As the EC itself recognized, such letter "*(…) is, of course, not the same as a classification ruling or opinion made by the Harmonized System Committee*".[53] In fact, the WCO Secretariat discloses that in the event the customs authority does not agree with the views presented in its letter of advice, the Secretariat is ready to re-examine the question on the basis of further information provided by the customs authority.

On this note, the Panel should bear in mind that the Appellate Body in *EC – Computer Equipment* considered that "***decisions*** *of the WCO* ***may*** *be relevant*"[54] in the interpretation of tariff concessions in Schedule LXXX. If, as suggested by the Appellate Body, WCO decisions, which are taken by the HS Committee and approved by the Customs Co-operation Council, are questionable (*may*) as relevant means of interpretation, then opinions given by the WCO Secretariat are even more so.

Even though Brazil has not had the benefit of examining the precise terms in which the questions posed by the Cypriot authority were made and the factual circumstances surrounding that inquiry; Brazil will endeavour nonetheless to comment on the advice concerning the classification of frozen salted fish and to make a correlation between that product and the one at issue in this case.

In doing so, the first thing that stands out is the Cypriot authorities' primary concern as to "whether there is a minimum percentage of salt for salted fish on the final product and if there is any different percentage for salted fillets and salted fish in the whole". The immediate and direct response provided by the WCO Secretariat to this concern was that: "The Nomenclature does **not** offer any specific criteria as to the salt content needed to constitute 'salted fish' (…)".[55] The Panel will be able to verify that this is also true for salted meat of Chapter 02. The HS Nomenclature does not offer any specific criteria as to the salt content needed to constitute salted meat of heading 0210. However, and this is the catch, the EC's Combined Nomenclature at the time of the conclusion of the Uruguay Round negotiations did offer a very specific criteria as to the salt content needed to constitute "salted meat" of heading 0210. At the time of the Uruguay Round, "salted meat" of heading 0210 was "meat (…) which has been deeply and homogeneously impregnated with salt in all parts, having a total salt content not less than 1,2% by weight". This was the specific criteria needed to constitute "salted meat" of heading 0210, established by the EC by means of Additional Note 8 of Chapter 2 of the Combined Nomenclature. This criteria existed in the EC's Combined Nomenclature when Schedule LXXX was concluded and remained there until Regulation No. 1871/2003 changed it.

The letter of advice goes on to state that fish sprinkled with salt water or packed with salt as a temporary preservative during transportation are classified as fresh, chilled or frozen fish under headings 0302 and 0303.[56] We agree. It could not be otherwise, since this is exactly what is provided in the Explanatory Notes to these headings. Let's see. For heading 0302, the HS Explanatory Notes state that: "*This heading covers fish, fresh or chilled, whether whole, headless, gutted, or in cuts containing bones. However, the heading does not include fish fillets and other fish meat of heading*

[53] EC Oral Statement at the First Substantive Meeting, para. 27.

[54] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 90 (emphasis added).

[55] Exhibit EC-19 (emphasis added).

[56] Id.

03.04. The fish may be packed with salt or ice or sprinkled with salt water as a temporary preservative during transport. (…)".[57] For heading 0303, the notes state that: "*The provisions of the Explanatory Note to heading 03.02 apply, mutatis mutandis, to the products of this heading*".[58] Under Chapter 02 of the HS, similar language is found **only** in the HS Explanatory Notes to that chapter. Specifically, the Explanatory Notes to Chapter 2 provide that: "*This Chapter covers meat and meat offal in the following states only, whether or not they have been previously scalded or similarly treated by not cooked: (1) Fresh (including meat and meat offal, packed with salt as a temporary preservative during transport) (…)*".[59] With respect to this note, the Panel can confirm that Brazil has already specifically commented this language in paragraphs 139 through 143 of its first written submission. We do not intend to repeat those arguments but will remind the Panel that: 1) the salt reference in this note relates to fresh and not frozen meat; and 2) the packing of fresh meat with salt as a temporary preservative for purposes of transportation is **quite different** from the addition of salt to a product, through a process of preparation, that renders the product deeply and homogeneously impregnated with salt (and irreversibly different from the unsalted product).

Nowhere do the Harmonized System and its Explanatory Notes provide that Chapter 02, or Chapter 03 for that matter, is structured according to methods of preservation. In fact, we have found no WCO decisions on the subject.

The letter from the WCO Secretariat further indicates that the fish in question was subjected to a "normal" salting process before freezing and that it was not clear what exactly was meant by "normal" process. What was clear was the guidance provided that if the "normal" process mentioned by the Cypriot authority covered "*packed with salt or sprinkled with salt water as a temporary preservative during transport*" it was classifiable in heading 0303. In the present case, the salting process applied to chicken meat deeply and evenly **impregnates** the meat with salt. Hence, this process does not qualify as "*packed with salt or sprinkled with salt water*".

In the end of its letter, the WCO Secretariat cautiously volunteered that "salted" fish classifiable in heading 0305 is not **normally** lightly salted to render it necessary for freezing and declared to be unaware of frozen fish, which had been really salted and still required freezing to be preserved. This statement of the Secretariat is not supported by the facts however. Brazil has provided in paragraphs 40 through 43 of its oral statement examples of how there are meat, including fish, that have been salted and/or smoked that still need to be kept in cool or refrigerated conditions for purposes of preservation.

More importantly, the EC itself seems to consider that frozen salted/dried/smoked fish should be classified under heading 0305 and not under headings 0303 or 0304. In Exhibit BRA-34, Brazil is providing information on existing BTIs issued by an EC customs authority classifying frozen salted/dried Alaska Pollack (a type of cod fish) and frozen salted/smoked salmon under heading 0305 of the EC Combined Nomenclature and not under headings 0303 or 0304, even though these products are frozen.

Most importantly, the letter of the Secretariat merely expresses the technical opinion of one individual (Mr. I. Kusahara, who signs the letter) or possibly more. This opinion does not bind WCO Members in any way and has no legal value. This is perfectly illustrated if we take a look at other similar letters of the Secretariat.

Brazil brings to the attention of the Panel another letter of advice from the WCO Secretariat, also regarding the meaning of the term "salted". This time, however, it is the term "salted" of

[57] Exhibit EC-20 (emphasis added).
[58] Id.
[59] Exhibit BRA-24 (emphasis added).

heading 0210.[60] This time, unlike the EC, that selected a letter dated September 1997, Brazil refers to a letter much closer to us: one that is dated May 2003, slightly over a year ago. The letter in question is signed by Mr. Holm Kappler, Head of the Nomenclature and Classification Directorate, the same area where Mr. Kusahara worked when he signed his letter seven years ago. Mr. Kappler's letter was in response to a question posed by the Bulgarian Customs Administration on whether imports "*de poitrines de l'espece porcine, desosees, congelees, qui avant la congelation ont subis un salage en surface (sic)*"[61] should be classified under subheading 0203.29 or subheading 0210.12. In that case, "*les resultats du l'analyse de laboratoire, apres la decongelation, indiquent que le sel n'a penetre que dans une couche tres limitee (celle situee sous la surface du produit) et non pas en profondeur* (sic)"[62] and the authority believed, guided by the language under Additional Note 7 of Chapter 2 of the EC Combined Nomenclature, that the product should be classified under heading 0203 because it was not deeply and homogeneously impregnated with salt. The importer, on the other hand, argued that the product was classified under heading 0210 because the total salt content was approximately 1.9% by weight. Faced with this dilemma, the authority requested advice from the WCO Secretariat.

Before we go any further, we highlight that the authority's inquiry in that case was founded precisely on the fact that the product only met part of the description / criterion for "salted meat" of heading 0210, found in Additional Note 7 of Chapter 2 of the CN. In the case at hand, there is no doubt. Frozen salted chicken cuts exported from Brazil **fully** met the definition of "salted meat" of heading 0210 under the Combined Nomenclature. The Panel can verify this by looking at Exhibits THA-22 and THA-23, which show that EC Member States carried out analysis of the products that confirmed that the salting met the criteria laid down in Additional Note 7 of Chapter 2; and by looking at the BTIs provided in Exhibit BRA-31.

Back to the question posed by the Bulgarian authority, the first and foremost advice provided by the Secretariat was that "En ce qui concerne le terme "salé", **aucun** texte official **ni** Note explicative de la Nomenclature du Système harmonisé **n'en donne une définition**".[63] The Secretariat was clear: there is **no** official definition in the Harmonized System and its Explanatory Notes for the term "salted". This, we recall, was in May 2003.

The Secretariat went even further and acknowledged that the EC Combined Nomenclature had a specific criterion to define salted meat of heading 0210 and that the Bulgarian authority should turn to the EC for clarification. Here, we draw attention to the fact that the authority specifically asked for guidance with respect to the salting degree and method of heading 0210. Yet, in the exchange of letters and opinions neither the Bulgarian Authority nor the WCO Secretariat considered or even raised the point that salting had to **preserve** the product for it to merit classification under 0210. It seems reasonable that if, as the EC suggests, heading 0210 of the Harmonized System only covered meat that was preserved (as opposed to prepared) by salting, drying or smoking, the WCO Secretariat, and the Bulgarian authority itself, would have mentioned this in their letters. But the truth is that they did not.

In fact, if Mr. Kappler had the same understanding of the EC or, apparently, of Mr. Kusahara, his answer should have been quite simple: if the product is frozen, then the salting is not intended for long-term preservation and, therefore, it must be classified under heading 0207. That was not the conclusion of Mr. Kappler however, who ended his letter stating that the Secretariat was not in a position to decide on the classification of the product.

[60] Exhibit BRA-35.
[61] *Id* (emphasis added).
[62] *Id* (emphasis added).
[63] *Id* (emphasis added).

More significantly, Mr. Kappler (i) notes that Bulgaria bases its tariff classification on the Combined Nomenclature (CN) of the EC; (ii) indicates that the CN has a definition of "salted meat"; and (iii) refers the Bulgarian Administration to the Communities: "*vous devriez vous adresser à la Communauté européene pour connâitre son interpretation de cette définition*".

FOR ALL PARTIES:

56. Do the parties agree that the relevant time at which the meaning of headings of the EC Schedule – LXXX – should be assessed is the time at which that Schedule was annexed to the Marrakech Protocol on 15 April 1994? If not, at what time/during what period should such an assessment be made?

To be exact, the relevant time at which the meaning of headings in Schedule LXXX should and could have been assessed was on 15 April 1994, when the Contracting Parties signed the Final Act of the Uruguay Round and at which time Members' schedules of concessions were annexed to the Marrakech Protocol. In principle, 15 April 1994 was the last opportunity a Contracting Party had to refuse or accept adherence to the Protocol.

Members were also afforded a specific period to verify the scope and meaning of tariff concessions in other Members' Schedules. In this regard, the Appellate Body in *EC – Computer Equipment* confirmed that "*(…) a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed Uruguay Round participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions.*"[64]

We underline that, from 15 February until 25 March of 1994, Members were given the opportunity to check and control the scope and definition of each others tariff concessions. It was prior to the end of this verification process, that the EC issued Regulation No. 535/94 with its definition of "salted meat" of heading 0210. More precisely, Regulation No. 535/94, of 9 March 1994, was published in the EC's Official Journal on 11 March 1994 and came into force 21 days after publication, ironically enough on 1 April 1994.

The EC itself recognizes that Regulation No. 535/94 was published within the period for verification of tariff schedules, but argues that said Regulation only entered into force after the verification period had ended.[65] With this statement, it seems the EC is arguing that even though it made its definition of "salted meat" public prior to the end of the verification period, because Regulation No. 535/94 only entered into force after that period its definition of "salted meat" of heading 0210 did not exist at that time.

In this regard, we draw attention to the fact that previous WTO and adopted GATT panels "have always considered that mandatory legislation of a Member, even if not yet in force or not applied, can be challenged by another WTO Member".[66] If mandatory legislation not yet in force can be challenged by another WTO Member; it seems that the EC's definition of "salted meat" in Regulation No. 535/94, that was public but not in force during the period of verification of schedules, could also have been challenged by a negotiating partner during the period of verification. After all, this was to be the EC's understanding of what constitutes "salted meat" of heading 0210 in its Schedule LXXX. The rationale here is that even though the EC's definition of "salted meat" of

[64] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 109 (emphasis added).

[65] EC's First Written Submission, para. 200.

[66] Turkey – Restrictions on Imports of Textiles and Clothing Products, Panel Report, WT/DS34/R, para. 9.37 and footnote 263; and United States – Taxes on Petroleum and Certain Imported Substances, Panel Report, BISD 34S/136, paras. 5.2.1-5.2.2 (emphasis added).

heading 0210 was not yet in force, thus not applicable to current trade, it would be applicable to future trade. Publication of what the EC considered to be "salted meat" of heading 0210 gave negotiating partners the predictability needed to plan future trade. Thus, the mere knowledge by the EC's negotiating partners of what the EC considered to be "salted meat" of heading 0210 was enough for purposes of check and control of the scope and definition of tariff concessions.

57. Was the EC Schedule in question negotiated on the basis of series of offers and requests or, rather, was it based on a unilateral offer that was made by the EC?

As stated in our First Written Submission, Brazil has not found any specific document on the preparatory work of Schedule LXXX with respect to headings 0207 and 0210.[67] Nevertheless, regardless of whether Schedule LXXX was negotiated based on a series of offers and requests or on a unilateral offer by the EC, all offers made by a Member throughout a negotiating process are, in a sense and ultimately, unilateral and it is up to the negotiating partners to either accept or decline that Member's offer. Thus, in either situation – series of offers and requests or a unilateral offer – Members negotiating tariff concessions must take account of each other's definition of the products being negotiated. The tariff concessions and corresponding definitions were accepted by the other Members when they signed the Marrakech Agreement.

58. Was EC Regulation 535/94 enacted in response in whole or in part to requests made of the EC by other Members during the conclusion of the Uruguay Round for clarification regarding the headings in the EC Schedule at issue in this case?

The manner in which the above question has been framed leads Brazil to believe that perhaps it has not been clear with respect to its arguments regarding Regulation No. 535/94. Brazil has presented Regulation No. 535/94 in its First Written Submission as EC legislation on customs classification that existed at the time of the conclusion of the Uruguay Round negotiations.[68] To us, Regulation No. 535/94 is part of the circumstances surrounding the conclusion of Schedule LXXX, within the meaning of Article 32 of the Vienna Convention.

We have presented Regulation No. 535/94 in this way based on the Appellate Body's acknowledgement that "If the classification practice of the importing Member at the time of tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, **surely** that Member's legislation on customs classification at that time is also relevant."[69] The reason the Appellate Body found it so obvious that an importing Member's classification legislation, at the time of tariff negotiations, was relevant in the interpretation of tariff concessions is because a Member's legislation sheds light as to the scope and definition of the tariff commitment that Member undertook.

That being so, we turn to the Panel's question. Brazil understands that Regulation No. 535/94 was not enacted as a response to requests made by Members to the EC for clarification regarding heading 0210 in Schedule LXXX. Regulation No. 535/94 was enacted as a response to a case that seems quite similar to the one at issue here: whether salted and frozen meat should be classified under heading 0207 or under heading 0210. As a result of that case, the EC amended its Combined Nomenclature and inserted a very specific criterion that had to be met for meat to be considered "salted meat" of heading 0210. That criterion did not include the term or concept of preservation or long-term preservation.

[67] Brazil's First Written Submission, para. 166.
[68] Brazil's First Written Submission, paras. 166 to 176.
[69] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 94 (emphasis added).

59. Are there any GATT Schedules of WTO Members other than the EC's in which headings identical or similar to the headings at issue in this case exist? If so, please provide details of such Schedules and information regarding the classification practices of such Members in respect of those headings. If possible, the parties are requested to indicate how such Members classify the products at issue in this case.

In Exhibit BRA-37 we are providing the tariff concessions for heading 0210 found in the Schedules of some WTO Members.[70] Specifically, the concessions submitted are for countries that are major import markets of chicken products from Brazil. To the best of our knowledge, there are no significant markets, other than the EC, that import frozen salted chicken cuts for further processing. Thus, we were not able to obtain classification practice of other Members on imports of frozen salted chicken meat.

Nonetheless, the Panel will note that there are some slight variances among descriptions of heading 0210 and its subheadings in some Schedules.[71] Nonetheless, based on the nature of the question posed by the Panel, we would like to reiterate that a Member's tariff concession is not interpreted merely by what is provided in the tariff line of its Schedule. The Appellate Body has shown that other factors, besides the words employed in the text, are also relevant in the interpretation of a tariff concession in a Member's Schedule, including a Member's classification legislation at the time of tariff negotiations.[72]

60. The parties are requested to provide details regarding the processes to which the products at issue are subjected upon importation to the EC and prior to final consumption. In particular, please provide details including supporting material regarding:

(a) the physical processes that are applied to the products at issue;
(b) the effects of these processes on the products at issue;
(c) the time taken to complete these processes; and
(d) the costs and benefits that such processes entail.

Brazil submits that the information requested is not information that belongs to the Brazilian Government or to the Brazilian producers/exporters of salted chicken meat and is, thus, not information to which Brazil has easy or complete access to. We further note that salted chicken cuts are used as raw material in the processing of a wide variety of value-added chicken products. This means that frozen salted chicken cuts are further processed in many different ways. Consequently, the information we provide in this response is a general overview of some of the processes to which frozen salted chicken cuts are submitted in the making of value-added chicken products.

In the processing of cooked / breaded chicken products, frozen salted chicken cuts are thawed, tumbled / blended with seasoning, left to rest (to mature), pre-dusted / battered / breaded, pre-fried, cooked, frozen and packed. Depending on the product, this process may present some variations. Frozen salted chicken cuts may be thawed, ground, tenderised with seasoning, mixed with other ingredients in a mixer, formed, pre-dusted / battered / breaded, pre-fried, cooked, frozen and packed. They may also be thawed, ground, mixed with other ingredients in a mixer, formed, pre-dusted / battered / breaded, pre-fried, pre-cooked, frozen and packed.

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[70] We note that Exhibit BRA-37 also provides the tariff applied by Russia and Saudi Arabia, which are not WTO Members, but are major importing markets of Brazilian chicken products.

[71] We note that the Republic of Korea provides for a "meat of poultry" subheading within heading 0210 of its Schedule. The US and Canada, although not listed in Exhibit BRA-37, also provide in their Schedule a "meat of poultry" subheading within heading 0210.

[72] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 94.

In the processing of marinated chicken, frozen salted chicken cuts are thawed, tumbled / blended with seasoning, left to rest (to mature), packed and frozen.

In the processing of sausages and chicken deli products, frozen salted chicken cuts are thawed, ground, mixed with other ingredients in a mixer, left to rest (to mature), pressed, tied, weighed, packed and frozen. Depending on the product, this process may present some variations. Frozen salted chicken cuts may be thawed, ground, mixed with other ingredients in a mixer, pressed, cooked / smoked / chilled and packed. They may also be thawed, ground, mixed with other ingredients in a mixer, emulsified, pressed, cooked, chilled, dyed, dried, packed, pasteurised and packed a second time. They may also be thawed, ground, cut in a cutter, pressed, cooked, chilled and packed.

In the processing of chicken burgers, the frozen salted chicken cuts are thawed, ground, mixed with other ingredients in a mixer, formed, frozen, enveloped and packed. In the processing of chicken meatballs and alike, the frozen salted chicken cuts are thawed, ground, mixed with other ingredients in a mixer, formed, frozen and packed.

Regarding the descriptions above, we observe that: 1) the first step in all processes is always the thawing of frozen salted chicken meat; 2) there is no de-salting stage in all processes described (salted cuts are not de-salted for further processing); and, 3) the reference to seasoning does not include salt.

The effect of these processes on the product at issue is that salted chicken cuts are transformed into elaborated chicken products (cooked / breaded / delicatessen / etc). By and large, value-added chicken products are more expensive than less elaborate chicken products. Because salted chicken cuts are used as raw material in the making of a wide range of products, the time to complete these processes varies greatly. That said, we believe that a period of 24 to 48 hours is the time usually taken to complete these processes.

61. If boneless chicken cuts have been deeply and homogeneously salted, can they be de-salted?

Brazilian salted chicken cuts, which are deeply and evenly impregnated with a salt content of over 1.2%, cannot be completely de-salted. For the Panel's benefit, Brazil is providing as Exhibit BRA-36 a brief explanation on salting methods and the effect of desalting salted chicken meat, written by Professor Dr. Nelcindo N. Terra,[73] pursuant to information gathered from international scientific literature.

In addition, we ask the Panel to think about the EC's suggestion that salted chicken meat exported from Brazil can be de-salted and that the salting process can be largely reversed before meat is consumed.[74] If this were true, then the Panel should ask itself: Why haven't Brazilian producers and exporters simply raised the salt content in meat so as to meet the EC's new definition of "salted meat" of heading 0210? After all, if it is possible to simply de-salt the product after it has been imported so that it goes back to being the same unsalted product, with the same properties, that existed prior to salting; then why haven't producers/exporters already done this? The answer is simple.

[73] Dr. Nelcindo Nascimento Terra is a Professor at the Federal University of Santa Maria (UFSM), in the State of Rio Grande do Sul (RS) – Brazil. Professor Terra belongs to the Department of Science and Technology of Food Products of UFSM and has taught classes on meat technology.

[74] EC's First Written Submission, paras. 25 and 43.

The salting process carried out by Brazilian producers irreversibly renders the product salted, different from the product without salt.[75] Some de-salting is possible. However, Brazilian chicken meat deeply impregnated with salt **cannot be completely** desalted to the point that it goes back to being unsalted chicken with the same basic characteristics and use that existed prior to salting. Once deeply and evenly impregnated with salt, chicken meat will always present itself as salted meat, even after desalting. Brazil has no knowledge of any European importer that de-salts the product. As far as our inquiries went, we found that processors may adapt the mixture of ingredients or the recipes in order to take into account the fact that the chicken cuts are already salted.

What's more, because desalting entails the addition of water to meat for a certain period, when part of the salt is removed by the water, certain important muscle proteins, vitamins and minerals are also removed. As a result, the desalting process depletes meat of fundamental characteristics and sometimes even leaves it inadequate to be used as raw material for the processing of meat products.

62. What is/would be the process used to salt boneless chicken cuts so as to ensure long-term preservation of the cuts?

Salting for "long-term preservation" is a concept created by the EC, which has actually not been defined. Brazil, therefore, is not able to respond what is / would be the salting process necessary to ensure long-term preservation.

What we can attest is that frozen salted chicken cuts exported from Brazil to the EC were deeply and homogeneously impregnated with salt in all parts with a total salt content of over 1.2% by weight and, therefore, met the criterion set out in the EC's Combined Nomenclature for "salted meat" of heading 0210.

63. What end-products other than chicken nuggets use the products at issue as an input?

Salted chicken cuts are used as raw material in the processing of several value-added chicken products, such as: cooked, breaded, battered, marinated chicken products (e.g., patties, fingers, nuggets, meatballs); chicken wieners, sausages and other deli products; prepared meals, entrees, pies; etc.

64. Have the products at issue been salted with common salt? Does the term "salted" in the EC Schedule relate to the addition of common salt or does it include the addition of other salts as well?

Brazilian salted chicken cuts exported to the EC are impregnated with common salt. Brazil would rather not volunteer comments on whether, in abstract, the term "salted" of heading 0210 in Schedule LXXX only relates to preparation by usage of common salt or whether it can also relate to salt preparation that includes the addition of other salts.

65. Does chilling/freezing subsequent to salting, brining, drying or smoking for long-term preservation mean that the product in question should be categorised under heading 0207?

No. Chilling or freezing are processes applied to meat that merely serve to preserve it in the same manner, or with the same basic characteristics, as prior to chilling or freezing. Meat will fundamentally possess the same basic characteristics and be used for the same purposes before and after freezing. For example, salted chicken meat after thawing will be the same salted chicken meat that existed prior to freezing. The possibility that freezing may cause irreversible changes of a

[75] Brazilian First Written Submission, paras. 83 and 141.

microscopical nature, normally imperceptible to consumers, does not mean that the essential or basic characteristics of the product have changed.

On the other hand, salting, brining, drying and/or smoking are processes that have such an impact on meat that they change the characteristics of the product. We have presented in Exhibit BRA-16 literature on the action and impact of salt on meat and the different properties it conveys. In Exhibit BRA-36, we are providing an explanation, based on scientific literature, regarding different salting methods and the effect of desalting on meat, specifically that the salting process cannot be completely reversed and that desalting depletes meat of inherent and important properties.

Heading 0210 is a specific heading for meats that have been prepared by certain processes: salting, brining, drying or smoking. These processes confer the characteristic of the product and, consequently, its classification. Thus, once meat is salted, it does not matter whether it remains fresh or is kept chilled or frozen, for all purposes that meat is and will remain salted meat.

66. In interpreting headings 0207 and 0210 of the EC Schedule, should the ordinary meaning of all the terms in those headings be assessed as a whole or, rather, should the terms other than "frozen" in heading 0207 (i.e. "fresh" and "chilled") and the terms other than "salted" in heading 0210 (i.e. "in brine", "dried" and "smoked") be treated as context for the interpretation of the terms that appear to be directly at issue – i.e. "frozen" and "salted". Will the result of the interpretative exercise differ depending upon which approach is adopted? If so, please explain making specific reference to the headings at issue in this case.

Brazil has provided the ordinary meanings of all the relevant terms in heading 0207 ("fresh", "chilled" and "frozen") and heading 0210 ("salted", "in brine", dried" and "smoked")[76] because it believes that what is under examination by the Panel is the scope and meaning of the tariff concession of heading 0210 in Schedule LXXX. Accordingly, heading 0210 is composed of terms other than salted that must be interpreted as well. Furthermore, the measures at issue, namely Regulation No. 1223/2002 and EC Commission Decision, relate to the inclusion of "salted meat" within heading 0207. Thus, the scope and meaning of (all terms of) that heading must also be examined.

Brazil does not consider that the result in the interpretative exercise will differ whether the other terms of headings 0207 and 0210 are assessed as ordinary meaning or as context.

67. Can products that fall within the scope of heading 0207 of the EC Schedule be considered as having undergone a "process"? If so, please explain what is meant by "process". Can the processes to which products falling within the scope of heading 0207 are subject, if any, be distinguished from those to which products falling within the scope of heading 0210 are subject? If so, how?

Dictionaries define the term "process" as "a continuous and regular action or succession of actions, taking place or carried on in a definite manner"[77] or "a series of operations performed in the making or treatment of a product".[78] The Panel will note that the definition of the term "process" is a wide-ranging one.

Within that very broad definition, and aside from fresh meat, products under heading 0207 may be considered as having undergone a process; that is, a series of actions taken to chill or freeze

[76] Brazil's First Written Submission, paras. 71 to 75.

[77] The Shorter Oxford English Dictionary on Historical Principles – Third Edition, Oxford at the Clarendon Press, 1944, p. 1590.

[78] The American Heritage College Dictionary – Third Edition, Houghton Mifflin Company, 1993, pages 1090 and 1091.

meat. Chilling and freezing are carried out to preserve meat. Brazil does not know of any other reason for chilling or freezing meat. Thus, freezing serves to preserve meat so that after thawing it remains basically the same, and used for the same purposes, as prior to freezing.

Products under heading 0210 are also considered to have undergone a process. In other words, a series of operations that turn *in natura* meat into salted, dried or smoked meat. Salting, drying or smoking of meat is done for several reasons, including: to confer organoleptic characteristics to meat; to give it special processing properties (extraction of proteins, reduced drip loss, increased yields); and, to preserve it. Different from thawing, after meat is de-salted it will not present the same basic characteristics, and will not serve the same purposes, as it did prior to salting.

68. If some or all products that fall within the scope of heading 0207 of the EC Schedule can be considered as having undergone a "process", what is the purpose of that process? What is the purpose of the processes to which products falling within the scope of heading 0210 are subject?

Please refer to the response to question no. 67 above.

69. To what extent, if at all, is the purpose of a process to which a product is subject relevant to the interpretation of: (a) heading 0207 of the EC Schedule; and (b) heading 0210 of the EC Schedule? Should the purpose take precedence over the process in either case? If so, please explain why and in what circumstances. In the case of both headings, if there are multiple purposes underlying the processes in question, which purpose should take precedence?

For Brazil, the purpose of the processes to which the products under headings 0207 and 0210 are subject to is not relevant in the interpretation of the meaning and scope of these headings.

For instance, the process of salting or smoking meat may serve more than one purpose. One may salt, dry or smoke meat because they want to preserve it. One may also salt, dry or smoke meat because they want a product with special organoleptic qualities (or with special processing properties). Heading 0210 of Schedule LXXX does not qualify the purpose of the process of salting/bring/drying/smoking. Likewise, Chapter 2 and heading 0210 of the Harmonized System also do not qualify the purpose of the processes in that heading. They simply qualify the processes of heading 0210 as preparation process. The "salted meat" definition in Regulation No. 535/94 (and in the EC's Combined Nomenclature) also **clearly** did not qualify the purpose of the salting process. That definition merely qualified the salting process as that which leaves meat deeply and homogeneously impregnated with over 1.2% of salt, and not as that which preserves meat for long-term. We understand the EC tried to introduce [a narrow] purpose for salting by means of Regulation No. 1223/2002 and Regulation No. 1871/2003.

Based on the above, Brazil considers that purpose should not and could not take precedence over process.

70. Does the order of steps/activity entailed in a process to which a product is subject play a role in the classification of that product? Please explain making reference to the products at issue in this case.

The order of steps/activity may be relevant only to the extent that it changes the basic characteristics of the end product. As described in the response to question no. 14 and in Exhibit BRA-33, Brazilian chicken cuts are first subject to a salting process and then frozen. Hence, when the product is frozen, chicken cuts have already been deeply and homogeneously impregnated with salt. After frozen salted cuts are thawed, they go back to being salted chicken cuts with the same

characteristics and use that existed prior to freezing. Therefore, the product is salted chicken that has been frozen.

From the scientific literature submitted in Exhibit BRA-16, we understand that temperature influences salt penetration. Specifically, "*very low temperatures (…) hinders salt penetration*"[79] and "*the higher the temperature, the quicker the penetration. However, higher temperatures are liable to a greater microbial growth*".[80] If freezing (*very low temperatures*) prevents or inhibits salt penetration, than we understand it is possible that salt will not deeply and homogeneously impregnate the meat if salting occurs after the product is frozen.

71. Are there different degrees to which meat can be dried, smoked or soaked in brine? If so, is it the case that meat products can only be classified under heading 0210 if the degree of drying, smoking or soaking in brine has exceeded a particular level? If so, what are those levels and how are they determined?

Yes, there are different degrees to which meat can be dried, smoked or soaked in brine. However, when a Member specifically defines a criterion (or degree) of salting, drying or smoking for meat to fall under heading 0210, at the time it commits to a tariff related to that product, that Member is providing predictability to other Members of what constitutes meat of heading 0210 and what tariff will be applied to it.

In that sense, Brazil understands that there is not just one universal value (degree) that is applied across the board to every Schedule of Commitment. In the case of the EC, the salting value (degree) that was applicable to Schedule LXXX was that existing at the time of its conclusion. That is, that meat be deeply and homogeneously impregnated with salt in all parts with a total salt content not less than 1.2% by weight.

72. Does the reference to "poultry" in heading 0207 of the EC Schedule make it more "specific" within the meaning of General Rule of Interpretation 3(a) of the Harmonized System than heading 0210, which refers more generally to meat"? Please explain.

The short answer is no. The reference to poultry in heading 0207 does not make it more specific than heading 0210.

However, before adequately addressing the question, we would first like to remind the Panel that based on the examination of the terms of headings 0207 and 0210 and their relative Section and Chapter notes, Brazil does not consider frozen salted chicken cuts to be a product that *prima facie* falls under two or more headings.[81] For us, frozen salted chicken cuts fall under heading 0210.

As stated in paragraph 70 of our First Written Submission, the EC in its measures – and apparently throughout this proceeding – does not dispute the fact that both subheadings 0207.41.10 and 0210.90.20 include chicken meat. Hence, there is no question that chicken meat is a product covered by both subheadings. The HS Explanatory Notes explain that heading 0210 applies to <u>all kinds of meat</u>, meaning that a variety of meats are classified under that heading. This includes meat of swine, bovine animals, horses, lambs, goats, geese, turkeys, <u>chicken</u> and others. In other words, because the term "meat" under heading 0210 includes all kinds of meat, it would be just the same to state that heading 0210 refers to meat of swine, bovine animals, horses, lambs, goats, geese, turkeys, chicken, etc.

[79] Literature on the Action of Salt in Meat. João Andrade Silva at page 184. Exhibit BRA-16.
[80] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 724. Exhibit BRA-16.
[81] Brazil's First Written Submission, para. 147.

However, what is under dispute here is the interpretation and reach of the terms "salted" in heading 0210 and "frozen" in heading 0207 of Schedule LXXX. In this case, the term "salted" more specifically describes the product "frozen salted chicken cuts" than the term "frozen".

We have provided in paragraphs 150 to 156 of our First Written Submission, the reasons why salted meat is more specific than frozen meat. Salt confers special properties to meat. In particular, it changes the organoleptic characteristics (flavor and texture) of meat and provides special and important properties that favour processing (protein extraction, reduced drip loss and increased yield). These properties also have an impact on consumer perception of the product and the buyer of chicken meat must know and be able to identify whether the meat being bought has been salted or not.

73. Is the Harmonized System "context" under Article 31.2 of the *Vienna Convention*? If so, please explain by demonstrating how the various elements in Articles 31.2(a) or 31.2(b) are fulfilled.

In *EC – Computer Equipment*, the Appellate Body considered that the Panel in that case had failed to "*examine the context of Schedule LXXX (…) in accordance with the rules of treaty interpretation set out in the Vienna Convention*"[82] and was, thus, "*(…) puzzled by the fact that the Panel, in its efforts to interpret the terms of Schedule LXXX, did not consider the Harmonized System and its Explanatory Notes (…)*".[83] The Appellate Body believed, as does Brazil, that a proper interpretation of Schedule LXXX should include an examination of the Harmonized System and its Explanatory Notes.

Taking the above into consideration, Brazil considers that the Harmonized System and its Explanatory Notes are context under Article 31.2(b) of the Vienna Convention. Article 31.2(b) establishes that context, for purposes of treaty interpretation, is also comprised of "*any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*". The Harmonized System and its Explanatory Notes fulfil the elements in that Article in the following manner:

1. "*Any instrument which was made by one or more parties (…)*" – the Harmonized System Convention, with the HS nomenclature, was an instrument made by various parties to the WTO Agreement.

2. "*(…) in connection with the conclusion of the treaty (…)*" – The Harmonized System was made "in connection with" the conclusion of the WTO Agreement, in the sense that it relates to the WTO Agreement – because tariff negotiation were held on its basis – and not in the sense that it was concluded at the same time as the WTO Agreement.

3. "*(…) accepted by the other parties as an instruments related to the treaty*" – Even though not all WTO Members are parties to the Harmonized System, all WTO Members accepted that the Harmonized System would be used as basis for the negotiations of schedules of commitments.

[82] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 88 (emphasis added).

[83] *Id*, para. 89.

74. Assuming that the Harmonized System qualifies as "context" for the interpretation of the EC Schedule under Article 31.2 of the *Vienna Convention*, to what extent if at all can the General Rules for the interpretation of the Harmonized System be used to determine the meaning of the headings in question?

Relevant part of Article 1(a) of the Harmonized System Convention provides that: "(…) the "Harmonized System", means the Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading notes and the General Rules for the interpretation of the Harmonized System (…)".[84] Therefore, the General Rules for the interpretation of the Harmonized System are part of the Harmonized System and, consequently, also qualify as context for the interpretation of headings under Schedule LXXX.

We call the Panel's attention to the fact that Article 1(a) of the HS Convention does not include the Explanatory Notes as part of the Harmonized System. We point this out to show that the Appellate Body, in *EC Lan- Equipment*, knowing that Explanatory Notes were not part of the HS, intentionally gave them the same interpretative weight and status as that given to the Harmonized System.[85] We know the Appellate Body fully understood the legal nature of HS Explanatory Notes, for this was discussed during the proceedings of that case.[86] Nonetheless, the Appellate Body understood that an examination of the Explanatory Notes was also relevant in the interpretation of Schedule LXXX.

75. How are the following to be categorised, if at all, within the framework of Articles 31 and 32 of the *Vienna Convention*: (a) 1981 Explanatory Note to heading 02.06 of the EC's Common Customs Tariff; (b) the 1983 Explanatory Note for subheadings 0210.11-31 and 0210.11-39 of the EC's Common Customs Tariff; (c) the 1983 *Dinter* judgement of the ECJ; (d) the 1993 *Gausepohl* judgement of the ECJ; and (e) the December 1994 Explanatory Note to subheadings 0210.11.11 and 0210.11.19 to the EC's Combined Nomenclature?

None of the items mentioned in question no. 75 above are to be categorized within the framework of Articles 31 and 32 of the Vienna Convention.

We understand that the Appellate Body in *EC – Computer Equipment* acknowledged that EC customs classification legislation – in other words, the Combined Nomenclature – at the time of the Uruguay Round negotiations was relevant in the interpretation of tariff concessions in Schedule LXXX.[87] The Appellate Body, however, did **not** say that the Explanatory Notes to the Combined Nomenclature, specially those dating 10 years prior to the conclusion of the Uruguay Round, could be considered as part of the "circumstances of [the] conclusion" of the WTO Agreement.[88] We further highlight the fact that CN Explanatory Notes are instruments that are not legally binding and that the European Court of Justice itself has at times considered their content not to be in accordance with actual provisions of the Combined Nomenclature.[89]

Likewise, Brazil fails to see how ECJ Court cases prior to the conclusion of the Uruguay Round could qualify as "circumstances of [the] conclusion" of the WTO Agreement. In fact, Brazil, a

[84] Exhibit BRA-20 (emphasis added).
[85] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 89.
[86] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 38.
[87] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 94.
[88] Id.
[89] Exhibit THA-18, page 1284.

country based on the civil law system, understands that a Member is not required to know another Member's entire case-law and non-binding instruments, such as CN Explanatory Notes, at the time of tariff negotiations. For that purpose, it would suffice to know that Member's customs classification legislation. This is exactly what the Appellate Body in *EC – Computer Equipment* understood.

76. Can the Harmonized System be considered as comprising "relevant rules of international law" within the meaning of Article 31.3(c) of the *Vienna Convention*? If so, please explain by demonstrating how the various elements in Article 31.3(c) have been fulfilled.

No. Please refer to Brazil's response to question no. 73, where we provide that the Harmonized System and its Explanatory Notes are context within the meaning of Article 31.2(b) of the Vienna Convention.

77. Apart from the issue of timing, what is the difference, if any, in the nature of evidence of classification practice that must be adduced to prove the existence of "subsequent practice" within the meaning of Article 31.3(b) of the *Vienna Convention* as compared to the nature of evidence that is needed regarding classification practice for the purposes of Article 32 of the *Vienna Convention*?

In the case at hand, Brazil understands that there are two moments with respect to classification practice. One, prior to the conclusion of the Uruguay Round negotiations. Another, subsequent to it.

We know that prior to the conclusion of tariff negotiations, the EC did not import salted chicken meat under heading 0210. We also know that there was some debate regarding whether frozen and salted meat should be classified under heading 0210 or not, and that there was no specific classification legislation in the EC that defined or established a criterion for "salted meat" of heading 0210.

It was **prior** to the conclusion of tariff negotiations, more precisely during the verification of tariff schedules, that the EC issued Regulation No. 535/94 with a very specific definition for the product "salted meat" of heading 0210 in its Combined Nomenclature. This definition was the EC's understanding of what constitutes "salted meat" of heading 0210 and negotiating partners – exporting Members – accepted and understood that the tariffs being negotiated for heading 0210 in Schedule LXXX (and not for every Member's Schedule) applied to the products that fit the definition of "salted meat" as set forth in the EC's Combined Nomenclature.

This was a landmark, intended to clarify, once and for all, when salted frozen meat – of any type – was to be classified under heading 0210.

Subsequent to it, after the conclusion of the Uruguay Round, exporting Members began exporting salted chicken meat under heading 0210 in accordance with the definition introduced in the EC's Combined Nomenclature by means of Regulation No. 535/94. Customs authorities in the EC accepted and classified the product frozen salted chicken cuts, which met the criterion set out in Regulation No. 535/94, as "salted meat" of heading 0210. Authorities classified in this manner for a period of over 6 years (4 years for the Brazilian product and 6 for the Thai). EC legislation classification for "salted meat" of heading 0210 remained as provided in the end of the Uruguay Round until the measures at issue – Regulation No. 1223/2002 and EC Commission Decision – became effective. In other words, from 1995 until 2002, the EC maintained its classification legislation with respect to "salted meat" of heading 0210 as it was when it negotiated its tariff concessions under Schedule LXXX. Consequently, from 1996 to 2002, the EC classified imports of frozen salted chicken cuts under heading 0210.

As stated in the response to question no. 16 above, what is under examination is the meaning and scope of the tariff concession for heading 0210 under Schedule LXXX. Schedule LXXX is the EC's, and not some other Member's, Schedule of Commitment. Consequently, subsequent classification practice must be that of the EC based on its Schedule of Commitment. It may be the case that for some tariff concessions Members' Schedules are similar or identical and, in that sense, classification practice of some or all Members is relevant to establish the meaning and scope of a tariff concession. However, this is not the case for "salted meat" of heading 0210 in Schedule LXXX. For heading 0210, the EC inserted a specific definition that differs from that found in most if not all Member's Schedule. Therefore, relevant classification practice must be that of the EC's for purposes of interpretation of the tariff concession for heading 0210 of Schedule LXXX.

78. Do the parties consider that the WTO Modalities for the Establishment of Specific Binding Commitments under the Reform Programme issued on 20 December 1993 amounts to "preparatory work" within the meaning of Article 32 of the *Vienna Convention*? If so, please explain why and indicate the significance parties attach to this document?

The last paragraph of page 1 of the December 1993 WTO Modalities Paper explicitly provides that: "The revised text is being re-issued on the understanding of participants in the Uruguay Round that these negotiating modalities **shall not** be used as basis **for dispute settlement proceedings** under the MTO Agreement (sic)."[90] Members, therefore, unequivocally expressed their intention **not** to use the referred Paper as basis for dispute settlement proceedings under the WTO Agreement.

We recall that the WTO dispute settlement system also serves "(…) to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".[91] In other words, the mechanism is used to clarify WTO law according to public international rules of interpretation. Since the rules that may be applied in interpreting the meaning of a concession are the rules of interpretation in the Vienna Convention (Articles 31 and 32), Members determined that the Modalities Paper may **not** be used as "preparatory work" within the meaning of Article 32 for purposes of this dispute settlement proceeding.

In addition, we point out that "preparatory work" is to be used in the interpretation of a treaty – in this case Schedule LXXX – and not in the interpretation of the EC's import practice at the conclusion of the Uruguay Round. We state this because it seems that this is precisely what the EC does when it associates the Modalities Paper to its import practice of frozen chicken and salted meat at the conclusion of the Uruguay Round.[92]

79. What common essential feature(s) do the parties consider characterise products that fall under:

(a) Chapter 2 of the Harmonized System?
(b) heading 0207 of the EC Schedule?
(c) heading 0210 of the EC Schedule?

For products falling under Chapter 2 of the Harmonized System, the common essential feature is that they are meat or edible meat offal. The common feature of products falling under heading 0207 of Schedule LXXX is that they relate to poultry meat or edible offal that have not been prepared. With respect to heading 0210 of Schedule LXXX, the common feature of products thereunder is that they refer to meat or edible meat offal that have been prepared by salting, brining, drying or smoking.

[90] Exhibit EC-9 (emphasis added).
[91] Article 3.2 of the DSU.
[92] EC's First Written Submission, para. 53.

80. In paragraph 20 of its oral statement during the first substantive meeting, Brazil submits that "[i]mporting Members have ample margin to define their offers in such a way that their interests are fully protected". Does this mean that, in the process of making tariff commitments, Members must be taken to have anticipated, or at least, assumed responsibility for all possible changes in trade patterns?

Although Members can anticipate some changes in trade patterns, Brazil does not think it is possible for Members to fully anticipate and assume all possible changes in trade patterns when they are negotiating tariff concessions. After all, trade flow is something that has always been and always will be dynamic, with new patterns developing to fit fresh market demands and existing rules.

At the time tariffs are negotiated, Members define their offers and their obligations in terms that best suit their needs. There is no doubt about that. A Member, however, cannot possibly thoroughly foresee what its needs will be ten or more years from the date it negotiated its tariffs. It is precisely because trade flow is dynamic that it is possible, and even likely, that some new and unexpected trade pattern will develop in a way that is contrary to or that does not suit a Member's need. This is something all WTO Members are subject to.

In fact, the WTO Agreements recognise this possibility and provide ways for Members to address unexpected trade patterns. One avenue is the Agreement on Safeguards, when an unexpected surge of imports of a given product occurs. A Member may also resort to anti-dumping or countervailing measures when dumped or subsidised imports increase in volume and injury to the domestic industry ensues. A Member may even modify its Schedule of Concessions under the provisions of Article XXVIII. However, what a Member cannot do is unilaterally change its commitments simply because a new trade pattern has emerged and the corresponding concession in its Schedule no longer suits its needs.

ANNEX C-2

**RESPONSES BY BRAZIL TO QUESTIONS
POSED BY THE PANEL AND THE EUROPEAN COMMUNITIES
AFTER THE SECOND SUBSTANTIVE MEETING**

(2 December 2004)

QUESTIONS POSED BY THE PANEL

FOR BRAZIL:

81. In its reply to Panel question No. 77, Brazil submits that the definition of the term "salted" in Regulation 535/94 comprised the EC's understanding of what constitutes "salted meat" of heading 02.10 and negotiating partners – exporting Members – accepted and understood that the tariffs being negotiated for heading 02.10 in the EC Schedule (and not for every Member's Schedule) applied to the products that fit the definition of "salted meat" as set forth in the EC's Combined Nomenclature. Please provide evidence of such "acceptance" and "understanding".

In *EC – Computer Equipment*, the Appellate Body concluded that "*(…) the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members*".[1] Brazil reiterates that this "common agreement among all Members" was reached on 15 April 1994 when Members agreed to and signed the Marrakech Protocol. Regulation No. 535/94, with the EC's understanding/definition of "salted meat" of heading 0210, was published in the EC's Official Journal prior to 15 April 1994, more precisely on 11 March 1994. Thus, the Marrakech Protocol itself is the ultimate evidence that negotiating partners accepted the term "salted meat" in Regulation No. 535/94 as the definition of "salted meat" of heading 0210 in Schedule LXXX.

Brazil also understands that Members were given an opportunity, prior to 15 April 1994, to verify each others schedules so as to "check and control" the scope and definition of tariff concessions. This opportunity to verify schedules ended on 25 March 1994 and Members had until this date to raise, discuss and resolve issues with respect to the scope and definition of specific tariff concessions. Regulation No. 535/94 provided, on 11 March 1994, the EC's definition of "salted meat" of heading 0210 within the Combined Nomenclature and, consequently, within Schedule LXXX. Had Brazil, or any other WTO Member, an objection or issue regarding the EC's definition of "salted meat" they had until 25 March 1994 to bring it up and discuss it with the EC.

But, where no objections or issues were raised, there was no need or reason to expressly acknowledge acceptance of specific concessions negotiated. An implicit acknowledgement would naturally occur on 25 March 1994, at the end of the period for verification of schedules. This was the case for the tariff concession of heading 0210. Brazil did not, and did not have to, express a formal acceptance of the scope and meaning of each and every tariff line of special interest to Brazil. In this sense, what the Panel is asking is that Brazil provide the impossible proof of a negative: that Members did not object to the scope of heading 0210 in Schedule LXXX. We have searched and found no document expressing Brazil's "acceptance" of the scope and definition of heading 0210 of Schedule

[1] *EC – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 109 (emphasis added).

LXXX, nor of any other tariff line. This obviously does not mean that Brazil was oblivious to the definition and scope of headings of Schedule LXXX, some of them related to crucial Brazilian export items. This simply means that, during the verification period, Brazil found no reason to object to the definition and scope of those headings. The actual evidence of acceptance of the definition of "salted meat", as set forth in the EC's Combined Nomenclature, is the signature of the Marrakech Agreement by Brazil and by all WTO Members on 15 April 1994.

82. In its reply to Panel question No. 60, Brazil notes that, upon importation into the EC, the products at issue are "seasoned" and/or "mixed with other ingredients". Please provide proof that "seasoning" and "mixing with other ingredients" does not entail the addition of salt.

Brazil reiterates that it is the objective characteristic of the product at the time of importation that is of relevance for purposes of classification. In the case at hand, Brazil has already shown that frozen salted chicken cuts met the objective characteristics of meat of heading 0210 laid down in Additional Note 7 of Chapter 2, inserted in the Combined Nomenclature by means of Regulation No. 535/94.[2] In other words, frozen salted chicken cuts from Brazil and Thailand were, in actual fact, deeply and homogeneously impregnated in all parts with a minimum salt content of 1.2% by weight when they entered the EC. This is not disputed by the EC. Accordingly, how a product is further handled after importation is not relevant for purposes of classification.

That said, we turn to the Panel's request. As a preliminary observation, we note that salted chicken cuts are used by European processors as raw material for a wide variety of value-added chicken products. Consequently, specific information regarding the composition of formulations used in the many different processes is sensitive commercial information that belongs to the European processing industry and to which the Brazilian government and producers/exporters of salted chicken cuts do not have complete and ready access to.

The information Brazil was able to obtain is that, when salted cuts are used, salt is not added in the processing of value-added chicken products. To support this information, we refer to Exhibit BRA-30 with letters from European companies attesting that processors do not need to add salt to their formulations because the cuts are already salted.[3] Brazil is also submitting, as Exhibit BRA-41, further confirmation from European processors that no additional salt – other than that found in the salted cuts – was included in the processing of chicken meat. We note that all information contained in Exhibit BRA-41, particularly names of importers and processors, is considered confidential and should be treated as such during and after these proceedings.

***FOR THE COMPLAINANTS**:*

84. How do Brazil's and Thailand's exporters describe the products at issue on their exportation documentation when exported to the EC?

Brazil has submitted as Exhibit BRA-29 a number of correspondences, invoices, bills of lading and purchase orders of sales of salted chicken cuts from Brazil to the EC for the period 1998 through 2002. By means of these documents, the Panel is able to assess how Brazilian exporters described the product at issue when exported to the EC.

Specifically, in Exhibit BRA-29(a) the product was described in a 1998 invoice as "*chicken breast, halves, skinless, boneless, without innerfillet, without medallion, uncalibrated, exe kg packed, frozen, spiced with salt*". In Exhibit BRA-29(d), we provided a 2001 invoice and bill of lading for the same transaction with the following product description: "*pechuga de pollo sin hueso y sin piel*

[2] Exhibits THA-22 and THA-23.
[3] Exhibit BRA-30. Second and third letters in the Exhibit.

sazonada con sal congelada" (chicken breast boneless and skinless seasoned with salt frozen). In Exhibit BRA-29(e), the product was described in a 2000 invoice as "*frozen chicken half breast boneless skinless salted*". In Exhibit BRA-29(f), we submitted a 2001 invoice, bill of lading and purchase order for the same transaction describing the product as "*frozen boneless, skinless, innerfillet breast salt content 1,3% by weight*". In Exhibit BRA-29(g), we submitted another set of documents for a 2001 transaction (invoice, bill of lading, purchase order) with the same product description as that found in Exhibit BRA-29(f). In Exhibit BRA-29(h) we provided an invoice, bill of lading and purchase order for a 2002 transaction, describing the product as "*frozen chicken breast, boneless, skinless, single without innerfillet salted 1,2% to 1,5%*".

Brazil is also submitting in Exhibit BRA-42 additional export documentation with the description of the product at issue. Specifically, Exhibit BRA-42(a) contains a 1998 *pro-forma* invoice, where the product at issue is described as "*frozen chicken breast, boneless skinless, in halves, without inner fillet, without middle cartilage, without medallion, 80 GM UP, salted 1,2 / 1,5% tumbled, 7,5 kg block blue foil, mini container of 570 kg*". In Exhibit BRA-42(b), the product described in a 1999 *pro-forma* invoice is "*chicken breast, frozen, half breasts, skinless, boneless, without middle cartilage, without innerfillet, without medallion, salted, normal sizes 80G UP and small sizes, packed in 7,5 kg blocks / blue foil, in mini containers of 570 kg*". Still with respect to the invoice in Exhibit BRA-42(b), we call attention to the fact that the field titled "shipment" in that invoice describes the product as salted chicken breast. We are also providing, in Exhibit BRA-42(c), a 2001 bill of lading, describing the product as "*Brazilian fresh frozen chicken breast, butterfly, with innerfillet, boneless, skinless, without tendon, salted (1,2 pct – 1,6 pct)*". Regarding this bill of lading, we note that in it the reported customs classification code for the product was NCM 0210.90. Still regarding Exhibit BRA-42(c), we are also presenting the export registration (RE) of that transaction with the customs code NCM 0210.90 reported under field No. 10 and the export receipt for that transaction. Similarly, we are submitting in Exhibit BRA-42(d) another 2001 bill of lading that describes the product as "*frozen salted chicken breast, in halves, boneless, skinless, without innerfillet, min. 1,2% max. 1,6% salt, max. 2% water*", the export registration (RE) for that transaction with the customs code for the product declared as NCM 0210.90, and the corresponding export receipt for the transaction. In Exhibit BRA-42(e), we have provided the following documentation related to one 2001 sales transaction: invoice, bill of lading, packing list, certificate of origin, animal and public health certificate (in Portuguese and English), additional declaration, and purchase order confirmation. In all documents of Exhibit BRA-42(e) the product is described as "*chicken breast fillets, boneless, skinless, salted, matured, without innerfillet, tumbled, minimum 140 G UP per piece, salt 1,2 – 1,5%, layer packed, polyliner cartons of 15 kg*".

Brazil stresses that all documents contained in Exhibits BRA-29 and BRA-42 and all information therein (including names of importers and processors) are highly sensitive and confidential and should be treated as such during and after these proceedings.

85. Please explain the export classification process for the products at issue. In particular, is this undertaken by domestic customs authorities and/or by exporters?

Based on pertinent regulations and also on information obtained from Brazilian authorities as well as producers/exporters of salted chicken cuts, Brazil is providing the following general overview of the export classification process for all chicken products, including the one at issue.

First, the exporter negotiates and defines with the importer/processor the terms and conditions of a specific sales transaction. Such process entails the definition of market destination, product description, quantity, price, payment conditions, shipment conditions and term, and other negotiated variables. The exporter then sends a *pro-forma* invoice to the importer/processor with an account of the negotiated transaction, including a description of the product. In sequence, the exporter receives a

confirmation of the *pro-forma* invoice from the importer. The exporter then directs an order for production.

In sequence, the exporter arranges shipment details (date and carrier) and sends the product from the production unit to the loading port. At this point, the exporter generates the invoice with information such as: quantity, price, product description (sometimes with the corresponding customs classification code in the Mercosul Common Nomenclature – NCM), name and address of producer, name and address of customer, loading and discharge port, terms and conditions of payment and shipment, etc. In addition, the exporter also prepares other documents required for shipment, such as: packing list and certificates (quality, sanitary).

After the container has been sterilised, the exporter – or his customs broker – registers the export transaction by filling out a document titled *Registro de Operações de Exportação* (RE) in an on-line registration system called *Sistema Integrado de Comércio Exterior* (SISCOMEX). Through SISCOMEX, the Brazilian government is able to control all import and export transactions in Brazil. The government entities that manage and are responsible for SISCOMEX are: the Secretariat of Foreign Trade (*Secretaria de Comércio Exterior* – SECEX),[4] the Federal Revenue Services (*Secretaria da Receita Federal* – SRF),[5] and Brazil's Central Bank (*Banco Central do Brasil* – BACEN). The objective of the export registration in SISCOMEX is to monitor/control all merchandise being shipped, thus assuring that what has been invoiced for export is effectively what is being shipped abroad. The RE contains information about the specific export transaction, such as: name and taxpayer registration number of the exporter; exporter's production and dispatching units; name, address and country of importer; payment and shipment terms and conditions; value of transaction; customs classification code (NCM) of the product exported;[6] product description; quantity; etc. The SISCOMEX software checks whether all fields have been properly filled out. If this is the case, the RE is issued by the system. Article 8 of Portaria SECEX No. 15, of 17 November 2004, holds the exporter responsible for the information entered into the RE.

Next, the exporter – usually the customs broker – puts together an export declaration, called *Declaração de Despacho de Exportação* (DDE), comprised of the invoice, an extract of the RE, and a request for shipment from the Department of Animal Products Inspection (*Departamento de Inspeção de Produtos de Origem Animal* – DIPOA).[7] These documents are submitted to the Federal Revenue Services at the loading port. The Federal Revenue Services then may immediately release the merchandise for shipment or it may select it for inspection. Selection for inspection in case of exports is very rare and, when it does occur, it is usually because the declared value of the merchandise is well below market price, the product description is vague or inexact, or when documentation appears to have been tampered with.

At this stage, the merchandise is released and ready for shipment. The exporter, in turn, has already sent shipment instructions to the ship owner, who – upon shipment confirmation of the merchandise – issues the bill of lading. The ship owner's customs broker has approximately 48 hours after the issuance of the bill of lading to register shipment data in SISCOMEX. There is simultaneous cross checking of information within SISCOMEX between the information provided by the exporter in the DDE and the shipment data registered by the customs broker in SISCOMEX.

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[4] SECEX belongs to the Brazilian Ministry of Development, Industry and Foreign Trade (*Ministério do Desenvolvimento, Indústria e Comércio Exterior* – MDIC).

[5] SRF belongs to the Brazilian Ministry of Finance (*Ministério da Fazenda* – MF).

[6] In Exhibits BRA-42(c) and BRA-42(d), the customs classification code (NCM) for the product is reported as 0210.90 in field No. 10 of the RE.

[7] DIPOA belongs to the Brazilian Ministry of Agriculture (*Ministério da Agricultura, Pecuária e Abastecimento* – MAPA).

If DDE matches the bill of lading, a notation/registration is issued, an export receipt is generated and the merchandise is released by SISCOMEX for shipment.

86. In paragraphs 14 and 36 of its second written submission, the EC submits that low levels (0.5%) of salt are regarded in the industry as sufficient for the purposes of preventing "drip loss". According to the EC, there is no need for a salt content of 1.2% or above for such purposes. The EC argues that, therefore, even if drip loss were relevant, it does not require that the salt content be greater than 0.5%. Please comment.

In their second written submission, the Communities asserted that a level of 0.5% of salt is regarded by the industry as sufficient to prevent "drip loss" and, thus, according to the EC there is no need to impregnate meat with a salt content of 1.2% or more.[8] We stress that, once again in these proceedings, the EC makes an allegation that is unsubstantiated by evidence.

Brazil, on the other hand, has provided letters from European companies attesting that salted chicken meat exported from Brazil to the EC – that is, meat impregnated with a minimum 1.2% of salt – is favoured over unsalted chicken meat precisely because it reduces "drip loss".[9] Thus, what the Panel has before it is the industry's confirmation that a 1.2% salt content in chicken meat effectively reduces "drip loss".

In addition, Brazil has provided technical literature explaining that water-holding capacity is the ability of meat to retain water[10] and that "drip loss" is the flipside of water-holding capacity. In other words, it is the inability of the muscle tissue to retain water, and with it protein. In connection, the literature also provides that meat treated with increasing quantities of salt becomes initially voluminous, greatly increasing the amount of retained water.[11] In simple terms, the more salt you add to the meat the greater the water-holding capacity and the lower the "drip loss". But there is a limit to the correlation between the increase in quantities of salt and the reduction in "drip loss". When meat absorbs about 5% of salt, a state of maximum "drip loss" inhibition is reached and, with this, the amount of retained water also reaches its peak.[12] By continuing to add salt, the volume of meat and retained water decreases and when it reaches a salt concentration of 10 to 12%, the process is inverted; that is, the muscle bundles have their volume reduced and the meat starts losing its own water.[13]

Translated to the case at hand, the higher the salt content (up to 5%), the lower the "drip loss". Thus, according to the evidence before the Panel, if 0.5% of salt can reduce "drip loss", a 1.2% salt content can reduce "drip loss" even more. For the processing industry, the prevention or reduction of "drip loss" in salted meat is a good thing because it means that more water and protein is retained in the final processed product.

At any rate, the Panel should not lose track of the most important point here: that it was the EC that established the objective characteristics for "salted meat" of heading 0210 as meat deeply and homogeneously impregnated with a minimum 1.2% of salt by weight. It is undisputed that salted

[8] EC's Second Written Submission, paras. 14 and 36.

[9] Exhibit BRA-30.

[10] Literature on the Action of Salt in Meat. Montana Meat Processors Convention, page 7. Exhibit BRA-16. Aguirre, S.E., Ingredientes que Aumentan la Capacidad de Retención de Agua em Productos Cárnicos, first paragraph. Exhibit BRA-38.

[11] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 724; João Andrade Silva at page 183. Exhibit BRA-16.

[12] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 724; João Andrade Silva at page 183. Exhibit BRA-16.

[13] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 724; João Andrade Silva at page 183. Exhibit BRA-16.

chicken cuts exported from Brazil and Thailand to the EC met this objective characteristic at the time of importation. That salted chicken meat impregnated with 1.2% of salt in effect reduces "drip loss" is one commercial reason why there is demand for the product in the EC. However, what determines classification under heading 0210 is that the product met the objective characteristics set out in the EC's nomenclature at the time of importation.

***FOR ALL PARTIES**:*

118. What is the distinction between "preservation" and "long-term preservation"?

Brazil has provided that the verb "preserve" means to "maintain (a thing) in its existing condition" or "to prevent (organic bodies) from decaying or spoiling".[14] Brazil understands that the concept of preservation is not absolute and unequivocal and that a product may undergo processes that allow preservation for entirely different time spans. With that in mind, we affirm that "long-term preservation" is a term not found or defined in the Harmonised System nomenclature, in Brazil's classification nomenclature and legislation, nor in the EC's Combined Nomenclature.

Furthermore, we remind the Panel that "long-term preservation" was a term created and introduced by the EC, which has never really been properly defined in this dispute. At one point, the EC seems to have qualified it as preservation for "many" or "several" months,[15] but Brazil is not certain since in the Annex to Regulation No. 1223/2002 the term appears to mean preservation for one year (12 months).[16] Still, recital (4) of Regulation No. 1871/2003 suggests that the term is preservation for a period other than transportation.[17] In *Gausepohl*, the discussed terminology for long-term preservation was "*preservation considerably exceeding the time required for transportation*".[18] In that case, we recall that the time required for transporting the meat in question was only one hour but it was preserved for up to two days, a period that was regarded by the Advocate General as considerably exceeding the time required for transportation.[19] Additional confusion as to the meaning of "long-term preservation" was introduced by the EC when it provided that salted/dried/smoked meats may be "*further preserved*" by other means – such as chilling or freezing – and still fall under heading 0210,[20] while arguing at the same time that what determines classification under heading 0210 is that salting/drying/smoking ensures long-term preservation.

Based on the absence of a legitimate definition for the term and taking into account the various meanings provided in the paragraph above, Brazil submits that it cannot establish a distinction between the terms "preservation" and "long-term preservation".

119. At the time the EC concluded its Schedule, was there evidence of the existence of trade in meats under heading 02.10 which, through salting, were preserved for less than a few months?

In all likelihood, when the EC concluded Schedule LXXX there was trade under heading 0210 of meats prepared with salt, which were also preserved by that salting for a period inferior to a few months. The trade of products such as chilled or frozen bacon and Parma ham under heading 0210 is not a recent practice. However, the questions that remain are: 1) whether a salt content of

[14] Brazil's First Written Submission, para. 76.
[15] EC's Second Written Submission, para. 41; Exhibit EC-5.
[16] Exhibit BRA-08.
[17] Exhibit BRA-10.
[18] Exhibit EC-14, page I-3056, para. 35.
[19] Exhibit EC-14, page I-3061, para. 6.
[20] EC's Replies to the Panel's Questions, paras. 54, 57 and 79; EC's Second Written Submission, para. 30.

1.2% alone preserved meats for a period of a few months, as suggested by the EC; 2) whether these salted meats were also frozen – for further preservation – when traded under heading 0210; and 3) whether the same salted meat was preserved for different time spans, depending on the distance between exporting and importing country.

Brazil searched the World Customs Organisation's (WCO) Harmonised System Commodity Database On-Line to find out what kinds of salted meat were traded under heading 0210 at the time the EC concluded its Schedule. We point out that the WCO On-line Database consists of a combination of databases obtained from Member administrations, private companies, international organisations, etc. It is designed to help users determine the classification of commodities in the Harmonised System and is part of the complementary publications and databases of the Harmonised System. Unfortunately, the On-line Database is only available for the 1996 and 2002 version of the Harmonised System. In any event, we are submitting in Exhibit BRA-43 part of the list found in the HS On-line Database of salted meat classified under subheading 0210.90 (1996 HS version). The Panel will note that "salted meat of chicken" and "salted meat of poultry" are included in this list as examples of products that fall under subheading 0210.90.

The list is also suggestive because it contains a number of products that fail to meet the absurd criterion proposed by the EC for classification under heading 0210: a "preparation that places meat in a recognisably different state, normally one which is identified by a name."[21] Products such as salted edible offal of reindeer, salted meat of beavers, salted frogs' legs, salted meat of pigeons, or salted meat of hares, to cite just a few, are hardly "instantly recognisable in the sense that bacon or charque are instantly recognisable."[22] Yet, as the list clearly shows, these are products that are normally traded under heading 0210.90.

120. With respect to Brazil's suggestion in its reply to Panel question No. 3 that the Panel should draw adverse inferences regarding the EC's failure to provide certain information requested of it by the Panel, is there any basis for the Panel drawing similar inferences regarding Brazil's and Thailand's refusal to provide export classification practice for the headings at issue?

Brazil has stated in its response to question No. 3 that Binding Tariff Information (BTI) is information that EC authorities and importers have easy access to and, consequently, it is not information that non-EC producers/exporters or the Brazilian Government can easily obtain. Consequently, only the Communities in these proceedings have full and immediate access to BTIs issued by its Member States and only the Communities can effectively provide this information to the Panel.

In question No. 53, the Panel requested that the EC provide copies of the relevant BTIs or other material to support the assertion that other customs offices – apart from those in Hamburg, Rotterdam and in the United Kingdom – did not classify the product at issue under subheading 0210.90. As a response, the EC provided an unrelated BTI for ham, not chicken, of subheading 0210.11.31 and, therefore, failed to provide the information requested by the Panel: relevant BTIs, or other supporting material, demonstrating that other EC customs offices did not classify the product at issue under subheading 0210.90. Apparently, even the Panel acknowledges that the EC failed to provide this information for it is once again requesting it in question No. 117.

In contrast, Brazil has not refused to provide export classification practice for the headings at issue. We recall that in question No. 16 the Panel asked that the Complainants provide details of their classification practice in relation to imports and exports of the product at issue. This is precisely what

[21] EC's Second Written Submission, para. 35.
[22] EC's Second Written Submission, para. 36.

Brazil did. First, we informed that there is no import classification practice for salted chicken cuts because we do not import this product. Then, we further provided that our export classification practice of frozen salted chicken was inconsistent. That is, while sometimes the Brazilian exporter or its customs agent correctly classified exports of salted chicken cuts under heading 0210,[23] Brazil concedes that other exports of the product at issue were incorrectly classified under heading 0207. In this regard, we also explained why such export practice was inconsistent. A point, however, that should not escape the Panel is that Brazil does not believe that its classification practice is relevant for the interpretation of Schedule LXXX. We have extensively provided the reasons why in our response to questions Nos. 16 and 77, in our second written submission, and in our second oral statement, and will not replicate our arguments here.[24]

In short, Brazil would like to make clear that it has not refused to provide information on its export classification practice of salted chicken cuts and, thus, believes there is no basis for the Panel to draw adverse inferences on any information and/or response it has provided.

121. What relative weight should the Panel accord to inferences that may be drawn for the headings at issue in this case from:

(a) the structure of Chapter 2 of the HS and its predecessors;

(b) the Explanatory Notes that are relevant to Chapter 2 of the HS and to its predecessors; and

(c) General Interpretative Rule 3 of the HS.

Given that the EC and Brazil have different views as to how Chapter 2 of the HS is structured, the inferences that can be drawn for the headings at issue, and the weight that should be accorded to such inferences, must be based on what is explicitly provided in the HS and in its predecessors. In this sense, the EC's view that Chapter 2 of the HS is structured according to methods of preservation finds no support in the language of the HS nor in former nomenclatures. It is simply a point of view of the EC that is not validated by the language in the HS.

In contrast, there is clear and unequivocal language in the HS Explanatory Notes to Chapter 2 and heading 0210 that clarify that the structure of Chapter 2 is based on methods of preservation and preparation, and that the processes of heading 0210 are preparation – and not preservation – processes. Clear language on the structure of Chapter 2 is also found in nomenclatures preceding the HS, which can be of assistance to the Panel in understanding how the HS was originally structured. For example, in the 1937 Draft Customs Nomenclature of the League of Nations, Chapter 2 was structured so as to place *in natura* meat at the beginning of the Chapter and "simply prepared" meat at the end.[25] The 1937 Draft also explained why the terms "fresh", "chilled" and "frozen" – terms related to preservation – were placed as tertiary items within a heading and not as separate headings. There was a real concern that fundamental distinctions not be made between "fresh", "chilled" and "frozen" because countries might be compelled to introduce in their classification nomenclature subdivisions that would lead to discrimination being made between the same meat – preserved by different methods – coming from different parts of the world.[26] This was not a concern for salted meat because salt preparation was not considered a method of preservation. That is why salted meat was placed in a separate heading within Chapter 2.

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[23] Exhibits BRA-42(c) and BRA-42(d) illustrate the point that some exports of the product at issue were classified under subheading 0210.90 when they left Brazil.

[24] Brazil's Second Written Submission, paras. 75 and 76; Brazil's Second Oral Statement, paras. 40-48.

[25] Brazil's Second Written Submission, paras. 36 and 37; Exhibit BRA-40.

[26] Brazil's Second Written Submission, paras. 38 – 41; Exhibit BRA-40.

As to the weight the Panel should accord to inferences drawn from HS Explanatory Notes to Chapter 2, we have provided that, in *EC – Computer Equipment*, the Appellate Body believed that a proper interpretation of Schedule LXXX should have included an examination of the Harmonised System and its Explanatory Notes.[27] In this dispute, all parties agree that both the HS and Explanatory Notes are relevant in the interpretation of the terms of Schedule LXXX. Specifically, Brazil and the EC consider that the HS and Explanatory Notes are context.[28] Specifically regarding Explanatory Notes, we note that the Appellate Body in *Computer Equipment* intentionally gave them the same interpretative weight and status as that given the HS.[29] We know this because in that case the US cautioned the Appellate Body of the interpretative value that should be given to these notes.[30] Although warned by the US, the Appellate Body considered the Explanatory Notes to be just as relevant as the HS itself in the interpretation of Schedule LXXX.[31]

Similarly, with respect to General Interpretative Rule 3 of the HS, Brazil has provided that it is part of the HS. We call to mind that the Harmonised System is made up of "*(…) the Nomenclature comprising the headings and subheading and their related numerical codes, the Sections, Chapter and Subheading notes and the General Rules for the interpretation of the Harmonized System (…)*".[32] Because it is part of the HS, General Rule 3 is also part of the context of Schedule LXXX. Even though Brazil does not consider that the product at issue may *prima facie* fall under two or more headings of the HS (to us it is unequivocally a product of heading 0210), if General Rule 3 is applied it should be used as part of context – alongside the other rules of treaty interpretation – in the interpretative exercise of the Panel.

122. Do the parties consider that actual knowledge during negotiations of a document or instrument is necessary on the part of some/all negotiators involved in the negotiation of a treaty in order for it to qualify for consideration as "preparatory work" and/or "circumstances of conclusion" of a treaty under Article 32 of the *Vienna Convention*? If so, please provide support for this view. If not, please provide support for this view.

To properly respond, Brazil finds it necessary to qualify the phrase "actual knowledge" found in the Panel's question.

If "actual knowledge" means that all negotiators must have been, in effect, aware of the existence and content of certain documents and instruments during negotiations, then the response is: "No". Actual knowledge of a document or instrument is not necessary on the part of some/all negotiators in order for these instruments to be considered as "preparatory work" and/or "circumstances of conclusion" within the meaning of Article 32 of the Vienna Convention. For example, instruments or documents may be drafted during the negotiations of a treaty without the participation of all States, contracting parties to that treaty. One cannot presume that such documents are not part of the historical background of the treaty negotiated simply because some States did or were not able to [fully and equally] participate in the discussion or drafting of such documents.

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[27] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 89.

[28] EC's First Written Submission, para. 107; EC's Replies to the Panel's Questions, paras. 95 and 102; EC's Second Oral Statement, para. 28; Brazil's Replies to the Panel's Questions, Question 73; Brazil's First Oral Statement, para. 31; Brazil's Second Written Submission, para. 27.

[29] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 89.

[30] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 38.

[31] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 89.

[32] Article 1(a) of the Harmonized System Convention. Exhibit BRA-20 (emphasis added).

On the other hand, if "actual knowledge" means that certain documents and instruments were publicly available and, thus, potentially accessible to all negotiators during negotiations, then the response is: "Yes". For a document or instrument to qualify for consideration as "preparatory work" and/or "circumstances of conclusion", that document or instrument must have been published. That is, States should have had the possibility of consulting these documents or instruments during negotiations if they wished to do so. Quite logically, one cannot possibly call upon documents or instruments that have not been published, or which are concealed, as historical documents associated with the negotiation of a treaty.

To better illustrate the distinction indicated in the above paragraphs, we quote Sir Ian Sinclair, regarding supplementary means of interpretation:[33]

> "*(…) the better view would still appear to be that recourse to travaux préparatoires* ***does not*** *depend on the participation in the drafting of the text of the State against whom the travaux are invoked. To hold otherwise would disrupt the unity of a multilateral treaty, since it would imply that two different methods of interpretation should be employed, the one for States who participated in the travaux préparatoires and the other for States who did not so participate. One qualification should, however, be made.* ***The travaux préparatoires should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them****. Travaux préparatoires which are kept secret by the negotiating States should not be capable of being invoked against subsequently acceding States.*" (emphasis added)

In the case at hand, we note that Regulation No. 535/94 was available in the public domain as of 11 March 1994, and all EC negotiating partners had the possibility of consulting the Communities' understanding/definition of "salted meat" of heading 0210 prior to the conclusion of Schedule LXXX.

QUESTIONS POSED BY THE EUROPEAN COMMUNITIES

Brazil is asked to identify and cite the specific sentences of its Exhibits which it considers supports the following claims:

- **"Brazil has provided evidence that salt at such [1.2-3%] levels has some preservative effect on meat" (Para. 2 of Brazil's Second Oral Statement)**;

Brazil has already identified and cited in footnote 1 of its closing statement the specific pages in the technical literature, provided in Exhibit BRA-16, which support the fact that 1.2 to 3% of salt in meat has some preservative effect. In the spirit of cooperation, we reproduce below some of the cited passages in Exhibit BRA-16.

Meat Science Foundations
John C. Forrest at page 246

> "*(…) the reduction of water activity to a level sufficient for an effective preservation requires a salt concentration in the finished product of 9-11%, a quantity considerably higher than the* ***2-3%*** *usually found in commercially processed products.* ***Although some micro-organisms are inhibited by these [2-3%] salt concentrations****, the water activity is still sufficiently high so as to tolerate the growth*

[33] *The Vienna Convention on the Law of Treaties, Second edition*, Sir Ian Sinclair, Manchester University Press, 1984, page 144.

of molds, yeasts and halophilic bacteria (salt lovers). Thus, on todays commercially processed meat products, ***salt only exerts a limited preserving effect, whereas these products need other methods of preservation in order to have their shelf-life extended****."* (emphasis added)

Chemical Food Preservation – Characteristics, Uses, Effects
E. Lück at page 84

"In these cases [as a preservative], ***common salt exerts a good microbial effect at concentrations as low as 1-3%.*** *These relatively small additions reduce water activity to prevent the growth of important putrefaction bacteria, such as those in sausages, hams, and salted meats.*" (emphasis added)

Meat Science, Technology and Hygiene
Miguel Cione Pardi at pages 722 and 723

"*a) on sufficiently high concentrations, salt inhibits the microbial growth by increasing the osmotic pressure of the environment, with the consequential reduction of water activity (aa);*

b) on concentrations between 1% and 3% of salt, a good antimicrobial action is exerted, in view of a reduction in the water activity (aa);

c) ***the growth of some bacteria is inhibited on low concentrations such as 2%****, while others, like yeasts and molds, are capable of growing in salt concentrations which may reach even the saturation point; whereas halophiles in general require concentrations higher than 10% NaCl;*

d) in order for the product to be properly preserved, it should contain between 50 and 55% of water, and between 9 and 11% of salt, that is, an aqueous phase almost saturated with salt;

e) the preserving effect of salt diminishes significantly when its concentration on the aqueous phase of cured meat is lower than 5.5%;

d) in current practice, ***where 2 to 3% of salt is added*** *so that the cured product presents a pleasing taste****, the salt lacks a significant preserving effect*** *in products with a humidity content of 60% or more; (…)*" (emphasis added)

Topics on Food Technology
João Andrade Silva at pages 182 and 183

"*In sufficiently high concentrations, salt inhibits microbial growth by increasing the osmotic pressure of the environment, with the consequent reduction of the water activity;* ***low concentrations of salt between 1.0 to 3.0%, already exert a significant antimicrobial action, due to the reduction in the water activity of the environment****. (…)*" (emphasis added)

"*(…) On cured meats,* ***the salt preserving effect is dramatically reduced, when its concentration is lower than 5.5%****, on the aqueous phase.* ***The preservation of products with salt concentrations lower than this value should be made by means of refrigeration (cooling).*** *(…)*" (emphasis added)

- **"Salt extracts proteins, increases water-holding capacity and yield, improves bind and texture and reduces 'drip loss' after thawing' (para. 17 of Brazil's Second Oral Statement)**

Throughout these proceedings, Brazil has identified and cited in its submissions, statements and responses, passages that validate the facts provided in paragraph 17 of Brazil's second oral statement. Specifically, we direct the Panel to paragraphs 85 - 87 and footnotes 75 - 79 of Brazil's first written submission; paragraph 26 and footnotes 15 - 19 of Brazil's first oral statement; and, paragraph 15 and footnotes 20 - 22 of Brazil's second written submission. These passages, as well as paragraph 17 of Brazil's second oral statement, are supported by: Exhibit BRA-16, scientific literature on the action of salt in meat; Exhibit BRA-30, letters from European companies declaring their preference of salted over unsalted chicken cuts because it leaves meat more tender and reduces drip loss (better yields); Exhibit BRA-36, a brief account provided by Professor Dr. Nelcindo Terra of the effect of salt on poultry meat, the different methods of salting poultry meat, and the consequence of desalting meat; and, Exhibit BRA-38, supporting information on the action of salt and different salting methods.

For ease of reference, Brazil has reproduced below extracts in the scientific literature provided in Exhibit BRA-16 that confirm the statement in paragraph 17.

Meat Science, Technology and Hygiene
Miguel Cione Pardi at page 721

> "***Salt (sodium chloride) is used on prepared meats due to its important binding attributes****, aroma/flavour and preservation.* ***One of the purposes of NaCl is to extract the myofibril proteins. The extraction and solubilization of these muscle proteins contribute to the binding of meat particle in order to emulsify the fat and increase the WHC (water holding capacity)****. Thus, it* ***reduces the losses occurred*** *when the product is cooked and* ***improves the quality and texture of the product****. When the raw product is cooked, the fat, water, and other constituents are attracted inside the coagulated meat protein matrix to* ***form acceptable products with respect to yield, softness, humidity, texture, and overall quality*** *(SCHMIDT et al (13); ACTON et al (2)). (…)*" (emphasis added)

Science of Meat and Meat Products
James F. Price at pages 381–385

> "*The binding mechanism of meat systems is complex and not completely understood. Nonetheless,* ***the more relevant factors that determined the efficiency of the bind are: the protein extraction, the mechanical labour, the presence and concentration of added salts, the pH and the heating temperature*** *(Trout and Schmidt, 1984).*" (emphasis added)

> "*(…) The* ***mechanisms by which salt increases the binding capacity of the protein matrix are****: (a)* ***by increasing the number of protein extracted****; (b) by altering the ionic force and the pH of the environment so that the stable protein matrix by the final heat forms a coherent three dimensional structure.*
>
> *An explanation of how salts increase the gel force was proposed by Siegel and Schmidt (1979a, 1979b), who demonstrated, by electronic microscope sweepings, that when myosin and actomyosin are heated in saline solutions of high ionic force, proteins formed a three-dimensional framework of fibers. Without these added salts, the same proteins formed a spongy structure with little force (Siegel et al., 1979).*

Thus, ***they concluded that the addition of salts was necessary for meat proteins to form a stable three-dimensional net***." (emphasis added)

Topics on Food Technology
João Andrade Silva at page 181

"***One of the most important roles of salt****, in the meat product industry,* ***is the extraction of myofibril proteins****. The extraction and solubilization of these muscle proteins contribute to the emulsification of fats and to the* ***increase in its water holding capacity****, thus* ***reducing weight losses*** *when the product is cooked,* ***contributing to the improvement of the quality and texture of the product.*** *(…)*" (emphasis added)

Ingredients in Processed Meat Products
Montana Meat Processors Convention at page 11

"*(…) Salt is used in most instances as a flavour enhancer but* ***it is also important to water binding ability of meat and extraction of meat proteins*** *necessary for the manufacture of boneless or chopped and formed hams. When salt is added to meat it causes swelling of the myofibrils (Hamm, 1960). With the addition of salt the isoelectric point (lowest water holding capacity) is shifted to a more acidic pH,* ***increasing the water binding ability of meat*** *at its normal ultimate pH of 5.5-5.6 (Hamm 1960).*

Salt improves water binding but also is necessary to extract proteins *in the manufacture of boneless hams.* ***Salt solubilizes actin and myosin to form the glue between muscle pieces so boneless products appear as once piece and aids in the sliceability of the finished product.*** ***Increasing levels of salt will extract more muscle proteins*** *but the amount that can be used is limited by the taste of the product. (…)*" (emphasis added)

Regarding the "drip loss" effect, we note that the EC itself asserted that the issue arises in respect of frozen food and that it concerns, more specifically, the loss of protein when thawing.[34] Accordingly, salted meat is more attractive to processors because further processed products, that use it as raw material, are able to retain more water and protein.

[34] EC's Second Written Submission, paras. 14 and 36.

ANNEX C-3

COMMENTS BY BRAZIL ON THE EUROPEAN COMMUNITIES' RESPONSES TO QUESTIONS AFTER THE SECOND SUBSTANTIVE MEETING

(9 December 2004)

QUESTIONS POSED TO THE EUROPEAN COMMUNITIES

Question 91

We begin by pointing out that the Communities failed to provide a response to the Panel's question as to how a product is dealt with by customs officials when it is not obvious that a product has been preserved by one of the means mentioned in heading 0210.

Furthermore, we recall that the EC has claimed throughout these proceedings that the product at issue does not qualify as salted meat of heading 0210 because the salting in question does not ensure long-term preservation. In responding this question, the EC states that it is "normally obvious" to customs officials what kind of salted/dried/smoked meat has been preserved, since the preservation techniques referred to in heading 0210 leave meat with specific characteristics that are readily detectable. Yet, for a period of over 6 years it was "normally obvious" to EC customs officials that the product at issue was classified under heading 0210. Apparently, the product at issue presented specific characteristics (saltiness), readily detected by EC customs officials, which put it under heading 0210.

In connection, the EC provided in response to question No. 89 that in assessing the objective characteristics of a product customs officials carry out certain steps in their inspection/analyses. Among these steps is "*the physical inspection of the product, in particular its temperature, smell, taste, colour*". There is no doubt that, upon inspection, the product at issue is readily detected as "salted meat", especially because of the salty taste of the product.

The EC also points out laboratory analysis of product samples as another possible means of inspection in the assessment of the objective characteristics of a product. Such analysis is undertaken to verify conformity with customs specifications. In the instant case, EC Member States effectively carried out analysis of frozen salted chicken cuts that confirmed that the product at issue met the objective characteristics criterion laid down in Additional Note 7 to Chapter 2 of the CN.[1] That is, customs officials actually verified that the product conformed to customs specifications.

Question 93

The EC has provided that "Regulation 535/94 sets a minimum salt content, a pragmatic rule, below which it cannot be considered that a product is salted for preservation". For the sake of argument, if we were to consider this a true statement, it seems logical that the EC would only set a 1.2% minimum salt content in heading 0210 if there was some kind of meat that, in effect, was preserved [for long-term] with this salt percentage. Otherwise, why would the EC set the minimum salt threshold at 1.2%? Yet, the EC has provided that it does **not** know of any type of meat that deeply and homogeneously impregnated with 1.2% of salt can be preserved for many or several months without chilling or freezing.[2] In another response, the EC also replied that "in order to be preserved with salt, meat should be deeply and homogeneously impregnated with a level of salt

[1] Exhibits THA-22 and THA-23.
[2] EC's Response to Brazil's Questions Following the Second Substantive Meeting, Question 2 para. 2.

sufficient to ensure long-term preservation, i.e., much higher than 3%".[3] From these responses, it is clear to us that - different from what has been argued by the EC - the 1.2% threshold in Regulation No. 535/94 was not a pragmatic minimum salt content rule below which a product is not salted for preservation (in order words, at or above which it could be salted for long-term preservation).

Besides, Regulation No. 535/94 does **not** mention "preservation" or "long-term preservation". The EC would like the Panel to believe that "*the requirement of preservation (…) flows directly from heading 0210 of the Combined Nomenclature*" and it is implicitly contained in Regulation No. 535/94. That is simply **not** true. Until the advent of Regulation No. 1871/2003, "long-term preservation" was not a concept/notion/requirement found **anywhere** in the Combined Nomenclature. One cannot, as the EC implies, interpret that it was an assumed concept within the CN because it was covered by the HS. This is also **not** true. "Long-term preservation" was **not**, and is **not**, covered or even referred to in the HS, especially with respect to salted meats of heading 0210. We have fully demonstrated this during these proceedings.

The truth of the matter is that Regulation No. 535/94 simply set out the objective characteristics criterion a product had to meet in order to qualify as salted meat of heading 0210. In this regard, the EC does not dispute that the product at issue met the objective characteristics criterion for salted meat of heading 0210: the product was deeply and homogeneously impregnated with salt in all parts with a minimum 1.2% of salt by weight.

Question 96

It is undisputed that the EC classifies Parma ham, prosciutto and jamón serrano under heading 0210,[4] even when chilled or frozen. The packages provided in Exhibit THA-25 are proof that these products need to be preserved by chilling. Brazil has also provided that Danish salted/smoked bacon is classified under heading 0210, even when frozen.[5] The EC itself has conceded that salted/dried/smoked meat that has been sliced – such as the case of Parma ham and prosciutto - is vulnerable to surface contamination unless measures [chilling/freezing] are taken to protect the meat.[6] With respect to salted/smoked bacon, the EC also admitted that it is frozen because it is sliced and put into consumer packs ready for retail sale. To the EC, the fact that it has been refrigerated to permit a longer shelf-life does not alter its classification under heading 0210.[7]

Now, the EC is altogether denying that it has ever said that these types of products require additional means of preservation. In doing so, it refers to an opinion provided by Professor Karl-Otto Honikel stating that Parma ham, prosciutto and jamón serrano are shelf-stable for many months at ambient temperatures and that, even when sliced, these products are shelf-stable,[8] although in this regard neither the EC nor Professor Honikel venture to state for how long. Perhaps, they could be shelf-stable without refrigeration for weeks, days or hours. Curiously, that information has not been provided. Still, Professor Honikel explains that moulds and yeasts may grow on unchilled sliced salted/dried/smoked meat and form unpleasant looking spots on the meat surface.[9] According to the Professor, this is the reason why sliced raw hams are chilled during storage or display. In other words, these products are chilled or frozen during storage or display to prevent the growth of moulds

[3] EC's Response to Panel's Questions Following the Second Substantive Meeting, Question 88 para, 4.

[4] We observe that the EC did not provide the classification of the products mentioned by the Panel when imported into the EC and that Exhibit EC-31 is the EC's Refund Nomenclature and not the EC's Combined Nomenclature.

[5] Exhibits BRA-32 and BRA-39.

[6] EC's Second Written Submission, para. 43.

[7] EC's Second Written Submission, para. 45.

[8] Exhibit EC-32.

[9] Exhibit EC-32.

and yeasts, microorganisms that deteriorate meat. In particular, we note that the formation of unpleasant looking spots in meat is part of the deterioration process. Thus, chilling and freezing are indeed applied to Parma ham, prosciutto, jamón serrano and bacon in order to ensure preservation.

Here, the Panel should keep in mind that if, as claimed by the EC, preservation is what really structures Chapter 2, and the processes of heading 0210 are those that ensure long-term preservation, then salted/dried/smoked meat – such as Parma ham or bacon – that are actually preserved or further preserved (for transportation, storage, display, etc) by chilling/freezing cannot be classified under heading 0210, as has been the EC's regular practice in respect to these products. In practice, not even the EC considers that [long-term] preservation is what bestows classification under heading 0210.

Brazil would also like to take this opportunity to make a few overall comments regarding Exhibit EC-32. First, the EC outright declares that Brazil has referred or cited to Professor Karl-Otto Honikel in the material it has presented in these proceedings. Brazil invites the Panel to check and verify whether any of the technical information it has provided to the Panel is authored by Professor Karl-Otto Honikel.[10] It is not. Second, the opinion provided by Professor Honikel in Exhibit EC-32 is not supported by any bibliography that can be verified by the Complainants or the Panel. Third, the bulk of the technical literature Brazil has provided in these proceedings was presented on 3 August 2004, in Exhibit BRA-16, together with Brazil's first written submission. The Communities had the opportunity, if they wanted, to present technical expert opinion on the action of salt in meat in its first written submission or at a subsequent stage – at the first substantive meeting, in response to the Panel's questions, or in their second written submission. Yet, the Communities chose to provide this information at the last opportunity possible, making it impossible for the Complainants - within the limited time frame to provide comments - to fully and technically address and rebut the information presented in Exhibit EC-32. For that reason, and based on item 14 of the Panel's Working Procedure, Brazil requests that the Panel disregard Exhibit EC-32.

Question 97

Regarding the above response, a few clarifications are in order.

More than once, the EC tries to pass off the idea that changes in red colouring is a meat characteristic brought about by salting when used for preservation.[11] Just to set the record straight, we remind the Panel that the product at issue is salted chicken meat. In other words, it is white - and not red - meat and, thus, irrespective of the amount of salt impregnated, will never present a "customary red colour". Likewise, salted frogs' legs, salted meat of ducks, salted meat of geese, salted meat of pigeons, salted meat of rabbits, and many other salted white meats listed in the WCO's HS Commodity DataBase as meats falling under subheading 0210.90 will not present a red colour after salting, as suggested by the EC. The EC seems to imply that only red meat can qualify as salted meat of heading 0210. This is **not** true.

The second clarification relates to the EC's proposition that Brazil has purposely claimed at a late stage in the proceedings that 1.2 to 3.0% of salt is enough to preserve meat. This is also **not** true. Brazil has, since its first written submission, been upfront about the action of salt in meat.[12] In fact, in

[10] Please note that in the article titled "Microstructure and Biochemistry of Avian Muscle and its Relevance to Meat Processing Industries", authored by Thayne R. Dutson and Ann Carter, found in Exhibit BRA-38, an article regarding bovine meat written by Professor Honikel, and others, is merely cited in the references section of that article.

[11] EC's Response to Panel's Questions Following Second Substantive Meeting, paras. 18 and 31. In these paragraphs the EC cites to paragraph 116 of its First Written Submission but Brazil fails to understand how that paragraph supports the EC's contention.

[12] Brazil's First Written Submission, paras. 83-87 and para. 102.

responding to EC question No. 1, following the second substantive meeting, Brazil not only indicated and cited to the passages in the technical literature that support the fact that 1.2 to 3.0% of salt has some preservative effect, but also reproduced parts of those passages for the EC.[13] But what is even more ludicrous is the allegation that we have made a new claim late in the proceedings. Brazil recalls that it was forced to clarify the issue precisely because the EC had misled the Panel into thinking that Brazil had claimed that cuts salted at such levels could not be preserved.[14] We were **not** making a new claim, as proposed by the Communities, but clarifying a misconception created by the EC.

We further clarify additional false impressions that the Panel may be under with respect to Exhibit EC-32. Professor Karl-Otto Honikel states in that Exhibit that "*in the raw and chilled state 3% salt is too low to prevent spoilage for more than a few days*".[15] We agree. In fact, we have pretty much said this already: at concentrations of 1 to 3% common salt exerts a good antimicrobial action but for the product to be properly/adequately preserved salt concentration of 9 to 11% is needed.[16] That concentrations of 1 to 3% of salt have some preservative effect on chicken meat is apparently not disputed, since even the EC's authority on the subject has acknowledged that it can preserve chicken meat for a few days.[17] Brazil is not of the view that salting of heading 0210 must ensure preservation. Nonetheless, even under the assumption that it must, we recall that in *Gausepohl* long-term preservation was a two-day period.[18] If long-term preservation was a two-day period in *Gausepohl* and Professor Honikel has asserted that salted chicken meat is preserved for a few days without refrigeration, then it seems that the product at issue qualifies as salted meat of heading 0210, according to the EC's criterion, and freezing takes place only as a means of further preservation of the product.

Still regarding Exhibit EC-32, Professor Honikel asserts that "there is no technological advantage of salting meat before freezing as frozen (salted or unsalted) chicken breast if used for meat products will be used in slight frozen state. So drip loss is of no concern."[19] In other words, what the Professor is saying is that drip loss has no effect if meat is not thawed. For the most part, we agree with this assessment. We do **not**, however, agree with the Professor's contention that frozen salted chicken cuts are not thawed prior to processing. In response to question No. 60 posed by the Panel, we have informed that the first step in all further processes is always the thawing of frozen salted chicken meat. Moreover, the processors themselves have declared that drip loss reduction of salted chicken meat is beneficial to them.[20] In actual fact, drip loss is a concern. The Communities, and Professor Honikel, have not even attempted to prove that it is not. We must point out that not only is Professor Honikel's assertion regarding drip loss of a commercial nature rather than a technical one ("chicken breast if used for meat products will be used in a slight frozen state"), but it is unsubstantiated by any evidence. This alone puts in question the impartiality and objectivity of Professor Honikel's "expert" opinion.

The last point of clarification deals with the EC's assertion that Brazil has interpreted that any amount of salting, drying or smoking would be sufficient for a product to qualify under heading 0210 of the HS. Brazil has **never** said this. For example, we understand that sprinkling meat with salt – which is not the case at hand – is not sufficient to qualify meat as salted under heading 0210. This is explicitly provided for in the HS. On the other hand, the HS does not provide a specific salt criterion or threshold for meat to fall under heading 0210. This is something that countries may insert in their

[13] Brazil's Response to EC's Questions Following the Second Substantive Meeting, Question No. 1.
[14] Brazil's Second Oral Statement, para. 2 and EC's Second Written Submission, para. 33.
[15] Exhibit EC-32.
[16] Brazil's Response to EC's Question Following Second Substantive Meeting, Question No. 1.
[17] Exhibit EC-32.
[18] Exhibit EC-14, page I-3061, para. 6.
[19] Exhibit EC-32.
[20] Exhibits BRA-30 and BRA-41.

own classification nomenclatures. The EC, for example, included in its Combined Nomenclature, and consequently in Schedule LXXX, a specific criterion and salt threshold for meat to qualify as salted under heading 0210. Obviously, the HS does not contain the definition of salted meat of heading 0210, as set out in Additional Note 7 to Chapter 2 of the CN. That is something the EC inserted in its CN, which does not exist in the HS and, as far as we know, in any other Member's national nomenclature.[21]

Question 98

In its reply, the EC provides that the reason meat, which has been preserved for long-term, should be further preserved is so that it may be preserved for an even longer term. We know that the EC considers the distinction between "preservation" and "long-term preservation" to be irrelevant to this case,[22] but we believe it is of the utmost relevance. If we do not know what "long-term preservation" means – or how long is long-term - how do we know where to draw the line between "long-term preservation" and "further preservation" for purposes of classification under heading 0210? The EC's response provides no clarity or predictability for importers and exporters.

According to the EC, slicing meat affects/diminishes the meat's shelf-life to the point that it needs to be [further] preserved by chilling or freezing.[23] Well, within the EC's reasoning that long-term preservation imparts classification under heading 0210, salted/dried/smoked sliced products should be classified under a heading other than 0210, for the salting/drying/smoking is no longer sufficient to ensure long-term preservation. If there were any logic to the EC's position with respect to long-term preservation, this would have to be the practice of the EC with respect to Parma ham and bacon. But the truth is that it is not.

In addition, the fact that HS Explanatory Notes to Chapter 2 explicitly envisage preservation techniques for meat falling under heading 0210 is perfectly aligned with our understanding that heading 0210 comprises meats that have been prepared, and not preserved, by salting/drying/smoking. Prepared meats will always be classified under heading 0210 despite of the preservation method applied to it.

Question 99

Brazil clarifies that it has simply stated that one letter of advice from the WCO Secretariat on a product that is different, and classified under a different heading (0305) and Chapter, from the product at issue cannot be seriously considered as relevant subsequent practice in the application of heading 0210 of Schedule LXXX.

Question 100

We begin by stressing our concern regarding Professor Honikel's opinion in Exhibit EC-32 and the Communities' understanding of it. Brazil has submitted in Exhibits BRA-16, BRA-30 and BRA-41 evidence that 1.2 to 3.0% has some preservative effect on meat, that drip loss does occur and that it is a real concern to the industry. The Communities' understanding, based on Professor Honikel's assessment, that the technical articles and letters are simply incorrect, once again puts in question the objectivity and impartiality of the opinion provided in Exhibit EC-32.

[21] Brazil's Second Oral Statement, paras. 46-48.
[22] EC's Response to Brazil's Question Following the First Substantive Meeting, Question 2 para. 6; EC's Response to Panel's Questions Following the Second Substantive Meeting, Question No. 118 para. 75.
[23] EC's Second Written Submission, para. 43.

That said, Brazil agrees that meat that has been salted/dried/smoked is undeniably different from *in natura* meat, that is, from meat that has not been prepared by those processes. This is basically the difference between meat of heading 0207 and meat of heading 0210, one is unprepared meat of poultry and the other is meat prepared by salting, drying or smoking. We have claimed this from day one,[24] and maintained this position throughout these proceedings.[25] However, we do not believe that criterion such as "recognizably different", "instantly recognizable" or "readily identifiable" are valid in the classification of goods. For one, these standards are not provided for under the HS or the CN.[26]

In yet another attempt to exclude salted chicken cuts from heading 0210, the Communities put forward that meats of heading 0210 have names, either general (bacon) or specific (Parma ham). Apparently, to the EC, the fact that salted chicken cuts do not have a [general or specific] name is an indication that it does not belong to heading 0210. This contention is absurd. First, because there are no classification rules or standards applied anywhere in the world that support such an illogical criterion for classification. Second, because Brazil has provided in Exhibit BRA-41 examples of salted meats that fall under subheading 0210.90 of the HS, as provided in the WCO's On-line Database, and none of the listed salted meats have "names". In fact, we have observed that the salted meats in the WCO On-line Database also do not meet the EC's criterion of "recognizably different", "instantly recognizable" or "readily identifiable" products.

Question 102

First off, the EC has **not** shown that the notion of preservation, or long-term preservation, is at the heart of heading 0210 in the HS, in Schedule LXXX or in the CN. Nothing in these nomenclatures signal that preservation is what imparts classification under heading 0210. On the contrary, the explicit language of the HS and its Explanatory Notes unequivocally demonstrates that preparation is what determines classification under heading 0210. Since 1937, the structure of Chapter 2 instructs us that salted meats are **not** salted for purposes of preservation. If salting served to preserve meat, then it would have been inserted as a tertiary item/subheading, within a heading, alongside fresh, chilled and frozen meat. But salted/dried/smoked meat has always been a separate product, found under a separate heading.

Furthermore, the Communities appear to have ducked the Panel's question. Is a shelf-life of many months at ambient temperatures long-term preservation? It seems that this is the EC's position, but we are not quite sure, since it fails to expressly say so. Another point that would require clarification is whether meat preserved for a few days at ambient temperature is also considered long-term preservation for purposes of heading 0210. We call to mind that in *Gausepohl* two days was sufficient to meet the long-term preservation criterion. Thus, the criterion in that case was **not** preservation for many or several months. In connection, we asked the Communities to indicate where in *Gausepohl*, or under Community law, is the principle of long-term preservation defined/provided as preservation for many or several months. Instead of pointing out passages in *Gausepohl*, or under Community law, the EC vaguely responded that it had already given ample guidance as to how the criterion of long-term preservation is enshrined in Community law.[27] This [lack of] response in itself is indication that the notion of long-term preservation, especially in the sense of preservation for many or several months, is not enshrined in Community law, either by way of legislation or even by way of case-law (as alleged by the EC).

[24] Brazil's First Written Submission, paras. 76-96.
[25] Brazil's Response to Panel's Questions Following the First Substantive Meeting, Question No. 79.
[26] Brazil's Second Oral Statement, para. 31.
[27] EC's Response to Brazil's Question Following the Second Substantive Meeting, Question 3 para. 3.

Question 105

The Communities acknowledge that its classification of goods is based on the product's objective characteristics, which are based on their composition and properties and verified by laboratory examination. They go on to assert that the state of frozen salted/dried Alaska Pollack and frozen salted/smoked salmon[28] can be established by laboratories by determining the moisture content and water activity. Brazil does not know whether the moisture content and water activity are objective characteristics criterion provided in the CN for these products (salted/dried Pollack and salted/smoked salmon). What Brazil knows is that the objective characteristics criterion for salted meat of heading 0210 – until the advent of the measures being challenged - was simply that it be deeply and homogeneously impregnated with salt in all parts with a minimum salt content of 1.2% by weight. That criterion was established in the CN. Laboratories verified that salted chicken cuts conformed to it.

Question 106

We agree in part with the response provided by the EC. We agree that many elements of Chapter 2 of the 1937 Geneva Draft were carried into the CCCN. We agree that item/heading division according to the type of animal was followed in the 1937 Geneva Draft and the CCCN. We also agree that the terms "chilled" and "frozen" – terms that indicate means of refrigeration – are linked to the term "preserved" in the 1937 Draft, the CCCN and the HS, whereas the terms "salted", "dried" and "smoked' are not. The EC failed to note, however, that products within Chapter 2, as well as within the entire structure of the three nomenclatures (HS, CCCN and 1937 Draft), are placed according to their degree of processing.

Item 18 indeed corresponds to CCCN heading 0206 and HS heading 0210. The phrase "cooked and simply prepared" in Item 18 is, in fact, no longer provided in heading 0210, but the term "prepared" deliberately remains in the Explanatory Notes to heading 0210 and Chapter 2 of the HS. The EC suggests that term "preparation" in the HS Explanatory Notes was inadvertently left behind in Chapter 2 and heading 0210 when the term "cooked" was moved into Chapter 16. This allegation is ludicrous. One cannot reasonably believe that a modification of such prominence (transfer of cooked meat into another heading and Chapter) was not fully discussed and known by the Contracting Parties to the HS Convention. Furthermore, if the term "prepared" was actually left behind in the Explanatory Notes to Chapter 2 and heading 0210, as proposed by the Communities, this could have been "corrected" in the various amendments made to the HS. Yet, no Contracting Party to the HS has ever requested such a correction or raised the issue in that forum.

Question 107

At this stage in the proceedings, the EC cannot seriously purport to have never submitted that Chapter 2 is structured according to methods of preservation. Just to cite a few places in which the EC has advanced this position, we ask the Panel to look at: recital (3) of Regulation No. 1871/2003;[29] paragraphs 76 and 138 of the EC's first written submission; paragraph 4 of the EC's second written submission; and also paragraphs 42 and 58 of the EC's response to the Panel's question following the second substantive meeting. Specifically, in paragraph 138 of its first submission, the EC declared that: "*(…) an examination of Chapter 2 as a whole shows that it is divided into different forms of preservation, and not into meat which has undergone no process and meat which has.*"[30]

[28] Products described in the information on the existing BTIs provided in Exhibit BRA-34.
[29] Exhibit BRA-10.
[30] EC's First Written Submission, para 138 (emphasis added).

Interesting enough, the two particular characteristics of salted meats mentioned by the EC in response to question No. 107 are not related to preservation: 1) salted meats are markedly different from meat that have not been processed by salting; and 2) salted meats were so similar to each other that they could be treated under a common heading. The Communities' conclusion that these characteristics arise from the fact that meats are preserved is merely a contention put forward by them alone that finds no support on the structure and language of the successive nomenclatures.

The Panel should also note that the EC provides all sorts of explanations in response to the Panel's question except the one that is explicitly stated in the Explanatory Notes to the 1937 Draft. The terms "fresh", "chilled" and "frozen" were placed as tertiary items within a heading - and not as separate headings - because of a concern that if fundamental distinctions were made among these terms, discrimination would take place concerning the same kind of meat - preserved by different methods - coming from different parts of the world. No such concern existed for salted meat because salting was not considered a method of preservation.

Question 108

Succinctly put, the concept of preservation is **not** reflected in Regulation No. 535/94. No WTO Member looking at Regulation No. 535/94 could presume that, as suggested by the EC, it set a minimum salt content below which it could not be considered that a product was salted for preservation. Anyone that read Regulation No. 535/94, including the EC's own customs authorities, would arrive at the logical conclusion that the regulation simply set out the objective characteristics a product had to meet to qualify as salted meat of heading 0210.

Furthermore, the EC errs when it states that Regulation No. 535/94 did not need to explicitly restate that heading 0210 was based on the concept of preservation. For one, the verb "restate" gives off the idea that long-term preservation was already a concept inserted in or associated with heading 0210 of the CN, when we know that "preservation" or "long-term preservation" were never provided in or associated with heading 0210 of the CN, or the HS for that matter. If Regulation No. 535/94 wished to introduce the concept of "preservation"/"long-term preservation" in heading 0210 of the CN it had to explicitly do so, which it did not.

Finally, the European Court's conclusion in *Gausepohl* that, from the scheme of Chapter 2, the meat covered under that chapter is either fresh/chilled or that which has undergone one of the processes required to ensure long-term preservation, finds **no** support in the Combined Nomenclature or the Harmonized System. Again, the CN has never provided that "preservation"/"long-term preservation" is what determines the "scheme" of Chapter 2. On the contrary, the direct and express language found in the HS Explanatory Notes to Chapter 2 prove that classification is bestowed according to preservation **and** preparation. In turn, the HS Explanatory Notes to heading 0210 establish that for that heading preparation is what imparts classification.

Question 109

Exhibit EC-34 offers **no** support to the EC's opinion that the principle of "long-term preservation" was well-entrenched in the EC as of 1 September 1986. On the contrary, the response provided by the EC is again a classic example of tautology. Let's see. According to the EC, its 1986 Common Customs Tariff reproduces the headings of the CCCN – the nomenclature predecessor to the HS. Heading 0206 of the CCCN, says the EC, enshrines the principle of preservation. Thus, the notion of long-term preservation was already included in heading 0206 of the EC's 1986 Common Customs Tariff. The only problem with this "logical" response is that **nothing** in the structure or language of the 1937 Draft, the CCCN or the HS support or even suggest that the salting of salted meats (of heading 0206 of the CCN or 0210 of the HS) is that which ensures long-term preservation.

The principle of "long-term preservation" was **not** found under these classification nomenclatures, was **not** found in the EC's Common Customs Tariff, and was **not** found in Schedule LXXX.

Question 111

From the response given, we understand that the EC preferred **not** to comment on the fact that the Advocate General in *Dinter* did not consider smoking to be a preservation process. In paragraph 90 of our second submission, we cited to the Advocate General in *Dinter* precisely to make the point that the principle of "long-term preservation" is not a well-entrenched/enshrined principle related to the interpretation of heading 0210 of the Combined Nomenclature, as the EC would like the Panel to believe. Further support of our view is found in the 6-year classification practice by EC customs officials of frozen salted chicken cuts under heading 0210.

Question 112

In this dispute, the EC seems to have established that the principle of "long-term preservation", supposedly well-entrenched in Community law, means shelf-stable for many or several months at ambient temperature. When asked exactly where in *Gausepohl*, or in Community law, one could find this definition, the EC vaguely replied that it had already given ample guidance as to how the principle is enshrined in Community law.[31]

Now, the EC provides that the "long-term preservation" principle used by the Court in *Gausepohl* was that found in the CN Explanatory Notes to swine meat (subheadings 0210.11.11 and 0210.11.19). We have already explained why Explanatory Notes – non-binding instruments – of a specific subheading cannot be applied *mutatis mutandis* to another subheading without an explicit provision indicating so.[32] Nonetheless, we draw attention to part of that Explanatory Note that provides that "*(…) the period of such preservation must considerably exceed the time required for transportation.*"[33] Nowhere is it stated that the period exceeding transportation is equal to many or several months. In *Gausepohl*, the period considerably exceeding the time required for transportation – in other words, the long-term preservation period - was only two days. Salted chicken, as attested by Professor Honikel,[34] can also be preserved for that same period and, accordingly, may be preserved for long-term if transported from Switzerland to Germany, for example. We recall that the EC has also provided that a salted/dried/smoked product can be further preserved by chilling/freezing and still fall under heading 0210. So, if the product at issue is considered preserved for long-term from Switzerland to Germany, it is only fair that from Brazil to Germany the same product also be considered preserved for long-term, even if further preserved by chilling or freezing.

Question 113

In *Gausepohl*, the *Bundesfinanzhof* considered that the case raised a problem as to the interpretation of the Community legislation in question – heading 0210 of the Combined Nomenclature – and, therefore, decided to refer the question to the Court of Justice under Article 177 of the EEC Treaty.[35]

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[31] EC's Response to Brazil's Questions Following the Second Substantive Meeting, Question No. 3 para. 3.

[32] Brazil's Second Written Submission, paras. 92-94.

[33] Exhibit EC-14, page I-3051, para. 9.

[34] Exhibit EC-32.

[35] Exhibit EC-14, page I-3051,para. 11.

Article 177 of the EC treaty provides that:

"*The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give a judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice." (emphasis added)

A Commentary on the EEC Treaty provides that "*Article 177 defines the Court's authority to decide questions of Community law arising in national tribunals*".[36] In explaining about the varying scope of the Court's authority, the Commentary states that "*the Court may have only the power to construe the law, but may not be authorized to apply the law to the established facts. This is what the Court has construed to be its task under Article 177.*"[37]

In *Gausepohl*, the law that the Court was asked to construe was Council Regulation (EEC) No. 2658/87, of 23 July 1987, establishing the EC's Combined Nomenclature.[38] The Combined Nomenclature, we recall, is made up of: 1) the HS nomenclature; 2) Community subdivisions (CN subheadings); and 3) preliminary provisions, additional section or chapter notes and footnotes relating to the CN subheadings.[39] Measures relating to the application of or the amendment to the Combined Nomenclature shall be adopted by the Commission.[40] The Commission, for example, can adopt a Regulation that inserts an additional note in a Chapter of the Combined Nomenclature. Regulation No. 535/94 is such an example.[41]

At this stage in these proceedings, the Panel has had the opportunity to verify that, until the arrival of Regulation No. 1871/2003, "long-term preservation" was **not** explicitly provided for in the Combined Nomenclature. Thus, when the Court in *Gausepohl* was asked to construe the CN, "long-term preservation" was not a part of the nomenclature. We must stress that, in responding to the Panel, the EC's entire reasoning is based upon an incorrect premise: that the concept of "long-term preservation" was included in the scope of heading 0210 of the Combined Nomenclature when the ECJ made its judgement in *Gausepohl*. We repeat, nowhere in the Combined Nomenclature, or in the HS, is the concept of "long-term preservation" provided for.

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[36] The *Law of the European Community, A Commentary on the EEC Treaty (Volume 5)*, Lexis Nexis, Mathew Bender (Original Authors: Hans Smit and Peter Herzog), page 5-313.

[37] The Law of the European Community, A Commentary on the EEC Treaty (Volume 5), Lexis Nexis, Mathew Bender (Original Authors: Hans Smit and Peter Herzog), page 5-314 (emphasis added).

[38] Exhibit BRA-23, Article 1.1 of Regulation No. 2658/87.

[39] Exhibit BRA-23. Article 1.2 of Regulation No. 2658/87.

[40] Exhibit BRA-23. Articles 9 and 10 of Regulation No. 2658/87.

[41] Exhibit BRA-6.

We warn the Panel that this is not an issue of hierarchy of norms, as the EC suggests.

The EC errs when it states that the Court confirmed the scope of heading 0210 in the CN. Confirmation implies validation of something that already existed, and the reality was that "preservation" or "long-term preservation" did not exist under heading 0210 of the CN. The fact that Additional Note 7 to Chapter 2 was inserted in the CN by means of a Commission Regulation, an inferior legal act to the Council Regulation that established the CN, has absolutely nothing to do with the issue. The EC tries to convince the Panel into thinking that it does.

The Communities push on. They provide that any Commission Act must necessarily be read together at all times with the superior norm, in this case the Council Act establishing the Combined Nomenclature. We agree. Commission Regulation No. 535/94 is in perfect harmony with what is provided under heading 0210 of the CN. In fact, we believe that "long-term preservation" was purposely left out of Regulation No. 535/94 so that it could be harmoniously read together with the Combined Nomenclature, part of which is based on the Harmonized System. The interpretation of the Court was simply incorrect. Brazil recalls that the ECJ has the authority to interpret an Act of the Council, such as the CN, but it does not have the authority to interpret the HS. An interpretation by the ECJ on the HS, or based on the HS, is still a unilateral interpretation and by no means an authoritative interpretation of that multilateral agreement.

Nonetheless, even if we were to consider that the Court's interpretation was correct – which it isn't - the standard applied in that case for preservation was a period in excess of the time required for transportation. In *Gausepohl*, the time required for transporting the meat in question was only one hour, but it was preserved for a time that considerably exceeding transportation: two days. However, this does not seem to be the EC's standard for "long-term preservation" in this case (many or several months).

Question 114

Based on the EC's response to question No. 115, Brazil is still of the position that a Regulation on the interpretation of a particular heading in the CN takes precedence over a Court judgement, delivered prior to said Regulation, on the interpretation of the same heading.

The EC asserts that a Commission Regulation must be compatible with Community law and the international obligations of the Community. Well, Regulation No. 535/94 was. Taking into account that the Combined Nomenclature did **not** provide that salting of heading 0210 was a preserving process and that, on the contrary, the HS actually provides that it is a preparation – and not a preservation - process, the objective criterion set out in Regulation No. 535/94 was compatible with Community law and the EC's international obligations under the HS Convention.

To make its point, the EC provides a hypothetical that is simply incoherent. It says that a change in the HS Convention to establish a salt threshold of 1.2% and above for heading 0210 could trigger a challenge of Regulation No. 1871/2003 (with long-term preservation requirement), based on the incompatibility with heading 0210 of the CN, which could in turn lead to a reversal of the "standing" case law on the interpretation of heading 0210. In the EC's example, it starts with the HS Convention (international obligation), goes on to Commission Regulation No. 1871/2003, providing the objective characteristics of salted meat of heading 0210 in the CN, and then to the Court's interpretation of heading 0210 in the CN. However, in the case before the Panel there were no measures (Regulations) that set out the objective characteristics of salted meat of heading 0210 in the CN when the Court in *Gausepohl* interpreted heading 0210 of the CN. The ECJ made an interpretation that was not based on explicit text provisions of: 1) Regulations interpreting heading 0210 of the CN; 2) the CN; or 3) the HS. The ECJ's interpretation was strictly a subjective assessment of the meaning of these texts.

The EC further affirms that there was no change in the superior norm looked at in *Gausepohl*, but that is simply **not** correct. First, the superior norm during *Gausepohl*, namely heading 0210 of the HS, did **not** provide that salting of heading 0210 was that which ensured long-term preservation. The concept didn't - and doesn't - even exist in the HS. The EC itself acknowledges that "*the word 'preservation' is not to be found in HS heading 0210*."[42] Second, the other superior norm looked at in *Gausepohl*, namely heading 0210 of the CN, was in fact changed, or clarified to say the least. The change was brought about by Regulation No. 535/94 and did not include the concept of "preservation" or "long-term preservation".

Question 115

Brazil notes that the EC has confirmed that Additional Note 6(a) takes precedence over the *Dinter* judgement. In connection, we cite a very important passage of the judgement in *Van de Kolk*, which upheld Additional Note 6(a): *"(…) it must be pointed out that that judgement [Dinter] was delivered in different circumstances from those in the present case; there was no provision in a regulation on the interpretation of the Common Customs Tariff (…)*".[43]

Applied to the case at hand, the *Gausepohl* judgement was also delivered in different circumstances. At that time, there were no provisions in a regulation on the interpretation of salted meats of heading 0210 of the Combined Nomenclature. Regulation No. 535/94 was precisely the regulation that gave the interpretation of salted meats of heading 0210 of the CN, and in doing so did not include "preservation" or "long-term-preservation". Additional Note 7 of Chapter 2 of the CN did not change the scope of the Chapters, Sections and headings of the CN. It merely specified the objective criteria to be taken into account for classifying salted meat under heading 0210.

Question 116

Brazil would like to clarify that the condition of "long-term preservation" did **not** exist in the Combined Nomenclature until it was **introduced** in the CN by Regulation No. 1871/2003. The EC throughout these proceedings has not been able to cite to any provision within the CN, past EC classification nomenclatures or anywhere in Community legislation where the condition is defined or even referred to.

Question 117

The EC has once again **failed** to provide BTIs, **or any supporting material**, to back-up the allegation that other customs offices within the EC did not classify the product at issue under subheading 0210.90. The ham-related BTI provided by the EC in Exhibit EC-26 is certainly not evidence that frozen salted chicken cuts were classified by certain EC customs offices under heading 0207 and not under heading 0210. On the other hand, Brazil and Thailand have provided copies of BTIs issued for frozen boneless salted chicken cuts with a salt content of more than 1.2% under subheading 0210.99.39.[44] Brazil has also shown that since 1998 it exported frozen salted chicken meat to the EC under heading 0210 to different ports of discharge of various EC Members States, including Germany, the Netherlands, Spain, Italy, and the United Kingdom.[45]

The Communities talk about the "*dangers of relying on BTIs as comprehensive indication of customs practice*" but have not presented even one BTI – or any other documentation – that would

[42] EC's Response to Panel's Question Following Second Substantive Meeting, para. 75.
[43] Exhibit THA-35. Judgement of the ECJ in case C-233/88, Van de Kolk, para. 15 (emphasis added).
[44] Exhibits BRA-31 and THA-24.
[45] Exhibits BRA-29 and BRA-42.

give the Panel some indication that certain customs offices classified the product under heading 0207 – and not under heading 0210 - from 1996 through 2002.

The EC tries to justify its failure to provide the requested information by explaining that it is possible under Community law to withdraw an application for a BTI where the outcome is considered unfavourable by the importer. Yet, Articles 6 and 8 of Commission Regulation No. 2454/93 sets forth that applications for binding information are made in writing and that a copy of the application for binding tariff information, a copy of the notification and the facts shall be transmitted to the Commission without delay by the customs authorities of the Member States concerned. It seems that even if an application was withdrawn by the importer, the Commission – or customs authorities of Member States - would at least have access to the written application and/or the forms mentioned in Articles 6 and 8.

QUESTIONS POSED TO ALL PARTIES

Question 118

We call the Panel's attention to the fact that the EC has conceded that the "*word 'preservation' is not to be found in HS heading 0210.*" Unfortunately, the EC insists that its law on classification contains the term "long-term preservation". That is **not** true. "Long-term preservation" has never been associated with or included in heading 0210 of the Combined Nomenclature, or in Chapter 2 of the CN for that matter. We have asked the Communities to show us where we could find the definition of that concept in *Gausepohl* or under Community law and the EC was not able to do so.

It now appears that, to the EC, "preservation" and "long-term preservation" have the same meaning. Based on this response, it is still not clear whether the EC understands the term "preservation" to mean shelf-stability for many or several months at ambient temperature. We recall that the ordinary meaning of the verb "preserve" is to "maintain (a thing) in its existing condition" or "to prevent (organic bodies) from decaying or spoiling",[46] and no time frame is associated with the ordinary meaning of the term. In fact, such time frame could vary from a few minutes or hours to possibly years.

Question 120

The EC has, in effect, **failed** to provide the requested BTIs – or any other supporting material - in Response to question No. 53 (not question No. 34, as stated by the EC). Also, and as a point of clarification, Brazil has **not** conceded to the existence of export classification practice as alleged by the EC in its statistics and sample documents.[47] Brazil has simply confirmed that its export classification practice of frozen salted chicken was inconsistent: sometimes the product was correctly classified under heading 0210 and sometimes it was incorrectly classified under heading 0207. To that effect, we even submitted export documentation in Exhibits BRA-42(c) and BRA-42(d) that demonstrate that some exports of frozen salted chicken were classified under subheading 0210.90 when they left Brazil.

We have provided the evidence in Exhibits BRA-42(c) and BRA-42(d) even though the Panel did **not** make a specific request that such documentation be presented. On the other hand, a very specific request was made [twice] to the EC and it failed to comply with it.

[46] Brazil's First Written Submission, para. 76.

[47] Brazil is unaware of any sample documentation submitted by the EC regarding Brazil's export classification practice of the product at issue.

Question 121

Again, the EC misconstrues what Brazil has argued. To Brazil, the product at issue does not *prima facie* fall under two or more headings of the HS.[48] Undeniably, it is a product of heading 0210. The Panel, of course, may resort to General Rule 3 if it understands that the product falls under two or more headings of the HS. In the event that General Rule 3 is applied, we have explained that, as part of context, the Panel should use it in conjunction with the other rules of treaty interpretation.

A small but important correction that must also be made is that the WCO Secretary General did refer to the HS Explanatory Notes, and highlighted their importance, in the letter of advice dated 25 October 2004. According to the Secretary General, HS Explanatory Notes provide the official interpretation of the HS. Obviously, they shed light and supply valuable insight as to the meaning of heading 0210 in the HS. The EC itself has provided that the "*Harmonized System is relevant insofar as it sets forth headings and provides Chapter and Explanatory Notes that elucidate the meaning of a heading*".[49] Besides, the Appellate Body gave HS Explanatory Notes the same interpretative weight as that given to the HS itself.

Question 122

We begin by quoting a passage from the above response: "At the same time is clear that any documents relied upon in an interpretation of WTO obligations according to Article 32 of the Vienna Convention must have been in the public domain or accessible to WTO Members." Brazil, in its response, has advanced a similar position: for a document or instrument to qualify as "preparatory work" and/or "circumstances of conclusion" it must have been published so that States had the possibility of consulting them during negotiations if they wish to do so.

That said, we turn to the following considerations.

As of 11 March 1994, Brazil and all other negotiating Members had knowledge of Regulation No. 535/94 for this was the date the regulation was published in the Official Journal of the EC. This date preceded both 15 April 1994 and 25 March 1994, when the period for verification of schedules came to an end. Knowledge of Regulation No. 535/94 meant knowledge of what was effectively and expressly provided in that regulation, and "long-term preservation" was **not** therein included. The Communities claim that if Brazil had [actual or presumed] knowledge of Regulation No. 535/94 it must also have had knowledge of "*the preservation criterion at the heart of Community law*". Yet, the preservation criterion was **not** a part and had **never** been inserted in the Combined Nomenclature, and the Harmonized System for that matter. The criterion was **never** at the heart of Community law.

In a rather ironic fashion, the EC declares that if Brazil "pretends" knowledge of Regulation No. 535/94, because it suddenly took upon itself the burden to screen developments in the EC, it could not deny the existence of the "long-term preservation" requirement that was well-enshrined in the CN as interpreted by "several" judgements of the Court of Justice, since these judgements too were publicly available.

Well, as a point of clarification, Brazil does not "pretend" to have had knowledge of Regulation No. 535/94. As was the case during the Uruguay Round, the Brazilian Mission in Brussels is tasked with monitoring legislative developments in the EC through the publication of legislative

[48] Brazil's First Written Submission, para. 147. Brazil's Second Written Submission, para. 49. Brazil's Response to the Panel's Questions Following the Second Substantive Meeting, Question No. 121.

[49] EC's Response to the Panel's Question Following the First Substantive Meeting, Question No. 76 para. 102 (emphasis added).

acts in the EC's Official Journal. Monitoring and verification of Court judgements, however, have **never** been a part of that job, and it still is not.

Going back to the response, we repeat that the "long-term preservation" requirement was not, and could not have been, well-enshrined in the CN simply because that "requirement" had never been included in the CN. But, even if we assume – for the sake of argument – that Brazil and other negotiating Members had knowledge of the *Dinter* and *Gausepohl* judgements and of the Court's understanding of the alleged "long-term preservation" requirement in heading 0210, we point out that the Court's assessment in those cases was **not** supported by any provision found in the Combined Nomenclature or in the Harmonized System. As we have demonstrated in these proceedings, Chapter 2 is **not** structured according to methods of preservation and heading 0210 does **not** encompass meat that has been salted for long-term preservation. Therefore, the Court's assessment regarding the "scheme" of Chapter 2 and the qualification of heading 0210 in those cases was simply incorrect.

Furthermore, the *Dinter* and *Gausepohl* judgements did **not** establish or define "long-term preservation", especially not in the sense of shelf-life stability of many or several months. In particular, in the case of *Gausepohl*, the standard was a period considerably exceeding transportation, which in practice was two days. Well, two days are quite different from many or several months. If, even to this date, the EC cannot provide a consistent definition for "long-term preservation", how can it expect the Panel and the Complainants to believe that it was a "well-enshrined" concept/notion/requirement in Community law that did not need to be explicitly stated in Regulation No. 535/94.

ANNEX C-4

RESPONSES BY THAILAND TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(14 October 2004)

FOR THAILAND:

7. Thailand is requested to provide proof of its assertion in paragraphs 7 and 53 of its first written submission that it commenced exporting salted chicken to the EC in 1996 in response to requests from European food processors.

See Exhibit THA–26.

8. Thailand argues in paragraphs 74-75 of its first written submission that a "frozen" product can be returned to its original state without any change in its physical or chemical characteristics. Thailand is requested to justify this argument in light of information contained in page 2 of Exhibit THA-14 to the effect that freezing causes the cell walls of food to rupture, thereby making poultry softer when it is thawed.

The article in Exhibit THA-14 discusses the "changes in food texture during freezing" and notes that the textural changes that result from freezing "are most noticeable in *fruits* and *vegetables* that have a high water content." Therefore, fruits and vegetables, such as lettuce and celery, which have a high water content, will be adversely affected by freezing as they would wilt and turn limp. In contrast, with respect to products that will be cooked before being eaten, the "textural changes due to freezing are not as apparent … because cooking also softens cell walls." Therefore, frozen boneless chicken cuts that will be thawed before being cooked will not be as changed or affected by the freezing.

FOR THE COMPLAINANTS:

12. Assuming that freezing has a permanent and irreversible impact upon meat, is there some way to distinguish that impact from the impact that salting, brining, drying and smoking have on meat?

If one were to assume that freezing may have such an impact on meat, the most appropriate way of distinguishing the effect of freezing from that of salting, brining, drying and smoking is to examine the effect on the taste. As meat is destined for human consumption, it is the effect on taste that is most relevant to the ultimate consumer. A frozen boneless chicken cut, once thawed and cooked, will taste the same as a fresh boneless chicken cut once cooked. However, a chicken cut that is salted, put in brine, dried or smoked would taste quite different having undergone such a process.

13. Brazil and Thailand suggest in their oral statements for the first substantive meeting (paragraph 16 in the case of Brazil and paragraphs 8 and 53 in the case of Thailand) that, for the purposes of the Panel's analysis under Article II of the GATT 1994, the decisive criterion for characterising the products at issue are the objective characteristics of the product at the time of importation. What role, if any, do Brazil and Thailand consider that production processes, end-uses and the perspective of end-users should play in the characterisation of the products at issue for the purposes of the Panel's analysis under Article II?

None. These are factors to determine the likeness of products under GATT Article III, a concept which is not at issue in this dispute. The information provided in these answers with respect to the production process, end-uses and the perspective of end-users are meant to give the panel a full picture of the facts of the case. However, Thailand's legal case does not rest on this information.

This dispute concerns the tariff treatment to be provided to the product at issue and, therefore, requires an examination of the EC's concession in heading 0210 and the assessment of whether the product at issue has the physical characteristics of the product described in the EC's Schedule of Concessions.

14. The complainants are requested to provide details regarding the processes to which the products at issue are subjected prior to being exported to the EC. In particular, please provide details including supporting material regarding:

(a) the physical processes that are applied to the products at issue;

Most salted chicken from Thailand is produced using the "tumbling" method. Under this process, chicken is cut into different sizes, following the customers' orders the chicken cuts are then mixed with salted water in the vacuum tumble machine. The tumbling takes around 20 minutes. Salted chicken can be tested for its level of salt. The test is carried out by using a special instrument which can determine the level of salt. Thailand will elaborate further on the processes in its second written submission.

(b) the effects of these processes on the products at issue;

The addition of salt reduces the level of water activity and prevents the growth of micro-organisms. Salt also breaks up the protein in the meat. Both protein and salt help reduce moisture loss when cooked and makes the meat juicier.

(c) the time taken to complete these processes; and

The tumbling process takes between 15 and 30 minutes.

(d) the costs that such processes entail.

The costs are as follows:

Thai workers' wages:	US$4.83/day or US$0.07-0.10/kg (200 baht/day or 3-4 baht/kg)
Cost of salt (common salt) - salt obtained from underground salt deposits located in the Northeast of Thailand	US$67-70/metric tonne
Total cost of production	**US$180-200/metric tonne**

15. Are the processes applied to the products at issue when they are exported to the EC from Brazil and Thailand the same as those processes applied to the products at issue when they are exported to other countries?

Thailand exports salted frozen chicken only to the EC as there are no orders for the product from countries other than the EC. Orders differ from country to country depending on consumer demand and importers' requirements. For example, in the case of orders from Japanese importers for

cooked chicken meat, the importers will provide a recipe and have the exporters cook the meat at the plant.

16. The complainants are requested to provide details of their classification practice in relation to imports and exports of the products at issue.

Thailand has never imported salted frozen chicken, and has therefore, never classified the product at issue for customs purposes. The classification of products for exportation is not relevant to determine the classification practice of a Member. What is relevant is the practice of Members in implementing their tariff concessions on salted meat.

17. Could the complainants comment on the fact that Explanatory Notes to Chapters 2 and 16 of the Harmonized System characterise both preservation and preparation as "processes".

It is not correct to state that the HS characterises "preservation and preparation as processes." Rather, they are the *purposes* for which a particular *process* is undertaken. For example, a product may be smoked by a particular process in order to achieve the purpose of preparation. This interpretation is based on the actual wording of the notes. In particular, the *Explanatory Note* to Chapter 2 makes a reference to "prepared or preserved by any process". The *Chapter Note* to Chapter 16 makes a reference to "prepared or preserved by the processes specified in Chapter 2 or 3 or heading 05.04." Thailand considers that this is an acknowledgement that the *purposes* of preservation and preparation may be achieved by the *processes* which are specified in Chapter 2, Chapter 3 and in heading 05.04. Please see answer to question 48(c) for further details.

***FOR ALL PARTIES*:**

56. Do the parties agree that the relevant time at which the meaning of headings of the EC Schedule – LXXX - should be assessed is the time at which that Schedule was annexed to the Marrakech Protocol on 15 April 1994? If not, at what time/during what period should such an assessment be made?

Thailand agrees that the relevant time that the meanings of the headings of EC's Schedule LXXX should be assessed is 15 April 1994, namely the time the Schedule was annexed to the Marrakech Protocol. 15 April 1994 is the date on which the EC assumed its commitments under the Uruguay Round. In this regard, Thailand notes that in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body stated that the key date for the interpretation of the treaty at issue was 1994, which was the time at Members assumed their obligations under the WTO Agreement. In particular, the Appellate Body examined the term "exhaustible natural resources" in GATT Article XX(g) in the light of the wording of the Preamble of the WTO Agreement (Appellate Body Report, WT/DS58/AB/R, para. 129). The WTO Agreement was signed by Members in Marrakesh on 15 April 1994. Therefore, this is the relevant date on which to ascertain the meaning of the obligations and, in particular in this case, the concessions, entered into by the EC.

As noted in Thailand's First Written Submission, Regulation 535/94 – which provided the following clear definition of the products falling under heading 0210 – had been published and was in force prior to 15 April 1994.

> "For the purposes of heading 0210, the terms 'meat and edible meat offal, salted, in brine,' mean meat and edible meat offal deeply and homogenously impregnated with salt in all parts, having a total salt content of not less that 1,2% by weight."

59. Are there any GATT Schedules of WTO Members other than the EC's in which headings identical or similar to the headings at issue in this case exist? If so, please provide details of such Schedules and information regarding the classification practices of such Members in respect of those headings. If possible, the parties are requested to indicate how such Members classify the products at issue in this case.

Thailand is in the process of gathering this information and, with the indulgence of the Panel, will provide this information shortly.

60. The parties are requested to provide details regarding the processes to which the products at issue are subjected upon importation to the EC and prior to final consumption. In particular, please provide details including supporting material regarding:

The information received from EC importers on a general basis pertaining to the product at issue is the following:

(a) the physical processes that are applied to the products at issue;

The products at issue undergo several processes such as cutting, cooking, marinating, coating and any combination of these processes. There is no uniform process that the majority of processors use.

(b) the effects of these processes on the products at issue;

The effect that these processes have in general is to change the quality of the product to fulfil the wishes of the consumer.

(c) the time taken to complete these processes; and

The time taken to complete these processes varies from few hours to less than a day.

(d) the costs that such processes entail.

The cost for these processes varies widely.

61. If boneless chicken cuts have been deeply and homogeneously salted, can they be de-salted?

The product cannot be thoroughly de-salted. In para. 79 of Thailand's First Written Submission, Thailand stated "unlike the chilling or freezing of chicken which may easily be reversed, the salting of chicken homogenously in all parts cannot be thoroughly removed."

66. In interpreting headings 0207 and 0210 of the EC Schedule, should the ordinary meaning of all the terms in those headings be assessed as a whole or, rather, should the terms other than "frozen" in heading 0207 (i.e. "fresh" and "chilled") and the terms other than "salted" in heading 0210 (i.e. "in brine", "dried" and "smoked") be treated as context for the interpretation of the terms that appear to be directly at issue – i.e. "frozen" and "salted". Will the result of the interpretative exercise differ depending upon which approach is adopted? If so, please explain making specific reference to the headings at issue in this case.

In its First Written Submission, Thailand has adopted the approach of examining the ordinary meaning of *all* the terms in headings 0207 and 0210. Therefore, Thailand has adopted the first of the

two interpretive approaches put forward in this question. However, in our view, the result will not differ depending on which of the two approaches are adopted.

67. Can products that fall within the scope of heading 0207 of the EC Schedule be considered as having undergone a "process"? If so, please explain what is meant by "process". Can the processes to which products falling within the scope of heading 0207 are subject, if any, be distinguished from those to which products falling within the scope of heading 0210 are subject? If so, how?

A process is defined in the *New Shorter Oxford English Dictionary* as, *inter alia*, "[a] thing that goes on or is carried on; a continuous series of actions, events or changes; a course of action, a procedure; *esp*. a continuous and regular action or succession of actions occurring or performed in a definite manner; a systematic series of actions or operations directed to some end, as in manufacturing, printing, photography, etc." (page 2364.) Heading 0207 covers products that are "fresh, chilled, or frozen." If a product is fresh it cannot be said to have undergone a process. Chilling and freezing may be considered as processes. Of the three states (fresh, chilled or frozen) listed in this note to heading 0207, Thailand is of the view that chilling and freezing relate to a process to ensure the purpose of preservation.

The processes in heading 0207 can be clearly distinguished from processes in heading 0210. The processes in heading 0207 relate to the temperature of the product. The note to heading 0207 states:

> This heading covers only fresh, chilled or frozen meat and edible offal of domestic poultry which, when live are classified in heading 01.05.

In contrast, the processes in heading 0210 relate to the preparation of the product rather than its temperature. The note to heading 0210 states:

> This heading note applies to all kinds of meat and edible meat offal which have been *prepared as described in the heading*, other than pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted (heading 02.09). The heading includes streaky pork and similar meats interlarded with a high proportion of fat, and fat with an adhering layer of meat, *provided they have been prepared as describedin the heading.* (Emphasis added).

During the first substantive meeting of the Panel with the parties, after the delegate of Thailand read out the first sentence of the note, the EC commented that it was an Explanatory Note which was used to delineate the coverage between heading 02.09 and heading 02.10. The fact that the note makes reference to the delineation between two sub-headings does not detract from the intrinsic value of the description that is used in that note. Furthermore, the phrase "prepared as described in the heading" appears in both the first and the second sentence of the note. The note is clear in both its first and second sentence that the terms "… salted, in brine, dried or smoked …" are *descriptions* of the manner in which meat and meat offal *have been prepared.* In other words, the sub-heading covers *meat and meat offal which have been prepared as des cribed in the heading*, namely by the process of being salted, put in brine, dried or smoked. Preparation is not related to a temperature-based factor.

68. If some or all products that fall within the scope of heading 0207 of the EC Schedule can be considered as having undergone a "process", what is the purpose of that process? What is the purpose of the processes to which products falling within the scope of heading 0210 are subject?

Insofar as the purpose of the process is relevant to the scope of the EC's concession on 0210 in Schedule LXXX, the purpose of the processes in 0207 (chilling or freezing) would be that of preservation. The purpose of the processes to which products falling under heading 0210 are subject would be that of preparation.

This is confirmed by the EC's own Additional Note 6 which states that: "products falling within heading No. 0210 to which seasoning has been added during the *process of preparation* remain classified therein, provided that the addition of seasoning has not changed the character of the product"(emphasis added). This Additional Note 6, which clearly refers to products in heading 0210 as having undergone a process for the purpose of preparation, has been included in the EC's Combined Nomenclature since at least 1992 until 2003. Thailand is submitting the 1992 and 1993 Combined Nomenclature of the EC as Exhibits THA- 27 and 28 respectively. (Thailand notes that the 1994 Combined Nomenclature has already been submitted as Exhibit THA-8 and BRA-7.) Thailand notes that this definition is still in the 2003 version of the Combined Nomenclature.

69. To what extent, if at all, is the purpose of a process to which a product is subject relevant to the interpretation of: (a) heading 0207 of the EC Schedule; and (b) heading 0210 of the EC Schedule? Should the purpose take precedence over the process in either case? If so, please explain why and in what circumstances. In the case of both headings, if there are multiple purposes underlying the processes in question, which purpose should take precedence?

The purpose of the process to which a product is subject is not relevant to the interpretation of either heading 0207 or heading 0210 of the EC's Schedule. As the European Court of Justice has stated, "[t]he decisive criterion for the customs classification of goods must generally be looked for in their objective characteristics and properties … " (Case 55/75, Belgium State *v.* Vandertaelen, 1975 E.C.R. 1647. Cited in Exhibit THA-18 at p. 1278.) Therefore, in either heading, the purpose should not take precedence over the process or the objective characteristics of the product.

As the process takes precedence over the purpose, it is not relevant whether there may be multiple purposes underlying a particular process for the classification of a product.

71. Are there different degrees to which meat can be dried, smoked or soaked in brine? If so, is it the case that meat products can only be classified under heading 0210 if the degree of drying, smoking or soaking in brine has exceeded a particular level? If so, what are those levels and how are they determined?

Yes, there are different degrees to which a meat product can be dried, smoked, or put in brine.

As Thailand has noted in its First Written Submission, the EC had provided a definition of "salted" in Additional Note 7 in Chapter 2 of its Combined Nomenclature which set a minimum quantitative level that a product had to meet in order to be classified as salted under heading 0210. In a similar vein, the EC provided a definition of "dried or smoked" in Additional Note 2(E) in the same Chapter which provides that:

> For the purposes of subheadings 0210 11 31, 0210 11 39, 0210 12 19 and 0210 19 60 to 0210 19 89, products in which the water/protein ratio in the meat (nitrogen content x 6,25) is 2,8 or less shall be considered as 'dried or smoked.' The nitrogen content shall be determined according to ISO method 937-1978.

As with the definition for the coverage under for 0210, this definition only specifies the quantitative level that must be met for a product to be considered as "dried or smoked". Thailand notes that the structure of Additional Note 2(E) is the same as that of Additional Note 7, namely that the classification of a product as "dried or smoked" or "salted" is dependent on a neutral and objective criterion. For a product to be considered as "dried or smoked" it must have a specific water/protein ratio. Similarly, for a product to be considered as "salted" it had to have a minimum salt content of 1.2% homogenously and deeply impregnated in the meat product. These are criteria for determining whether a product would fall under heading 0210 that could be easily assessed by a Customs Officer at the border.

Thailand further notes that there is no requirement in Additional Note 2(E) that the product must be dried or smoked for the purposes of long-term preservation.

73. Is the Harmonized System "context" under Article 31.2 of the *Vienna Convention*? If so, please explain by demonstrating how the various elements in Articles 31.2(a) or 31.2(b) are fulfilled.

Articles 31(2) of the *Vienna Convention* reads as follows:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and its annexes:
>
> a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Thailand does not consider that the Harmonized System is context within the meaning of Articles 31(2)(a) or 31(2)(b) as it does not fulfil the criteria set out in sub-paragraphs (a) or (b).

Thailand notes that in the *EC – Computer Equipment*, the Appellate Body did express the view that the Harmonized System should have been taken into consideration by the Panel "in its effort to interpret the terms of Schedule LXXX." (WT/DS/62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 89). However, the Appellate Body did not specify the provision in the Vienna Convention under which the Harmonized System should be taken into account. Thailand is of the view that it may not be necessary for the Panel to specify the provision in Article 31 under which it is considering the Harmonized System.

74. Assuming that the Harmonized System qualifies as "context" for the interpretation of the EC Schedule under Article 31.2 of the *Vienna Convention*, to what extent if at all can the General Rules for the interpretation of the Harmonized System be used to determine the meaning of the headings in question?

Under the assumption made by the Panel in this question, Thailand considers that the General Rules for the Interpretation of the Harmonized System must be used to determine the meaning of a particular heading. Article 1 of the Harmonized System Convention defines the Harmonized System as comprising, inter alia, the General Rules for the Interpretation of the Harmonized System. Article 3.1(a) obliges Contracting Parties to ensure that its "Customs tariff and statistical nomenclatures shall be in conformity with the Harmonized System." Furthermore, as stated in paragraph 104 of Thailand's First Written Submission, the EC and Thailand as Contracting Parties to

the Harmonized System Convention have agreed in Article 3 "to apply the General Rules for the Interpretation of the Harmonized System. "

Even if the Panel were to consider the Harmonized System under a provision other than Article 31(2) of the *Vienna Convention*, it would still need to rely upon the General Rules for the Interpretation of the Harmonized System because they are an integral part of the Harmonized System for the foregoing reasons.

75. How are the following to be categorised, if at all, within the framework of Articles 31 and 32 of the *Vienna Convention*: (a) 1981 Explanatory Note to heading 02.06 of the EC's Common Customs Tariff; (b) the 1983 Explanatory Note for subheadings 0210.11-31 and 0210.11-39 of the EC's Common Customs Tariff; (c) the 1983 *Dinter* judgement of the ECJ; (d) the 1993 *Gausepohl* judgement of the ECJ; and (e) the December 1994 Explanatory Note to subheadings 0210.11.11 and 0210.11.19 to the EC's Combined Nomenclature?

Thailand considers that (a), (b) and (c) cannot be categorised within the framework of Articles 31 and 32 of the *Vienna Convention* because they existed prior to the launch of the Uruguay Round. Thailand considers that (d) cannot be categorised under Articles 31 and 32 as prior to the conclusion of the treaty, there was specific legislation passed in Regulation 535/94 which clarified the very issue addressed in the *Gausepohl* case and made clear that classification under heading 0210 should be based on the product meeting specific criteria. Thailand considers that (e) should not be considered under Articles 31 and 32 because it relates to a type of meat which is not at issue in this proceeding. As Thailand suggested in its questions to the EC, the normal practice in the EC is not to apply provisions of one Explanatory note to another, unless it is so stated that it shall apply *mutatis mutandis.*

In contrast, Thailand wishes to clarify that Regulation 535/94 should be considered in interpreting the terms of the EC's concession under heading 0210. First, Regulation 535/94 was published on 9 March 1994 and entered into force on 1 April 1994. Article 1 of this Regulation stated that "The following additional note shall be inserted in Chapter 2 of the Combined Nomenclature annexed to Regulation (EEC) No 2658/87":

> For the purposes of heading 0210, the term "salted" means meat or edible meat offal which has been deeply and homogenously impregnated with salt in all parts, having a total salt content not less than 1.2% by weight.

Article 2 states that:

> This Regulation shall enter into force on [1 April 1994] … and shall be binding in its entirety and *directly applicable* in all Member States.

Second, Thailand notes that the definition of "salted" set out in Regulation 535/94 was inserted in the Combined Nomenclature as an "Additional Note" and not an "Explanatory Note." As noted in Thailand's Oral Statement at the First Substantive Meeting of the Panel with the parties, the European Court of Justice has explained that "an Additional Note decided upon by the Council becomes part of the heading to which it refers and has the same binding effect whether it constitutes an authentic interpretation of the heading or supplements it." (Case 38-75, Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrchten en accijnzen, 19 November 1975, ECR 1975, page 01439, at para. 10.) Therefore, Additional Note 7 provided a clear definition of "salted" for purposes of heading 0210 and was a binding part of the heading 0210 in the EC's Combined Nomenclature as of the conclusion of the WTO Agreement.

The interpretation set out in the Additional Note was binding and constituted the EC's understanding, under its own laws, of its commitments in heading 0210 of Schedule LXXX.

76. Can the Harmonized System be considered as comprising "relevant rules of international law" within the meaning of Article 31.3(c) of the *Vienna Convention*? If so, please explain by demonstrating how the various elements in Article 31.3(c) have been fulfilled.

The Harmonized System could theoretically be considered as comprising a relevant rule of international law applicable in the relations between the parties within the meaning of Article 31(3)(c). As Thailand noted in response to this question orally during the First Substantive Meeting of the Panel with the parties, in *EC – Computer Equipment*, in responding to the Appellate Body's question, the EC stated that: "on the basis of Article 31(3)(c) of the *Vienna Convention*, the *International Convention on the Harmonized Commodity Description and Coding System* (footnote omitted) … and its *Explanatory Notes* (footnote omitted) would be relevant in interpreting the obligations of the European Communities under Schedule LXXX *vis-à-vis* WTO Members which are also Members of the World Customs Organisation (the 'WCO')" (Appellate Body Report, *EC – Computer Equipment*, para. 13).

Thailand notes however that in this case, in paragraph 107 of its First Written Submission, the EC has suggested the Harmonized System as "context" within the meaning of the *Vienna Convention* which would suggest that it should be considered under Article 31(1) or Article 31(2) since these are the only two provisions in the *Vienna Convention* referring to context.

Thailand stated in its first written submission that the Harmonized System must be considered in an Article 31 analysis, but did not specify under which provision it should fall.

78. Do the parties consider that the WTO Modalities for the Establishment of Specific Binding Commitments under the Reform Programme issued on 20 December 1993 amounts to "preparatory work" within the meaning of Article 32 of the *Vienna Convention*? If so, please explain why and indicate the significance parties attach to this document?

The WTO Modalities for the Establishment of Specific Binding Commitments under the Reform Programme issued on 20 December 1993 may theoretically be considered as "preparatory work" within the meaning of Article 32 of the *Vienna Convention.* From the reference to this document in paragraph 63 of the EC's First Submission, it would appear that the EC is citing the Modalities paper in order to demonstrate that the Harmonized System was an important tool in the agricultural negotiations. However, it is unclear to Thailand what is the probative value of this document as a supplementary means of interpretation. Thailand notes that the Agreement of Agriculture, which is part of the treaty of the WTO Agreement, makes clear in its Annexes that the product coverage is listed by HS Codes. Thailand does not consider this document to be of significance in these proceedings.

Thailand considers it is important to emphasise that it is the concession made by the EC in its Schedule LXXX, and not the heading in the HS, that must be interpreted by the Panel.

79. What common essential feature(s) do the parties consider characterise products that fall under:

(a) Chapter 2 of the Harmonized System?

The title of Chapter 2 indicates that it covers "meat and edible meat offal." The Chapter does not cover products falling under 02.01 to 02.08 and 02.10, which are unfit or unsuitable for human

consumption. Therefore, the common essential feature within this Chapter is that the product must be meat or meat offal which is fit or suitable for human consumption.

The General Chapter Note which provides the distinction between meat and meat offal of Chapter 2 and that of Chapter 16 states the following:

This Chapter covers meat and meat offal in the following states only:

1) fresh

2) chilled

3) frozen

4) salted, in brine, dried or smoked.

Therefore, the total coverage of Chapter 2 is for meat and meat offal in any of these *four* states.

(b) heading 0207 of the EC Schedule?

Heading 0207 covers meat and edible offal, of the poultry of heading 0105, fresh, chilled or frozen.

The note to 0207 provides that: "[t]his heading covers only fresh, chilled or frozen meat and edible offal of domestic poultry which, when live, are classified in heading 0105."

Therefore, it is textually clear that heading 0207 covers meat and edible offal in *three* of the *four* states that are covered by Chapter 2 (as per the General Chapter Note).

The common essential feature of "chilled and frozen" in this heading is that of preservation.

(c) heading 0210 of the EC Schedule?

Heading 0210 covers meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal.

The note to 0210 states that: "[t]his heading note applies to all kinds of meat and edible meat offal which have prepared as described in the heading, other than pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted (heading 0209). The heading includes streaky pork and similar meats interlarded with a high proportion of fat, and fat with an adhering layer of meat, provided they have been prepared as described in the heading. "

Therefore, it is textually clear that heading 0210 covers meat and edible meat offal that is in the *fourth* state i.e., salted, in brine, dried or smoked, that are covered by Chapter 2 (as per the General Chapter Note).

Furthermore, Thailand notes that the Chapter Note to Chapter 16 excludes products that are "*prepared or preserved* by the processes specified in Chapter 2 or 3 or heading 0504." As noted above, Chapter 2 covers products in four states: (i) fresh, (ii) chilled, (iii) frozen or (iv) salted, in brine, dried or smoked. Chapter 3 covers fish and crustaceans, molluscs and other aquatic invertebrates which are fresh, chilled, or frozen, salted, in brine, dried or smoked. Heading 0504 covers guts, bladders, and stomachs of animals (other than fish) whole and pieces thereof. (Thailand

notes that this is the complete heading in the EC's Schedule whereas the HS heading in full is as follows: guts, bladders, and stomachs of animals (other than fish) whole and pieces thereof, fresh, chilled, frozen, salted, in brine, dried or smoked.) These are the only processes specified in Chapter 2 and 3 and heading 0504. Out of these processes, it is undisputed that fresh does not refer to meat that is subject to preservation, and that chilled and frozen do refer to preservation. The question is whether "salted, in brine, dried or smoked" are for the purpose of preservation or preparation. To refer to these as being carried out for the purpose of preservation would have the effect of rendering the terms "or prepared" in the Chapter Note to Chapter 16 inutile. because that would in effect mean that there was no process for the purpose of *preparation* specified in Chapter 2, Chapter 3 or heading 0504. The correct interpretation would be to refer to "salted, in brine, dried or smoked" as processes for the purposes of *preparation*. This reading would give meaning to all the terms in the General Note to Chapter 16.

Thailand submits that this latter reading is in conformity with the EC's own understanding that the type of processes covered in Chapter 2 include processes carried out for the purposes of preparation and preservation.

In the EC's Combined Nomenclature of December 1994 (Commission Regulation (EC) No. 3115/94 of 20 December 1994, Exhibits THA-8 and BRA-7), Additional Note 6 stated that: "Products falling within heading No. 0210 to which seasoning has been added during the *process of preparation* remain classified therein provided that the addition of seasoning has not changed the character of the product."

The EC has been consistent in its understanding that products in heading no. 0210 undergo a *process of preparation.* This consistent understanding has been reflected in every annual issuance of the EC's Combined Nomenclature from at least 1992 to 2003.

ANNEX C-5

RESPONSES BY THAILAND TO QUESTIONS POSED BY THE PANEL AND THE EUROPEAN COMMUNITIES AFTER THE SECOND SUBSTANTIVE MEETING

(2 December 2004)

QUESTIONS POSED BY THE PANEL

FOR THAILAND:

83. Please reconcile the statement in paragraph 44 of Thailand's oral statement at the first substantive meeting and in its reply to Panel question No. 16 that only the classification practice of Members in implementing their tariff concessions is relevant with its statement in paragraph 68 of its second written submission that the unilateral classification practices of Members cannot be considered as subsequent practice establishing "the agreement of the parties" regarding the interpretation of the tariff heading at issue.

Paragraph 44 states that the classification practice of Members in implementing their tariff concessions is relevant [for the purpose of elucidating their understanding of the scope of that tariff concession.] This statement was made to highlight the importance of classification practice on importation with respect to a tariff concession *as compared to* the classification of exports for statistical purposes.

However, Thailand never considered the unilateral classification of a Member in implementing its tariff concessions to be "subsequent practice" within the meaning of Article 31(2)(b) of the Vienna Convention regarding the interpretation of the tariff heading at issue. "Subsequent practice" within the meaning of Article 31(2)(b) must establish the agreement of the parties.

The two statements made by Thailand can, therefore, be reconciled as they address different points.

FOR THE COMPLAINANTS:

84. How do Brazil's and Thailand's exporters describe the products at issue on their exportation documentation when exported to the EC?

The product is described as "Fresh Frozen Boneless Chicken Meat (Boneless Skinless Breast)" and is specified by the shipping company as 0207 on their exportation documentation.

85. Please explain the export classification process for the products at issue. In particular, is this undertaken by domestic customs authorities and/or by exporters?

(1) Exporters must obtain a permit (R-9 form) from the Department of Live Stocks to export animal carcass. The R-9 form is used to obtain an export declaration form from the Customs Department.

(2) A shipping company is hired by the exporters to handle the customs export procedures and paperwork. The shipping company will also fill out the description of the product and its customs classification heading in the export declaration form. Salted chicken exported from Thailand to the EC is classified by the shipping company as 0207. The export declaration

form as filled out by the shipping company will be submitted to Customs officials for further appropriate export procedures.

(3) The export declaration form is in turn used to obtain a health certificate from the Department of Live Stocks. The health certificate is required by the EC for Thai salted chicken exports to the EC. The certificate indicates whether the product is fresh chicken or meat preparation or cooked chicken.

86. In paragraphs 14 and 36 of its second written submission, the EC submits that low levels (0.5%) of salt are regarded in the industry as sufficient for the purposes of preventing "drip loss". According to the EC, there is no need for a salt content of 1.2% or above for such purposes. The EC argues that, therefore, even if drip loss were relevant, it does not require that the salt content be greater than 0.5%. Please comment.

The salt content of 1.2% that was specified in Regulation 535/94 in 1994 was not based on a requirement to prevent "drip loss." The "drip loss" factor is a concept that was first introduced during the course of these proceedings. The "drip loss" factor is an important technical reason why importers prefer salted chicken. However, the amount of salt that may or may not be required for "drip loss" to be prevented is an *ex post facto* consideration and is not relevant to the issue before the Panel, namely, the scope of the EC's tariff concession of heading 0210 at the time of the conclusion of the WTO Agreement.

***FOR THE EUROPEAN COMMUNITIES**:*

93. Do the products at issue in this case meet the criteria set out in EC Regulation 535/94?

Yes.

Even EC Commissioner Fischler has acknowledged that the products at issue meet the criteria set out in Regulation 535/94. He stated in response to the question posed by the European Member of Parliament, Mr. Albert Maat, "[t]he Honourable Member assumes that the meat in question is lightly salted and the salt may be shaken off. This fact would not be in conformity with the definition in the Combined Nomenclature which reads: 'For the purposes of heading 0210, the terms 'meat and edible meat offal, salted, in brine' mean meat and edible meat offal deeply and homogeneously impregnated with salt in all parts, having a total salt content not less than 1.2% by weight'. The Commission is however not aware that imported salted poultry meat does not comply with this definition." (Exhibit THA-4).

108. In paragraph 119 of its second written submission, the EC submits that throughout the Uruguay Round negotiations, EC law on classification under heading 02.10, including Regulation 535/94, was based on the concept of preservation. Please explain where the concept of preservation is reflected in Regulation 535/94.

The concept of preservation is not reflected in Regulation 535/94. The EC has explicitly acknowledged this omission in paragraph 87 of its First Written Submission, where it stated: "… Regulation 535/94 did not need to refer to the concept of preservation nor to the judgment of the EC."

114. Please comment on Brazil's and Thailand's submission in paragraphs 56 and 8 respectively of their oral statements at the second substantive meeting that the legal effects of an ECJ judgement may be reversed or altered by a change in the law, including the enactment of a new Regulation.

In response to a question posed by Thailand with respect to the difference between the European Court of Justice's judgement in *Dinter* and the subsequent Regulation which enacted Additional Note 6(a), the EC stated that "the EC exercises its legislative powers carefully, with a view to ensuring that there is no conflict. Should any such conflict occur, there can be no doubt that the judgements of the Court of Justice would prevail." The EC then cited the *French Republic v. Commission* case to the effect that the Commission is not authorized to "alter the subject-matter of the tariff headings which have been defined on the basis of the Harmonized System … whose scope the Community has undertaken not to modify."[1] Thailand agrees that the EC cannot alter the subject matter of the tariff headings. For example, if the EC enacted a Regulation which altered the definition of "salted meat" in heading 0210 to include widgets, then the European Court of Justice could strike down that Regulation as *ultra vires* as the EC would have exceeded its legislative competence in passing such a Regulation. In such a situation, the judgement of the Court of Justice would prevail.

However, this is not the situation in the case before the Panel.

Regulation 535/94 (enacted as Additional Note 7) did not alter the subject matter of the tariff headings which have been defined on the basis of the Harmonized System. Rather, Regulation 535/94 merely specified the criteria to be taken into account for classifying certain goods under a particular heading, in this case, heading 0210.

In *Gijs van de Kolk-Douane Expéditeur BV*, the European Court of Justice reviewed an Additional Note that did not change the scope of the chapters, sections and headings of the nomenclature, but merely specified the criteria to be taken into account for classifying certain goods under a particular heading of the Common Custom Tariff …[2] In that case, the European Court of Justice held that the validity of the Additional Note was not affected.

In a similar manner, Thailand submits that the previous Additional Note 7 does not change the scope of the tariff headings in the Combined Nomenclature – it merely specified the criteria to be taken into account for classifying certain goods. Therefore, the validity of the Additional Note 7 is not affected.

Thailand submits that the legal effects of the European Court of Justice's judgment in the *Gausepohl* case were modified by the provisions of Additional Note 7, which specified the criteria to be taken into account for classifying products under heading 0210.

FOR ALL PARTIES:

118. What is the distinction between "preservation" and "long-term preservation"?

Following the First Substantive Meeting with the Parties, Brazil posed the following question to the EC: "Is there a difference between 'preservation' and 'long-term preservation'? If so, what is it?" The EC's response was that "[t]he question is not relevant to this dispute since no one maintains that the product at issue qualifies under either criterion."

[1] Replies of the European Communities to questions posed by the Complainants at the First Substantive Meeting of the Parties. EC Reply to Thailand's Question 1, 14 October 2004.

[2] C-233/88, *Gijs van de Kolk-Douane Expéditeur BV v Inspecteur der Invoerrecten en Accijnzen*, 8 February 1990, ECR [1990] page I-00265, para. 18. Exhibit THA-35.

The EC has repeatedly stated that "preservation lies at the heart of Chapter 2". (Thailand has never agreed that preservation is the key factor for determining classification under Chapter 2) However, the EC has never stated that "*long-term* preservation" lies at the heart of Chapter 2. Nevertheless, in Regulation 1223/ 2002 and in Regulation 1871/2003, the EC introduced the concept of *long-term preservation* as being the decisive criterion for determining the classification of a product.

However, as the EC has indicated throughout the course of these proceedings, it does not have a clear understanding itself of the standard to be used to assess "long-term preservation." Indeed, the EC has acknowledged that this determination would have to be resolved by individual EC customs officials within strict time-frames on a case-by-case basis, on a shipment-by-shipment basis, without any specific guidelines on the percentage of salting which would suffice to achieve the purpose of "long-term preservation." From the EC's own statements at the First Substantive Meeting with the Parties, a customs officer would have to determine that the product would need to be preserved for a period of between "a few" and "several months."

Thailand notes that in its oral reply to a question posed by the Panel during the Second Substantive Meeting, the EC stated that the analysis of what is meant by long-term preservation for the purpose of classifying the product under heading 0210, would have to be carried out on "a product-by-product basis and on a case-by-case basis." Such an approach fails to provide security and predictability to traders with respect to the trade concessions negotiated by the EC under Schedule LXXX.

119. At the time the EC concluded its Schedule, was there evidence of the existence of trade in meats under heading 02.10 which, through salting, were preserved for less than a few months?

In its First Written Submission, the EC provided information in Table 2 (page 22) which indicated that there was trade in meat under heading 02.10.90.20 in 1994 in the amount of 21 metric tonnes. However, there is no indication of the length of time for which the salted meat products were preserved, *e.g.*, a few days, a few months etc.

Thailand notes that the Panel has previously requested the EC "to provide details of the salt content of the products classified as 'other salted meats' with respect to the statistics provided in Table 1 (page 21)." The EC did not provide such details and instead replied:

> Table 1 of the EC's First Written Submission refers to imports during the period 1986 to 1993. The import declarations in respect of imports are not held centrally, but rather with the Member State customs authorities. It is unlikely that declarations from this period are still available, and it is moreover, unlikely that such declarations would mention the salt content of the goods in question. The EC has not been able to find documents attesting to the salt content of these products.[3]

It is not clear to Thailand why the EC has not requested this information directly from the Member State customs authorities.

In any event, Thailand notes that the meat in question in the *Gausepohl* case contained salt at the level of 0.71% (internal salt content 0.48%).[4] We further note that the *Oberfinanzdirektion* had

[3] EC's Replies to Panel's Questions Following the First Substantive Meting with the Parties, 14 October 2004. Question 35.

[4] Paragraph 2 of the Report of the Hearing in Case 33/92. Exhibit EC-14.

issued a Binding Customs Tariff Notice on 9 May 1989 classifying meat of bovine animals with a total salt content of 0.71% (internal salt content 0.48%) under subheading 0210 20 90 of the Combined Nomenclature. This fact by itself is an indication that there was trade in salted meat that was preserved for less than a few months. In that case, it was submitted that such a level of salt would not preserve the meat for an extended period of time.

120. With respect to Brazil's suggestion in its reply to Panel question No. 3 that the Panel should draw adverse inferences regarding the EC's failure to provide certain information requested of it by the Panel, is there any basis for the Panel drawing similar inferences regarding Brazil's and Thailand's refusal to provide export classification practice for the headings at issue?

No. Thailand never refused to provide the information. Thailand has maintained a legal argument throughout these proceedings that the classification practices of Thailand for statistical purposes is not relevant for determining the scope of the EC's concession on heading 0210 at the conclusion of the WTO Agreement.

However, in response to the Panel's request, Thailand has now provided the information in its response to question 84 and, therefore, there is no need for the Panel to draw adverse inferences.

121. What relative weight should the Panel accord to inferences that may be drawn for the headings at issue in this case from:

(a) the structure of Chapter 2 of the HS and its predecessors;

(b) the Explanatory Notes that are relevant to Chapter 2 of the HS and to its predecessors; and

(c) General Interpretative Rule 3 of the HS.

(a) The structure of the headings in the EC's Schedule of Concessions (which is the same as the structure of Chapter 2 of the Harmonised System and the same as the structure of Chapter 2 of the EC's Combined Nomenclature) should be taken into account by the Panel in its application of Article 31(1) of the Vienna Convention as part of the "context" following an examination of the "ordinary meaning" of the terms of the treaty at issue. The structure of Chapter 2 in the predecessor nomenclatures serves as useful background to the interpretation of the current Chapter 2 in the various agreements.

(b) The Note to Chapter 16 (which is not an Explanatory Note) is relevant to Chapter 2 of the HS. As explained in greater detail in Section B.3 of Thailand's Second Written Submission, the Note to Chapter 16 (which is legally binding) excludes products that are prepared or preserved by the processes specified in Chapter 2 or 3 or heading 0504. This means that the products in Chapter 2 undergo processes for the purpose of preservation *or* of preparation. Thailand has submitted that products in heading 0210 undergo processes for the purpose of preparation.

The Explanatory Notes to Chapter 2 should also be given weight by the Panel. The Appellate Body has specifically stated in *EC – Computer Equipment* that: "[w]e believe, however, a proper interpretation of Schedule LXXX should have included an examination of the Harmonized System and *its Explanatory Notes*." (Emphasis added. Para. 89). In interpreting Schedule LXXX, the Appellate Body could have chosen to not accord the Explanatory Notes of the Harmonized System the same weight as the HS itself. However, the Appellate Body made clear that the Harmonized System and its Explanatory Notes must be used in an

interpretation of the EC's Schedule LXXX. Therefore, the Panel should not give the HS Explanatory Notes less weight than the Appellate Body has recommended.

(c) The General Rule of Interpretation 3 of the HS may be taken into account as part of the Harmonized System. Article 1(a) of the Harmonized System Convention provides that the Harmonized System "means the Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading Notes and the *General Rules for the interpretation of the Harmonized System*, set out in the Annex to this Convention." (Emphasis added.)

122. Do the parties consider that actual knowledge during negotiations of a document or instrument is necessary on the part of some/all negotiators involved in the negotiation of a treaty in order for it to qualify for consideration as "preparatory work" and/or "circumstances of conclusion" of a treaty under Article 32 of the Vienna Convention? If so, please provide support for this view. If not, please provide support for this view.

No. Thailand does not consider that *actual* knowledge during negotiations of a document or instrument is necessary on the part of some or all negotiators in order for that document or instrument to qualify as "circumstances of the conclusion." From a practical perspective, it would be extremely difficult to prove "actual knowledge" among all negotiators. However, negotiators are expected to have *deemed* knowledge of the legislation in another Member's jurisdiction at the time of the conclusion of the treaty.

QUESTION POSED BY THE EUROPEAN COMMUNITIES

In para. 5 of its closing statement of 18 November 2004, Thailand opines that Additional Note 6(b) means "that products in heading 0210 undergo a process of preparation". How does Thailand explain that none of the parties in the *Gausepohl* case relied on this note to argue that the beef had been "prepared" and should therefore qualify under heading 0210, and that the Court did not consider it in its interpretation of heading 0210?

Reply

Thailand is not aware of the reasons why neither the parties nor the Court in the *Gausepohl* case relied on Additional Note 6(b) which stated that "that products in heading 0210 undergo a process of preparation".

Thailand is aware, however, that Additional Note 6(b) was introduced by Regulation No 3678/83 of 23 December 1983 (Commission Regulation (EEC) No 3678/83 of 23 December 1983 on the tariff classification of certain types of seasoned meat and amended Regulation (EEC) No 950/68 on the Common Customs Tariff, O.J. L 366/53). The note was at that time numbered as Additional Note 6(c) and provided:

> "However, products falling within subheadings 02.06 B I, 02.06 C I a) and 02.06 C II a) to which seasoning has been added during the process of preparation continues to fall within the said subheadings provided that the addition of seasoning has not changed their character of product falling within heading No 02.06."

In Thailand's view, as the Additional Note 6(b) was duly published and was in force at the time of the *Gausepohl* case, the parties and the Court could have relied on the provisions of this Note to the effect that "that products in heading 0210 undergo a process of preparation".

ANNEX C-6

COMMENTS BY THAILAND ON THE EUROPEAN COMMUNITIES' RESPONSES TO QUESTIONS AFTER THE SECOND SUBSTANTIVE MEETING

(9 December 2004)

QUESTIONS POSED TO THE EUROPEAN COMMUNITIES

Question 87

In Thailand's view, the meaning of the headings in the EC Schedule must be assessed as of the time of the conclusion of the WTO Agreement. The meaning of "salted" in heading 0210 in the EC's Schedule at that time was defined by Regulation 535/94 which had been published on 11 March 1994 and entered into force in the EC's Combined Nomenclature on 1 April 1994. As the Appellate Body stated in *EC - Computer Equipment*, "… the fact that Member's Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members." (para. 109) A treaty interpreter must assess the scope of the tariff commitment the EC made on heading 0210 when it concluded the WTO Agreement on 15 April 1994 in order to ascertain the EC's WTO obligations. The determination of whether there is a violation of the EC's obligations must be made on the basis of the situation existing at the date of the establishment of the Panel.

Furthermore, in this particular case, negotiators at the conclusion of the WTO Agreement could have been expected to have deemed knowledge of the *legislation* in the EC, such as Regulation 535/94, which was published and in force at the time of the conclusion of the treaty. Negotiators could not have been expected to be aware of every Court judgement in the EC because each judgement related to the specific fact situation before the Court. For example, the operative part of the ruling in the *Gausepohl* case on which the EC seeks to rely in this case only pertains to the interpretation of heading 0210 with respect to bovine meat. Therefore, the Court's interpretation of heading 0210 in *Gausepohl* is of little use to traders exporting salted chicken or other types of meat to the EC. Amendments made by legislation, on the other hand, are more generally applicable in a variety of situations. Regulation 535/94, which applies to all types of meat falling under heading 0210 is more general and therefore more informative to traders who export different types of meat.

Members did agree in the Modalities Agreement to use the *level* of duties applied as of 1 September 1986. It is very common to agree at the beginning of multilateral trade negotiations on a date in the past that would be used to determine the tariff levels to which any agreements on tariff reductions would be applied. This ensures that no participant in the negotiations can increase its "bargaining chips" in the course of a Round. This agreement to use the level of duties can not be taken to mean that the scope of the EC's Schedule should be determined as of the beginning of the Round. However, the content of the agreement finally reached must be determined by the circumstances prevailing at the conclusion of the agreement.

Indeed, the Vienna Convention makes clear in Article 31 that it is the terms of the treaty (as they have *been* negotiated) that must be interpreted and in Article 32 that it is the circumstances of the *conclusion* of the treaty to which recourse may be sought. The *Vienna Convention* does not have any reference to the circumstances at the *launch* of the negotiations of the treaty.

Question 97

The EC states that it "knows of no meat that is preserved by the use of common salt alone." It then notes that it had previously referred to bacon as the only meat product that is preserved by salting alone, but now states that it is more accurate to refer to bacon as "cured" rather than "salted" because a combination of common salt NaCL, sodium nitrate and nitrate are used in the process (para. 19). However, the terms of the heading 0210 do not contain the term "cured" but only refer to "salted, in brine, dried or smoked." So, the EC's answer oddly implies that meat which has been treated with common salt cannot be considered under the term 'salted' and that bacon which is regularly classified as "salted meat" under heading 0210 should not be considered as "salted" but "cured" even though the term "cured" does not appear in heading 0210. The EC's interpretation does not make sense.

In addition, the EC has obtained an expert's opinion which states that a minimum of 7% salt in meat is necessary to preserve the meat (Exhibit EC-32). (Thailand notes that there is a seeming inconsistency between this expert opinion and that provided in the *Gausepohl* case by the Federal Office for Meat Research which stated that 4-5% salt was necessary to preserve the meat). In any event, during the course of the First Substantive Meeting with the Parties, the EC stated that meat salted at the level of 3% or more would have no commercial market in the EC. Therefore, the EC is requiring that meat be salted for the purposes of preservation at such high levels that the meat would be inedible and unsuitable for human consumption. Thailand notes that the Note to Chapter 2 states that "[t]his chapter does not cover … products of the kinds described in headings 0201 to 0208 or 0210, unfit or unsuitable for human consumption." Thailand submits that meat salted at the level of 7% would be "unfit or unsuitable for human consumption." Therefore, the EC is seeking to establish criteria for "salted meat" (i.e., 7% salt content) that, if applied, would render the product ineligible for coverage under Chapter 2.

Question 100

There is no legal or evidentiary basis for the EC's alternative argument that preparation must "place the meat in a recognisably different state." The EC cites its Exhibit-5 as support to state that all the meats that "all the meats that we are aware of as being classified under heading 02.10 share this characteristic." However, Thailand notes that this Exhibit is entitled a '*Non-Exhaustive* List of Traditional *European* salted and dried/smoked meat products." This would imply that there are other products which are not on this list which could nevertheless fall under heading 0210. Further, Thailand notes the evidence that Brazil has submitted in BRA-43 which contains a partial list of the products listed in the HS on-line Database of salted meat classifiable under subheading 0210.90 (1996 HS version). This list includes products such as 'salted meat of chicken' which are not presented in a 'recognisably different state' and do not have a 'general' or 'specific' name such as bacon or Parma ham. Yet, the Harmonized System Database confirms the fact that 'salted meat of chicken' is a product falling under heading 02.10.

Question 102

In Thailand's view, the EC has not shown that the notion of preservation is "at the heart" of heading 02.10 in the Harmonised System, the EC's Schedule and the EC's Combined Nomenclature. If, indeed, that were the case with the Harmonised System, then the WCO would have presumably mentioned that point in its replies to the Panel's first set of questions. The EC would also have not introduced in 1983 Additional Note 6(a) in its Combined Nomenclature which stated that: "… products falling within subheading 02.06 [the predecessor to heading 02.10] … to which seasoning has been added during the process of preparation continues to fall within the said subheadings…"

Question 109

Thailand notes that the EC is unable to provide the Panel with any additional evidence to buttress its general and oft-repeated assertion that 'EC law and practice support the principle of long-term preservation'. Indeed, the EC submits only the EC's Common Customs Tariff for 1986 which reproduces the headings of the CCCN. The EC's sole argument is that the heading 02.06 of the CCCN contains effectively the same wording of heading 02.10, which according to the EC "enshrine" the principle of preservation. It remains unclear to Thailand how the mere wording of heading 0210 "enshrines" the principle of preservation. Indeed, Thailand has demonstrated throughout these proceedings how the term 'salted' in heading 0210 refers to a process undertaken for the purpose of preparation.

Moreover, the EC has only cited *one* only European Court of Justice case prior to 1 September 1986 which referred to the principle of preservation governing classification under Chapter 2, namely the *Dinter* case. *Gausepohl* which is the only other European Court of Justice case which refers to preservation (albeit in the context of the classification of bovine meat) refers only to *Dinter*.

Question 113

Thailand notes that the Court in *Gausepohl* provided its interpretation of heading 0210 with respect to bovine meat only, and therefore cannot be viewed as the Court's interpretation for all meat falling under heading 0210.

Furthermore, Thailand submits that the content of Regulation 535/94 has been enacted many times as a Council Regulation through the annual issuance of the EC's Combined Nomenclature. Thailand also submits that Additional Note 7 does not change the scope of the sections or headings in Chapter 2.

The Commission has the power to enact a Regulation such as Regulation 535/94 specifying criteria to be taken into consideration for classifying goods under heading 0210.

Question 114

The EC's explanation of the relationship between the *Dinter* case, Additional Note 6(a) and the effect of the judgement in the *Van de Kolk* case is misleading.

In the *Dinter* case (judgment issued on 17 March 1983), the Court held that "a criterion as subjective as taste may not be used to assess the seasoning of meat." On 23 December 1983, the Commission introduced Regulation 3678/83 on the classification of certain types of seasoned meat which provided in Additional Note 6(a) that " '[s]easoned meat' shall be uncooked meat that has been seasoned either in depth or over the whole surface of the product with seasoning either visible to the naked eye or clearly distinguishable by taste." Additional Note 6(a) was then incorporated in the EC's Common Customs Tariff through Council Regulation 3400/84. The original customs issue in the *van der Kolk* case was that classification under heading 16.02 was disallowed because the chicken product has not been seasoned over the whole surface and was not distinguishable by taste. The product was therefore classified under heading 02.02 and the importer then became liable for tariff duties under this heading.

The importer then appealed to the Tariefcommissie which then questioned whether the Additional Note 6(a) was in conformity with the criteria for the Brussels Convention on Nomenclature (a previous method of classifying goods prior to the introduction of the Harmonized System). The issue before the European Court of Justice was:

> First, whether the Council had exceeded its discretionary powers to interpret the Common Customs Tariff when it adopted Additional Note 6(a) and,
>
> Second, whether Additional Note 6(a) modified the scope of the chapters, sections and headings of the Brussels Nomenclature.

To both these questions the Court answered in the negative. For the purposes of this present dispute it is worth examining in detail the reasons for the Court's ruling in *van der Kolk*. First, the Court noted that in *Dinter* it held that a criterion as subjective as taste could not be used for classification purposes. However, the Court then went on to point out that that judgement was delivered under two different circumstances: first, there was no regulation interpreting the Common Customs Tariff *and* second, there was no ISO standard to confirm the objectivity of sensory testing. (Contrary to what the EC states, there is not indication in the Court's judgment that the ISO standard was the "key change in circumstance.") The Court held that the Council did not infringe its discretionary authority in establishing that "taste" could be used for classification purposes. Second, the Court held the Additional Note 6(b) did not change the scope of the chapters, sections and headings of the Brussels Nomenclature. Therefore, the Court in *van der Kolk* upheld the validity of Additional Note 6(a) which the EC has confirmed currently applies. In other words, the Court upheld the validity of Additional Note 6(a) because it was not *ultra vires* the authority of the Commission or the Council.

Regulation 535/94 (Additional Note 7) may be analysed using the same approach as the Court used in its review of the validity of Additional Note 6(b). First, Thailand submits that the Commission was within its discretionary powers to enact Regulation 535/94. Second, Thailand submits that Regulation 535/94 does not change the scope of the chapters, sections and headings of the Harmonized System or of the EC's Combined Nomenclature or the EC's Schedule. It merely specified the objective criteria to be taken into account for classifying goods under heading 0210.

Thailand disagrees that the definition of "salted meat" as a meat product containing 1.2% salt deeply and homogenously impregnated in all parts could be considered as altering the scope of the heading 0210. The EC refers only to its argument that salting at this level does not ensure preservation. Yet the EC has failed to prove that salting in heading 0210 means "preservation." It has still not been able to point to any EC case-law other than *Dinter* and *Gausepohl* in support of its assertion. It has only cited the headings of the CCCN and the HS without clearly demonstrating how salting means "preservation."

Question 121

With respect to the first paragraph in the EC's response, Thailand does not agree that "all parties to this dispute are agreed General Interpretative Rule 3 is not applicable in this case." Thailand refers the Panel to its discussion of GRI 3 in its First Written Submission (pages 33-35), its Second Written Submission (pages 12-14) and its Opening Statement at the Second Substantive Meeting with the Parties (paras. 24-25).

ANNEX C-7

**RESPONSES BY THE EUROPEAN COMMUNITIES
TO QUESTIONS POSED BY THE PANEL, THAILAND AND BRAZIL
AFTER THE FIRST SUBSTANTIVE MEETING**

(14 October 2004)

QUESTIONS POSED BY THE PANEL

FOR THE EUROPEAN COMMUNITIES

19. What is the legal effect of EC Commission Decision of 31 January 2003? In particular

(a) Is the legal effect confined to the revocation of certain BTI notices issued by Germany or is the legal effect broader? If the latter, please explain.

Article 1 of Commission Decision 2003/97/EC of 31 January 2003 limits its effect to the revocation of the BTIs listed in the Annex thereto.

(b) Is the legal effect restricted to Germany or do some or all aspects of the Decision apply more generally to all EC member states? If the latter, please explain.

Article 249 of the EC Treaty (which regulates the competences of the EC and its institutions) states "A decision shall be binding in its entirety upon those to whom it is addressed". Article 2 of Commission Decision 2003/97/EC states that the "Decision is addressed to the Federal Republic of Germany". Consequently, the legal effect of Commission Decision 2003/97/EC is restricted to Germany.

(c) Can recitals in EC Commission Decisions have legal effect? If so, please explain what the legal effect is, if any, of recitals 7 and 8 of the EC Commission Decision of 31 January 2003 as regards the interpretation and application of EC Commission Regulation 1223/2002?

Article 253 of the EC Treaty requires that Community legislative acts "state the reasons on which they are based". The recitals to Commission Decision 2003/97/EC therefore provide the reasons for which the decision was adopted. However, the legal effect of the decision flows from its operative part.

20. With respect to EC Commission Regulations 1871/2003 and 2344/2003: a) How does the EC characterise their legal effect(s) as regards frozen chicken cuts that have been deeply and homogeneously impregnated with salt with a salt content of 1.2% or more in comparison with the legal effect(s) associated with EC Commission Regulation 1223/2002 and EC Commission Decision of 31 January 2003?

The EC would first note that neither of these Regulations are in the Panel's terms of reference. Commission Regulation (EC) No. 1871/2003 inserts into Additional Note 7 to Chapter 2 of the EC's Combined Nomenclature the phrase "provided it is the salting which ensures long-term preservation", in order to clarify and confirm, that in order for a meat to qualify as "salted" under 02.10 the salting must be sufficient to ensure preservation. This Regulation amended the text of the *Combined Nomenclature* in force in 2003. Commission Regulation (EC) No. 2344/2003 makes a series of

amendments to the text of the Combined Nomenclature for 2004, including those insertions included in Regulation 1871/2003.

Additional Note 7 applies to heading 02.10 of the *Combined Nomenclature* in general. That is, it applies to all meats which are presented for import under 02.10. By contrast, Commission Regulation 1223/2002 concerns the classification of the specific goods described in column 1 of the annex to that Regulation i.e. "boneless chicken cuts, frozen and impregnated with salt in all parts. They have a salt content by weight of 1.2 to 1.9%. The product is deep-frozen and has to be stored at a temperature of lower than -18°C to ensure a shelf-life of at least one year". Similarly, Decision 2003/97/EC concerns the specific products identified in the BTIs listed in the Annex to that Decision.

(b) Could frozen chicken cuts that have been deeply and homogeneously impregnated with salt with a salt content of 1.2% or more be classified under heading 0210.90.20 of the EC Combined Nomenclature as a result of the application of Commission Regulations 1871/2003 and 2344/2003? If so, please explain under what circumstances or subject to what conditions. If not, please explain under what heading of the Combined Nomenclature such products would be classified.

Classification under 02.10 would only be possible if the goods in question were salted for preservation.

21. In paragraph 1 of the EC's first written submission and in paragraph 4 of its oral statement during the first substantive meeting, the EC submits that the product at issue is no more than "salty chicken". Could the EC further elaborate on what it means by this characterisation of the products at issue.

The expression "salty chicken" means that salt is added in the product at issue as an ingredient with the result that such chicken tastes of salt, as opposed to chicken that is preserved by salting. However, it is never consumed by the end-user as "salty chicken" because it is, as the Complainants explain, always transformed into further processed products, where salt is merely one ingredient.

22. Could the EC comment on arguments made by Brazil and Thailand in their oral statements during the first substantive meeting (paragraph 20 in the case of Brazil and paragraphs 47 and 49 in the case of Thailand) that exporters are within their rights to "seek the path of least resistance" and to develop products to minimize their costs, including tariffs.

The EC does not question the right of exporters to design products in a way that they come under a particular tariff heading. Sometimes this is successful, sometimes this fails. In any event, the decisive question is whether or not the product falls under the scope of the specific tariff line. The product exported by Thailand in 1996 and Brazil in 1998, i.e., frozen boneless chicken cuts with added salt between 1.2%-2.9% salt does not bring the product within the scope of heading 02.10. Therefore, Brazil's and Thailand's attempt to "seek the path of least resistance" was not successful.

23. Are there any guidelines for EC customs officers to assist them in determining whether or not salting achieves long-term preservation or do customs officers make this assessment on a case-by-case basis?

There are no specific guidelines as to when salting achieves long-term preservation. Such guidelines as are necessary would be specified in the Additional Notes or Explanatory Notes to the Combined Nomenclature. However, in practice such guidelines have never been necessary, because there has never been a problem in applying 02.10 (with the exception of the facts at issue in the *Gausepohl* case and in the present dispute) since there has been little dispute as to the type of product

which falls under 02.10.

24. The EC is requested to explain what is meant by the reference to "character" in the Annex to EC Regulation 1223/2003 and recital 7 of EC Commission Decision of 31 January2003.

These two references refer to the fact that the product at issue does not fall under the scope of tariff heading 02.10. In other words, it does not have the necessary characteristics (preservation by salting) to fall under 02.10.

25. Is there any mechanism in place in the EC that would prevent the duty levied on imports of the products covered by EC Commission Regulation 1223/2002 and EC Commission Decision of 31 January 2003 from exceeding 15.4% ad valorem?

Such products fall under heading 0207 and are subject to the duties applicable to these tariff lines under the EC's Common Customs Tariff. The EC currently has no mechanism in place which would subject the products covered by Regulation 1223/2002 and Decision 2003/97/EC but which fall under heading 0207 to a duty not exceeding 15.4% ad valorem. However, in the EC's view, it is not necessary to have such a mechanism in place because the product at issue is not entitled to benefit from the EC's concession of a 15.4% *ad valorem* rate under 02.10.

26. With respect to paragraph 45 of its first written submission, if there is no literature on the percentage of salt required to preserve chicken, how can the EC be sure that the impregnation with salt of boneless chicken cuts so that they have a salt content of between 1.2 – 3% does not result in long-term preservation?

The EC understands that there is no dispute between the parties that a salt content of between 1.2 and 3% is insufficient to ensure preservation. Neither Brazil nor Thailand have pretended that the specific product at issue has been salted for preservation purposes. In addition, , Brazil considers that "salted chickens cuts [..] are adequately preserved by salt contents ranging from 9-11% and above".[1] The EC considers from the general literature which it has examined that the salt content necessary to ensure preservation will vary with the type of meat, the cut of that meat and other environmental factors which may have an effect on spoilage mechanisms.

27. In paragraph 45 of its first written submission, the EC says that there is a "lack of practice of salting poultry for preservation." Despite the absence of such practice, the EC has suggested throughout its first written submission that products will only be classified as salted under heading 0210 if the salt has been used as a preservative. Further, the measures that have been challenged by the complainants suggest that a salt content of more than 3% is needed in order to preserve boneless chicken cuts. Is the EC effectively submitting that there is no trade in boneless chicken cuts with a salt content of more than 3%? Is there any trade into the EC of salted chicken cuts under heading 0210.90.20? If so, please provide details of such trade.

The EC is not aware of any trade in boneless chicken cuts with a salt content of more than 3%. The EC is not aware that any such product has been traded under heading 0210.90.20 (as it appears in the EC's Schedule). As far as the EC is aware, there is no commercial practice of salting chicken for preservation.

[1] Brazil, First Written Submission, para. 85.

28. Could the EC respond to the suggestion made by Brazil and Thailand in paragraphs 55 and 44 respectively of their oral statements during the first substantive meeting that export classification practice is less relevant than import classification practice given the fact that exported goods are not subject to levying.

Brazil and Thailand claim that "customs classification of products for exportation is not relevant to determine the customs classification practice of a Member."[2] The Complainants' distinction between classification for products for export and import finds no basis in law, and is simply intended to divert attention from their own classification practices. Classification of imports and exports should follow the same principles. This is recognised in Article 3.1(a) of the *HS Convention* which requires that the customs tariff and statistical nomenclatures shall be in conformity with the HS. The Preamble of the *HS Convention* envisages the promotion of "as close a correlation as possible between import statistics and export trade statistics and production statistics". A market access negotiator needs to rely on accurate export/import data in negotiating tariff concessions. GATT contracting parties recognised this in their decision of 1983 on the Harmonized System in which they noted:

> In addition to the benefits for trade facilitation and analysis of trade statistics, from a GATT point of view adoption of the Harmonized System would help ensure greater uniformity among countries in customs classification and thus a greater ability for countries to monitor and protect the value of tariff concessions.[3]

As the Appellate Body held, tariff negotiations are a process of "give and take" between exporting and importing Members.[4] A common basis of understanding for the classification of the goods is therefore necessary. The Complainants are wrong, therefore, to suggest that classification on export is any less relevant than classification on import.

29. In paragraph 25 of its first written submission, the EC questions why the tumbling procedure for adding between 1.2 and 3% salt takes place in Thailand. In paragraph 48 of its oral statement during the first substantive meeting, Thailand explains that the relevant costs are lower in the EC. Could the EC comment on Thailand's explanation.

The EC understands the Panel's reference is to costs being lower in Thailand and not the EC.

The EC's question remains pertinent and valid because the tumbling process carried out in Thailand is by necessity replicated in the EC. The European processing industry will tumble or inject the same chicken, in order to adjust the salt content (if necessary), add spices, other ingredients and ultimately redundant additional working process, designed, as far as the EC is aware, only for exports to the EC and only to avoid the tariff which frozen chicken attracts in the EC (as compared to salted meats). Thus, even if Thai labour costs are lower, the tumbling in Thailand does not serve to cut the costs of processing of chicken.

As further elaborated in response to Panel question 60, the processing industry in general prefers not to have the product tumbled or injected in the exporting country because this gives the exporter the chance to increase the weight of the chicken through the addition of water, hence inflating the price.

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[2] Oral Statement by Thailand, para. 44.

[3] Decision of the Contracting Parties of 12 July 1983 (L/5470/Rev.1) *GATT Concessions under the Harmonized Commodity Description and Coding System* GATT, BISD, Thirtieth Supplement, pp. 17-21 at para. 1.2. Quoted in the EC's First Written Submission at para. 61.

[4] Appellate Body Report, *EC – Computer Equipment*, para. 109.

30. In paragraph 33 of its oral statement during the first substantive meeting, the EC refers to a US customs ruling of November 1993, noting that the ruling found that the product a tissue fell under heading 0201 or 0202 (depending upon whether it was fresh or frozen) rather than under heading 0210. Could the EC refer to the specific aspects of that ruling that support the view that frozen meat that has been deeply and homogeneously impregnated with salt should be classified under heading 0207 rather than under heading 0210 of the EC Schedule.

The 1993 US ruling concerns the "tariff classification of fresh or frozen boneless beef, with 3 per cent added salt, from New Zealand". The salting process is described in the ruling as follows: "This meat is being tumbled, to get the myosin out of the meat and thus enhance its absorption ability. While the meat is being tumbled, some three percent by weight of salt will be added, and tumbling continued until all the salt has been absorbed".

The EC understands that this treatment results in the beef being "deeply and homogenously impregnated with salt", but that it does not preserve the meat. In other words, the meat in question was in the same state as the product at issue. This meat was classified by the US customs under 0201 or 0202 which are the headings for beef that correspond to heading 0207 for chicken. Thus the logic of the decision entirely supports the EC's conclusions.

31. What is meant by the expression " impregnated with salt" in the challenged measures? Please explain the process(es) that chicken would have to be subjected to and/or the qualities possessed by such chicken in order to qualify as having been impregnated with salt.

The expression "impregnated with salt" only appears in the product description in column 1 of the Annex to Regulation 1223/2002 and in recital 1 to Decision 2003/97/EC. In Regulation 1223/2002 the phrase is used to describe the product at issue, and this description is carried into recital 1 to Decision 2003/97/EC.

The phrase "impregnated with salt" appears as a legislative requirement in Regulation 535/94 (and in the ECJ's judgment in the *Gausepohl* case) where it is intended to distinguish products which have been salted for the purposes of preservation from those which have been simply sprinkled with salt. The types of process envisaged by this phrase are those leading to the preservation of the product by salting.

32. What is the difference, if any, between meat that has been "impregnated" with salt and meat that has been "deeply and homogeneously impregnated" with salt. Is the process associated with the latter different from the former? If so, please explain.

The word "homogeneously" is intended to signify that the salt has been spread evenly through the meat. The EC understands that it is not sufficient for the preservation of a product by salting to simply impregnate it with salt (even deeply) in one part – the whole piece of meat must be salted, otherwise spoilage will spread from the unsalted to the salted part. It may thus be the case that meat merely impregnated with salt will not be salted for preservation.

33. Does the EC characterise EC Commission Regulations 1789/2003 and 2344/2003 as annual revisions to the EC Combined Nomenclature within the meaning of Article 12 of Regulation 2658/87? If so, why were two annual revisions published in 2003? If not, please explain how these Regulations should be characterised.

Commission Regulation (EC) No. 1789/2003 reproduces the complete version of the *Combined Nomenclature* (see recital 6 thereto) for the year 2004. It replaces the entirety of Annex I to Council Regulation (EC) No. 2658/97, and was adopted on 11 September 2003, with entry into force on 1 January 2004. Commission Regulation (EC) No. 2344/2003 of 30 December 2003 makes certain

changes to the complete version of the *Combined Nomenclature* for 2004 annexed to Regulation 1789/2003 in order to take account of changes to the *Combined Nomenclature* in force in 2003 which were made after 11 September 2003.

Regulation 1871/2003 of 23 October 2003 was one such change. This explains the reference to Additional Note 7 to Chapter 2 in the Annex to Regulation 2344/2003.

34. In paragraph 94 of its first written submission, the EC states that the product description contained in EC Regulation 1223/2002 corresponded to product descriptions contained in BTIs. The EC is requested to provide copies of the BTIs upon which EC Regulation 1223/2002 was based.

Recital 4 and Article 2 refer to the existence of BTIs which were inconsistent with the classification ruling set out in the Annex to Regulation 1223/2002. Regulation 1223/2002 was not explicitly based on specific BTIs, but rather was intended to correct erroneous interpretations which had formed the basis for BTIs. The EC has provided, as Exhibit EC-24, a number of relevant BTIs, which show that the salt content in such BTIs ranged from 1.2 to 1.9%.

35. With respect to the statistics referred to in Table 1 (page 21) of the EC's first written submission, the EC is requested to provide details of the salt content of the products classified as "other salted meats".

Table 1 of the EC's first written submission refers to imports during the period 1986 to 1993. The import declarations in respect of imports are not held centrally, but rather with the Member State customs authorities. It is unlikely that declarations from this period are still available, and it is, moreover, unlikely that such declarations would mention the salt content of the goods in question. The EC has not been able to find documents attesting to the salt content of these products.

36. The EC suggests in paragraph 43 of its first written submission that the process of salting can be reversed. Can the same be said of meat that has been in brine, dried or smoked? Please explain providing supporting evidence.

It is the EC's understanding that the process of preservation caused by drying or smoking products cannot be reversed. This is because the processes bring about irreversible chemical and physical changes in the meat.

37. The EC is requested to explain what it means in paragraphs 43 and 135 of its first written submission that salting can be "largely" reversed. In particular, providing sufficient support, the EC is requested to indicate the extent to which salting can be reversed.

The EC understands that, as a matter of theory, common salt (sodium chloride, NaCl) that has been added to meat can be entirely removed, through a process of osmosis. Such removal, however, would require sophisticated techniques and would be expensive. It is not, therefore, commercially used. On the other hand, there has been a practice of reducing the salt level in imported salted chicken cuts by tumbling them with unsalted chicken while adding other ingredients, as mentioned in regard to Panel Question 60 and 61.

The EC refers the Panel, for an example of desalting, to the description provided of the desalting of salted cod provided in the EC's First Written Submission (see para. 39 and footnote 27).

As far as the EC is aware, the preservation of meat by "salting" often involves the use not only of sodium chloride, but also of sodium nitrate and nitrite. The latter combine with the muscle

pigment, myoglobin, to form the red-coloured nitrosomyoglobin. This process cannot be reversed. Residual sodium chloride could be reduced by osmosis.

38. Could the EC provide support for the view expressed in recital 4 of EC Regulation 1871/2003 that all processes listed in heading 0210 are for the purpose of ensuring longterm preservation.

Regulation 1871/2003 was not one of the measures identified by the Complainants in their requests for establishment of the Panel. That said, the interpretative exercise the EC was undertaking in the recitals of Regulation 1871/2003 is similar to that before the Panel. Moreover, the view expressed in recital 4 corresponds to the arguments the EC has made before the Panel – in line with its consistent position – on the conclusions for the interpretation of the term "salted" which must be drawn from the context of the term "salted"; i.e. the terms "in brine", "dried" and "smoked". As the EC has set out in its First Written Submission (paras. 127- 139) and its Oral Statement (paras. 10-16), the ordinary meaning of all of these terms refers to methods to preserve meats, as opposed to methods designed to add ingredients. In the current case, Brazilian and Thai exporters are simply adding ingredients – such a process does not bring the product at issue under 02.10.

39. The EC is requested to comment on the observation made by Thailand in paragraph 13 et seq of its oral statement at the first substantive meeting that, in cases where the EC wanted to make preservation a relevant criterion in its Schedule, it did so expressly.

The EC is not convinced by Thailand's argument that because in other instances the HS explicitly uses the term preservation, a reference to "frozen" in 0207, and all the processes mentioned in 02.10 cannot be a reference to preservation processes. The terms "frozen" and "dried", "salted", smoked, "in brine" necessarily imply that the meat is preserved. There is consequently, no need to explicitly mention it as it would be redundant. The *a contrario* reading suggested by Thailand is baseless. Indeed, Thailand contradicts itself. In its First Written Submission, it stated that the term "frozen" in the EC's schedule refers to "products preserved by [...] refrigeration", yet the term "preservation" is not mentioned with respect to the term "frozen" in the EC's Schedule.[5]

Moreover, a closer examination of chapter 8 which Thailand refers to, supports the EC's view that the processes described in 02.10 are meant for long-term preservation. The wording of 08.14 is vital in this respect. It states:

> Peel of citrus fruit or melons (including watermelons), fresh, frozen, dried or provisionally preserved in brine, in sulphur water or in other preservative solutions.

Heading 08.14 juxtaposes peel of citrus fruit or melons that are "frozen" or "dried" to those that are "provisionally preserved" in brine. As noted a moment ago, the expressions "frozen" and "dried" imply that the fruits are preserved through the processes of freezing and drying. Where the preservation is only provisional, this has to be expressly indicated.

[5] Thailand, First Written Submission, para. 72.

40. In paragraph 80 et seq of its first written submission, the EC refers to the *Gausepohl* judgement of the ECJ, which it argues stands for the proposition that the figure of 1.2% salt content was conceived of as a minimum salt content above which it was possible that a meat product could be preserved by salting alone. On what basis was the figure of 1.2% conceived? Presumably, the ECJ had meat products in mind for which a 1.2% salt content would suffice for their preservation. If so, what is the meat to which the ECJ was referring?

In order to respond to the question, it is useful to recall the procedural background to the *Gausepohl* case. That case arose from two classification decisions issued by the Hamburg Customs authorities that classified "beef with a salt content of 0.71 and 1,2 %" under 0202. The importer *Gausepohl* brought legal proceedings against the Hamburg authorities arguing that the meat ought to be classified as "salted" under 02.10. The the German Bundesfinanzhof was obliged to stay the proceeding and to seek a preliminary ruling from the European Court of Justice (ECJ) as the decision required an interpretation of the *Combined Nomenclature*, a Community law instrument. In doing so, the Bundesfinanzhof referred two specific questions to the ECJ (and it is for the referring courts to formulate them). The first question concerns the proper classification of the consignment at issue. However, the Bundesfinanzhof, also considered it useful to obtain more clarity generally about the interpretation of heading 02.10, because the second question enquires about the necessary salt content and other conditions that "must be fulfilled for meat of bovine animals to be classifiable as salted under heading 02.10".[6]

Neither *Gausepohl*, nor the responding German customs authority, nor Belgium and the European Commission (as interveners), nor the Bundesfinanzhof itself had any doubt that the process of salting mentioned under 02.10 must lead to preservation.[6] However, significant doubts were expressed as to the possibility of fixing positively a salt content at which all meat can be considered preserved. It was submitted that this decision is to be taken on a case to case basis.[7] Advocate General Tesauro considered that the minimum salt content can only be determined by "a process of elimination" (para.5) and he emphasised that a minimum salt content of 1.2% ought not to be regarded as decisive. The Commission accepted during the proceeding the need for some reference point for customs authorities in form of a minimum percentage of salt below which it can be excluded that beef is salted to ensure long term preservation.[8]

The ECJ therefore, in para. 13 of its Judgement undertook to determine the minimum percentage for meat to be classified under 02.10. The Court considered the different minimum salt contents suggested by the participants; 4-5% by the European Commission based on advice from the Kulmbach Federal Office for Meat Research, 2% by Germany and 1.2% by Belgium. The 1.2% threshold was simply the lowest (para. 14) indicated by any interested party and significantly below the one suggested by the scientific expertise as necessary to ensure preservation. The Court states in paragraphs 14 and 15 that:

> The documents before the Court show that various different figures have been adopted by the authorities of the Member States. They do, however, suggest that the minimum total salt content required for the long-term preservation of meat may be set at 1.2%. That percentage should, therefore, as proposed by the Belgian Government in its written observations and by the Commission at the heading, be

[6] Report for the hearing case C-33/92 (Exhibit EC-14), paras. 12 (BFH); 14 (German customs authorities), para. 20 (*Gausepohl* the plaintiff); 22 (Belgian Government) and 27 (Commission).

[7] Report for the hearing case C-33/92, paras. 22 and 25 (Belgian Government), paras. 31 and 37 and 39 (Commission).

[8] Opinion of Mr Tesauro, Case C-33/92, para. 7.

adopted as the minimum total salt content required for meat to be classified under heading 0210.[9]

By consequence the Court considered that it can be in all cases excluded that salting below 1.2% can lead to long-term preservation.

41. Could the EC explain what significance should be attached to the *Dinter* and *Gausepohl* judgements, if any, following enactment of EC Regulation 1223/2002 and EC Commission Decision of 31 January 2003.

The EC has explained in its First Written Submission (paras. 64 et seq.) the principles of EC law regarding customs classification issues, in particular the EC addressed the status of the various instruments. Furthermore, in its Oral Statement (para. 36) the EC emphasized that the Commission does not have the power to "alter the subject-matter of the tariff headings which have been defined on the basis of the *Harmonized System* established by the Convention".[10] Within the EC the authoritative source of interpretations of the Harmonized System is the European courts, and in particular the European Court of Justice. In the EC's First Written Submission it explained the legal significance of the *Dinter* and *Gausepoh* judgements. As regards the scope of tariff headings (which is the issue that confronts us) that significance cannot have been changed by the measures in question. In other words, Regulation 1223/2002 and Decision 2003/97/EC (like Regulation 535/94) should be read in conjunction with this case-law of the Court. All three acts confirm and/or apply the meaning of the terms in 02.10 as interpreted by the Court.

42. If, as is submitted by the EC in para. 72 et seq of its first written submission, the principle that products falling within heading 0210 must be salted for the purposes of long-term preservation is so well-entrenched in the EC, why was it felt necessary to enact EC Commission Regulation 1871/2003? What events/circumstances triggered the decision to enact this Regulation?

Commission Regulation 1871/2003 was designed to "clarify and confirm" (see recital 5) the appropriate meaning of the term "salted" in heading 02.10. The events which triggered the decision were the erroneous classification decisions of certain Member States customs offices with respect to the product at issue. It was considered that, in addition to dealing with the specific product in Regulation 1223/2002 and Decision 2003/97/EC, it was also appropriate to clarify, in general terms, the correct interpretation of heading 02.10, in line with the EC's consistent position on this matter.

43. In his reply to a question that was posed by a member of the European Parliament in November 2001 regarding imports of salted poultry into the EC, EC Agriculture Commissioner Fischler replied that "For the purposes of heading 0210 [of the EC's Combined Nomenclature], the terms 'meat and edible meat offal, salted, in brine mean meat and edible meat offal, deeply and homogeneously impregnated in all parts having a salt content of not less than 1.2% by weight'." (See Exhibit BRA—2). Please explain in this regard why "preservation" was not mentioned when clarifying products falling within the scope of heading 0210?

The EC notes that the Commissioner was simply answering a question concerning lightly and superficially salted chicken. The answer – a quote from the Additional Note – was sufficient to deal with this issue. A complete explanation of EC law on the matter was not necessary in that context.

[9] Exhibit EC-14.
[10] Case C-267/94 *French Republic v Commission* ECR [1995] I-4845, para. 20 (Exhibit EC-22).

44. With respect to paragraph 3 of the EC's closing statement during the first substantive meeting, what is the specific principle to which the EC is referring? Further, how is this principle applied? Is the answer different depending upon where the products originate from? Does the EC provide any advance rulings in this regard?

The principle the EC is referring to is that of preservation. As the EC has noted elsewhere, the application of the principle has rarely been problematic because it is normally obvious whether a product has been preserved by one of the means mentioned in 02.10. The EC applies this principle irrespective of the origin of imports.

45. The EC is requested to comment on the excerpt of the Minutes of the EC's Customs Code Committee of 25 January 2002 contained in paragraph 27 of Thailand's oral statement at the first substantive meeting indicating that the definition of "salting" for the purposes of EC Regulation 535/94 deliberately excluded certain elements of the ECJ's judgement in *Gausepohl,* including the requirement that salting be for the purpose of long-term preservation.

The EC strongly disagrees with the implication behind the comment in Thailand's oral statement. It implies that the reason that Regulation 535/94 did not refer to the concept of preservation was because the EC had made a policy decision no longer to interpret 02.10 in such a way. However, Thailand provides no grounds for considering that such an abrupt U-turn in position had taken place (it should be noted that Regulation 535/94 was adopted only a few months after the Court has rendered its judgment in *Gausepohl* where all parties had unequivocally considered that heading 02.10 referred to salting for preservation). It can only attempt to "spin" the minutes of a Customs Code Committee meeting 8 years after the event. The reality is that had the EC decided that the criterion of preservation was no longer relevant, it would have had to go to the WCO and either have the HS Nomenclature amended or, at a minimum, a classification decision adopted. Failing such a development, the Court of Justice has made it clear that the Commission cannot, of its own volition, change the headings of the Combined Nomenclature. As already noted, in Case 267/94 the Court of Justice held that the Commission's authority to adopt additional notes:

> does not authorize it to alter the subject-matter of the tariff headings which have been defined on the basis of the harmonized system established by the Convention whose scope the Community has undertaken, under Article 3 thereof, not to modify.[11]

Second, the EC does not agree with the implied interpretation of Thailand. Thailand appears to suggest that the phrase "the criterion of salting for the purpose of long-term preservation has not been introduced" in the minutes of the Meeting suggests that the notion of preservation had been entirely excluded from the EC's customs classification legislation. This phrase, seen in context, simply states that the notion does not appear in Additional note 7 (which is undisputed).

The EC would like to clarify the situation by addressing the reasons why the Commission adopted Commission Regulation 535/94. As noted the rulings of the Court of Justice are binding on the Commission and constitute the authoritative interpretation of the Combined Nomenclature. The Commission considered it necessary at that time to insert specific additional notes in respect of aspects of Court rulings that were not yet spelled out in the CN in the form of a Note, and were not readily apparent from an interpretation of the headings.

In *Gausepohl* the Court interpreted heading 02.10 as requiring salting for preservation. That was uncontested between the parties and already reflected in several Explanatory Notes, which the Court considered in its interpretation. Given that the requirement of preservation was already reflected in the Combined Nomenclature in various ways (the ordinary meaning of the heading 02.10,

[11] Case C-267/94 *French Republic v Commission* ECR [1995] I-4845, para. 20 (Exhibit EC-22).

its context and the Explanatory Notes) and given that this was entirely undisputed between all interested parties, there was simply no need to restate the obvious. It should be borne in mind that Explanatory Notes are in the first place directed to the customs authorities of the Member States who are responsible for the actual application of the Combined Nomenclature. Such notes only address problems that have arisen in implementation or are somewhat unclear. The criterion of preservation was neither disputed nor unclear.

Finally, the EC would note that the minutes reflect preparatory discussion for Regulation 1871/2003, not for any of the measures at issue, nor of Regulation 535/94. They are not legislative acts of the Community, nor do they represent the reasons justifying legislative action by the Community, nor are they authoritative interpretations of Community acts.

46. The EC is requested to comment on the excerpt of the Minutes of the Meeting of the EC Customs Code Committee of 18–19 February 2002 set out in paragraph 30 of Thailand's first written submission.

The EC understands that the reference is to paragraph 39 of Thailand's Submission. The meeting in question was part of the discussions leading up to the adoption of Regulation 1223/2002. Some Member States reported that they had classified the product at issue under heading 02.10. (as described in the EC's First Written Submission, paras. 91 and 92). The statement in question merely recalls this factual situation.

47. Could the EC specifically point to the aspects of the ECJ cases to which it refers, namely *Dinter* and *Gausepohl,* that support the view that the minimum salt content needed to qualify a meat under heading 0210 may vary from meat to meat.

The EC has explained in its First Written Submission (para. 84) and in its response to Panel Question 40 how the *Gausepohl* judgement supports the conclusion that the 1.2 percent salt rule was intended as a minimum to be taken into account alongside the criterion of long-term preservation. It is implicit in such a principle that the amount of salt required for such preservation will vary from meat to meat. If there were no such variation then the necessary percentage could be calculated and published.

48. In paragraph 41 of its first written submission, the EC indicates that products preserved by salting (or a combination of salting, drying and smoking) are popular primarily by virtue of their taste and other characteristics. Which characteristic(s) of the products at issue are the most important for the consumer/end-user?

In making this statement, the EC had in mind meats (such as Parma ham) which are preserved by salting, etc., and which are popular with consumers, who appreciate their characteristics of taste, texture and such like, as well as their long life.

With respect to the product at issue, the Complainants admit that frozen boneless chicken cuts with a salt content of between 1.2 and 3% is intended exclusively for further processing and is not consumed as such by household consumers. In contrast to meats traditionally traded under heading 02.10, it is used to produce further processed chicken products. The main physical characteristic of the meat sought by the industrial consumers is its suitability for further processing. Generally speaking, such processors prefer meat to which no ingredients have been added. They may, however, be ready to accept meats to which ingredients have been added, provided that the later addition of ingredients during further processing is not impaired. The sole characteristic which interested the European processing industry about the product at issue was that it was provided at a cheap price, due to it being imported under 02.10.

49. The EC is requested to comment on Brazil's argument in paragraph 95 of its first written submission that the two 1999 US classification rulings to which it refers show that frozen smoked salmon is to be classified under heading 0305 concerning, inter alia, fish that has been salted, in brine, dried or smoked rather than heading 0303 concerning frozen fish. Similarly, the EC is requested to comment on Brazil's argument in paragraph 96 of its first written submission that, in the US, bacon that has been salted/smoked but also frozen will be treated as salted/smoked bacon rather than frozen bacon. In particular, could the EC comment on any inferences that may be drawn from these rulings in relation the headings of the EC Schedule at issue in this case?

The EC considers that the evidence Brazil cites to equally support its position.[12] In both cases the meat has been smoked or cured which are processes used for preserving meats. These processes were not undertaken simply to add ingredients as with the product at issue.

The EC has shown that the shelf life of preserved meats is many months (Exhibit EC-5) at ambient temperatures. Operators may choose to attempt to extend that shelf-life (e.g. so that they can warehouse the product for longer) by cooling or even freezing the product. There is no suggestion that these products needed to be preserved by freezing.

In any event, this evidence can only be relevant to the interpretation of the EC's Schedule to the extent that it can be qualified as relevant subsequent practice.

50. Under which heading – 0303 or 0305 – does the EC classify frozen smoked salmon? Please provide relevant supporting material.

The EC has not had to consider this issue at central level. However, in researching this question, the EC found only one BTI in which frozen smoked salmon was classified under 03.05. This BTI was issued by the German authorities, and is exhibited as Exhibit EC-25. The operative part of it reads:

> Salmon Salmo Salar frozen[.] Vacuum-sealed in plastic foil with various labels (e.g., "Grande Luxe R"/"genuine smoked salmon" ('echter Räucherlachs')/"Ambach telijk-gerookte Zalm- nit Noorwegen"). According to the claimant, the merchandise is salted - with salt added ready for consumption -, smoked, frozen and sliced salmon filet in a customary packaging with content varying in weight. The appearance, smell and taste have not given rise to any indication that this information would not be correct.[13]

In the case of this BTI, the customs authorities checked that the product had gone through a process of preservation (i.e. smoking) by checking the products appearance, smell and taste. Apparently, the German customs authorities could immediately see that the product was one that had undergone one of the processes in 03.05 to ensure preservation. That it had been frozen to keep longer was irrelevant. As the EC has noted in its response to the previous question, operators may attempt to extend the shelf-life of the product they produce by e.g. cooling, freezing or vacuum-packing the product. Because the fish at issue in that BTI is sliced, thereby, creating a larger surface area exposed to the air (and hence to microbes) the operator may also have decided to vacuum pack it and freeze it to ensure that it kept longer.

[12] The EC objects to Brazil's purported reliance on a bill of lading as proving classification. A bill of lading is not a document produced by a governmental authority and is not probative of classification.

[13] Exhibit EC-25. Unofficial translation into English.

51. In paragraph 29 of the EC's first written submission, the EC submits that there is no EC industry producing chicken with an added salt content. Could the EC further explain these comments in light of the question that was posed by Albert Maat to the EC Commission in November 2001 (Exhibit BRA-2) and the information note from the Italian delegation to the Agriculture and Fisheries Council in January 2003 (Exhibit BRA-3).

The question posed by Albert Maat and the information note from the Italian delegation suggest that there is an influx of chicken on the EC market due to a misapplication of heading 02.10. Specifically, both consider that the chicken which entered under 02.10 was lightly salted and therefore would have to be excluded from the scope of 02.10 according to the Explanatory Note inserted in 1994. They also noted that this product serves the same purpose as the unsalted frozen chicken, imports of which had declined proportionately.

In para. 29 of its First Written Submission, the EC notes that the Community industry neither produces chicken meat that is lightly salted nor the product at issue in this dispute (deeply and homogenously impregnated with 1.2-2.9% salt). The above comments reinforce the conclusion that there is no demand from the EC processing industry for frozen boneless chicken cuts with added salt as a "new product".

52. With respect to the data submitted in Tables 2 and 3 (pages 22-23) of its first written submission, the EC is requested to provide the same statistics at the 8 digit level.

Table 2 does cover 8 digit level. The EC respectfully refers the Panel to footnotes 47 and 48 to the EC's First Written Submission. The reference in Table 2 to 02.07 and 02.10 was intended to avoid having to repeat the changes in the 8 digit nomenclature which took place during the period represented on the table.

The date in Table 3 is derived from GTAN database, which is a private database, to which the European Commission has a subscription. GTAN does not, however, provide the data at 6 digit level. The EC provided EC import data at four digit level to ensure comparability.

As the EC pointed out during the question and answer session with the Panel, the Complainants will be in a position to provide 8 digit statistics of their exports under the two relevant tariff lines in the period covered by Table 3 (1990-2003). The data at 8 digit level of imports into the EC can be found in Table 2.

53. In paragraphs 91–92 of its first written submission, the EC observes that, apart from EC member state customs authorities in Hamburg, Rotterdam and various offices, other customs offices did not classify the product at issue under heading 0210.90. The EC is requested to provide copies of the relevant BTIs or other material to support the assertion regarding those other customs offices.

In paragraph 92 of its First Written Submission, the EC stated that the interpretation of heading 02.10 as applying to products which were salted, but not for preservation, was only followed in a few Member States. A significant volume of trade of products classified under 02.10 which were salted, dried or smoked for preservation continued. For the large part, the classification of such products under heading 02.10 was uncontroversial, and so did not lead to requests for BTIs. However, there are some examples of BTIs showing that the interpretation given to 02.10 was only in respect of products which were salted, dried or smoked for preservation. The EC has exhibited as Exhibit EC-26 a BTI issued by the Spanish authorities, clearly referring to the necessity that in order for a product (in that case salted and dried) to be classified under 02.10 it must be preserved. The operative part of that BTI states:

Ham from the domestic pork species, conserved throughout a combination of a previous salting treatment followed by a drying one, partially without bone (without the "shin-bone"). It is presented in individual packs sealed in vacuum.[14]

54. In paragraphs 12 and 91 of its first written submission, the EC acknowledges that the product at issue had been classified under heading 0210 by some customs offices. Could the EC provide further details as to: (i) the period during which this classification practice existed; and (ii) what volume of total imports of the products at issue were affected by this "mistaken classification" of the products at issue. If the product at issue had been classified under heading 0210 by some customs offices for some time (i.e. possibly as early as 1996), why did the EC wait until 2002 to address the problem of "mistaken classification" through the enactment of EC Regulation 1223/2002?

The EC notes, first of all, that it does not accept that the erroneous classifications by certain customs offices could have altered the EC's international obligations, nor that it could constitute practice which might be relevant in the sense of Articles 31 or 32 of the *Vienna Convention*.

As Brazil and Thailand have explained, these imports started in 1996, and continued until the entry into force of the measures at issue. Statistics as to the volume of imports under the tariff line at issue have been presented in Table 2 of the EC's First Written Submission.

The EC did not wait until 2002 to address the problem. In fact, it only became evident to Commission officials that there was an issue of mistaken classification during 2001. This was because, first of all, the tariff line under which the imports were classified was "salted meats, other". The Commission could not tell what products were entering under this heading, and it was not until 2000 that there was a substantial leap in the statistics (imports tripled) (the statistics only being available from late 2000 into 2001). Even then, it was still not known that such products were not salted for preservation – this only became apparent after further investigation. Against this background, the EC would also note that roughly 30,000 BTIs are issued each year, (there are currently approximately 167,000 valid BTIs), that there were substantial problems communicating BTIs (as a result of a lack of interoperability of computer systems) and that the Commission only has one official, and two administrative assistants monitoring all issues with respect to the first 40 chapters of the Combined Nomenclature.

55. Why was an opinion of the EC Customs Code Committee not provided in relation to EC Regulation 1223/2002? What legal significance, if any, would have been attached to such an opinion had it been provided? What is the legal significance, if any, of the fact that an opinion was not provided in time in relation to EC Regulation 1223/2002?

The Customs Code Committee is a committee of Member States representatives responsible for monitoring the adoption of detailed secondary (delegated) legislation by the European Commission (the system is known as the "comitology" system). The Committee is asked to vote for or against a particular proposal. A qualified majority vote is required in order for the Committee to issue either a positive or negative opinion (for the necessary majority, see Article 205 of the EC Treaty). The adoption of a positive opinion, or the failure to arrive at an opinion, means that the proposal will be adopted. Only in the event of a negative opinion will the matter be examined by the Council of the European Union. The legal effects of the absence of such an opinion are therefore purely institutional and not of relevance for the adjudication of this dispute.

[14] Exhibit EC-26. Unofficial translation.

FOR ALL PARTIES:

56. Do the parties agree that the relevant time at which the meaning of headings of the EC Schedule – LXXX – should be assessed is the time at which that Schedule was annexed to the Marrakech Protocol on 15 April 1994? If not, at what time/during what period should such an assessment be made?

It is our view that the Panel is tasked to assess the meaning of the concession as of the date of Panel establishment according to Articles 3.2 and 11 of the DSU so as to take account of all relevant interpretative means under Article 31 of the Vienna Convention such as, e.g., subsequent practice.

Clearly, events after 15 April 1994 cannot possibly be circumstances of the conclusion within the meaning of Article 32 of the Vienna Convention.

57. Was the EC Schedule in question negotiated on the basis of series of offers and requests or, rather, was it based on a unilateral offer that was made by the EC?

Agricultural tariffs were established on the basis of the "Modalities Agreement" (Exhibit EC-9). The modalities established therein set out a specific formula for converting the level of protection provided by non-tariff barriers into "ordinary customs duties". Entering into the Uruguay Round, the EC did not have bindings for any of the tariff lines at issue. Pursuant to paragraph 3 of the Modalities Agreement, the EC bound its tariffs on "other salted meat" at 15.4 %, on the basis of the applied rate of duty on 1 September 1986. In respect of frozen poultry, the EC converted previous non-tariff barriers, through the process of "tariffication" into the tariffs which were eventually bound. The base period for the tariffication process was 1986-1988 (see Annex 3 of the Modalities Agreement). The levels of tariffs thus bound reflected the level of protection which had previously existed. Departures from this procedure could be negotiated, but none are relevant for the present case. The offer was not unilateral, but rather was one part of the framework for offers by all participants in the Uruguay Round.

58. Was EC Regulation 535/94 enacted in response in whole or in part to requests made of the EC by other Members during the conclusion of the Uruguay Round for clarification regarding the headings in the EC Schedule at issue in this case?

No. It was enacted in response to the ECJ's judgment in *Gausepohl*. That it was enacted during the spring of 1994 is purely coincidental. As noted in the EC's response to question 57, the relevant date for the EC's tariff concessions on salted meat was 1 September 1986, a full 8 years earlier. It is not plausible, therefore, to pretend that the common intention of the negotiating parties could be affected by this Regulation, or by any other such unilateral acts[15], absent some evidence from the Complainants (such as a footnote in the EC's Schedule) to the contrary.

59. Are there any GATT Schedules of WTO Members other than the EC's in which headings identical or similar to the headings at issue in this case exist? If so, please provide details of such Schedules and information regarding the classification practices of such Members in respect of those headings. If possible, the parties are requested to indicate how such Members classify the products at issue in this case.

Because the headings in question are derived from the Harmonized System, which was very widely adopted among the parties to the Uruguay Round negotiations, the EC assumes that the Schedules of most, if not all, other WTO Members are identical in so far as the headings in Chapter 2

[15] As explained in the hypothetical set out in the EC's Oral Statement to the First Substantive Meeting of the Panel.

are concerned. The EC has checked a number of Schedules (including those of the Brazil, Thailand and the US) and found this to be true.

The EC has already reported the practice of other Members on this issue in so far as it can be discovered. In particular, the only countries which have any practice of classifying the product at issue are Brazil, Thailand and the EC. Brazil and Thailand classify it for export in the same manner as the EC considers it should be classified. Moreover, the EC has already provided the Panel with evidence that the US classifies a materially identical product in the same way as the EC does.

60. The parties are requested to provide details regarding the processes to which the products at issue are subjected upon importation to the EC and prior to final consumption. In particular, please provide details including supporting material regarding:

(a) the physical processes that are applied to the products at issue;
(b) the effects of these processes on the products at issue;
(c) the time taken to complete these processes; and
d) the costs and benefits that such processes entail.

The EC has provided a series of photographs with commentary in Annex 1 to this document. These illustrate that the addition of salt between 1.2% and 1,9% by the exporter is economically nonsensical. As acknowledged by the Complainants, the product at issue is only sold to the processing industry. The processing industry will necessarily apply a tumbling process whereby the salt, spices and water are massaged into the meat. The cost of salt is negligible. The processor can therefore add the salt according to its own recipe when tumbling it. This does not entail any significant extra cost. To the contrary, in order to cover its production costs, the processing industry needs to add water when tumbling the meat. The processing industry has therefore an economic interest in keeping as much control of the chicken meat as possible in terms of ingredients and water content.

61. If boneless chicken cuts have been deeply and homogeneously salted, can they be desalted?

If salted chicken is tumbled with unsalted chicken the percentage of salt will tend to an average. The processing industry has used this system to arrive at a desired salt content while at the same time introducing other ingredients. Because most of the processed products at issue are marinated products, the industry will add 8, 10 or 15% water and other spices. This automatically reduces the salt content of the meat. However, the EC does not know whether these processes are effective for chicken with more than 3% salt. Moreover, the EC understands that where the salt used is not common salt it may be more difficult, if not impossible, to desalt the product.

62. What is/would be the process used to salt boneless chicken cuts so as to ensure long-term preservation of the cuts?

There are a number of possible techniques for salting of meat. The EC gave examples of such a technique being used for *charque* in the FAO document exhibited in Exhibit EC-8. The other article in Exhibit EC-8 also mentions that the salt may be absorbed through a process of tumbling or injection (noting that these techniques are commonplace in the meat industry) before being stacked with salt for a number of days. The stacking technique is similar to the technique mentioned in respect of Parma Ham in Exhibit EC – 6.

63. What end-products other than chicken nuggets use the products at issue as an input?

The Complainants will be better placed to respond to this question, because their exporters should be aware what the product at issue is processed into. As far as the EC is aware, the product at issue could be used for the preparation of any processed chicken product.

64. Have the products at issue been salted with common salt? Does the term "salted" in the EC Schedule relate to the addition of common salt or does it include the addition of other salts as well?

The Complainants will be better placed to answer this question. However, the EC understands that the product at issue has been salted with common salt. The term "salted" in the EC's Schedule would cover salting by other salts. Indeed, the EC understands that it is relatively uncommon for only common salt to be used for the preservation of products which are commercially traded.

65. Does chilling/freezing subsequent to salting, brining, drying or smoking for long-term preservation mean that the product in question should be categorised under heading 0207?

No. The processes listed in heading 02.10 put the meat in a particular state; that is they are preserved by one of the processes mentioned in 02.10. It retains that state whether or not it is subsequently chilled or frozen, or if the shelf-life is extended by any other means. (The EC notes the practical difficulties that would arise if mere chilling or unchilling could alter classification. All it would require would be to alter the temperature of a container by a few degrees. It is significant that changing the temperature of meat between normal and chilled does not change its classification under headings 02.01 to 02.09.).

66. In interpreting headings 0207 and 0210 of the EC Schedule, should the ordinary meaning of all the terms in those headings be assessed as a whole or, rather, should the terms other than "frozen" in heading 0207 (i.e. "fresh" and "chilled") and the terms other than "salted" in heading 0210 (i.e. "in brine", "dried" and "smoked") be treated as context for the interpretation of the terms that appear to be directly at issue – i.e. "frozen" and "salted". Will the result of the interpretative exercise differ depending upon which approach is adopted? If so, please explain making specific reference to the headings at issue in this case.

In the present case the EC has classified the product in question under heading 02.07 because it was poultry meat. The Complainants have objected to this decision on the sole ground that, they say, it should be classified under heading 02.10 as "salted". In order to succeed they must prove that it falls under this heading. The EC does not need to prove that the product at issue falls under 02.07.

In the present context, therefore, the term "salted" is to be examined in its context. The immediate context is the heading of 02.10. In its Submission and Oral Statement the EC has shown how Article 31 of the Vienna Convention, and in particular the principles of 'ordinary meaning' and 'context' lead to the conclusion that these terms have in common the notion of preservation. Whatever precise interpretation is given to that notion, not even the Complainants argue that it is met by chicken with 3 percent added salt.

67. Can products that fall within the scope of heading 0207 of the EC Schedule be considered as having undergone a "process"? If so, please explain what is meant by "process". Can the processes to which products falling within the scope of heading 0207 are subject, if any, be distinguished from those to which products falling within the scope of heading 0210 are subject? If so, how?

The EC does not believe that an analysis of the term 'process' that is separate from the particular operations mentioned or implied in headings 02.07 and 02.10 provides assistance in solving the present dispute. The EC notes that the word "process" has a very broad meaning. In particular, the EC submits that the meaning of the term "salted" is not greatly illuminated by the fact that it is described as a "process". Likewise, to the extent relevant, neither "chilling" nor "freezing" would be any better understood by having this term applied to them.

68. If some or all products that fall within the scope of heading 0207 of the EC Schedule can be considered as having undergone a "process", what is the purpose of that process? What is the purpose of the processes to which products falling within the scope of heading 0210 are subject?

The processes of chilling and freezing meat that are mentioned in heading 0207 are intended, by reducing the temperature and thereby slowing or stopping chemical and biological processes in the meat, to prevent changes, notably deterioration, occurring in it.

The processes of salting, etc., mentioned in heading 02.10 are equally intended to slow or stop the deterioration and decay of the meat. While the purpose of this process is to preserve the meat, these processes may also have incidental effects which makes them of interest to individual producers and consumers in varying degrees.

69. To what extent, if at all, is the purpose of a process to which a product is subject relevant to the interpretation of: (a) heading 0207 of the EC Schedule; and (b) heading 0210 of the EC Schedule? Should the purpose take precedence over the process in either case? If so, please explain why and in what circumstances. In the case of both headings, if there are multiple purposes underlying the processes in question, which purpose should take precedence?

(a) As regards heading 0207, clearly the processes referred to there – chilling and freezing – have a purpose, but the EC does not see that this has any implications for the interpretation of heading 02.10. The three states are instantly detectable, and there is no need to address the issue of purpose in order to decide whether meat is chilled or frozen.

(b) As regards heading 02.10, the EC's view is that the approach to its interpretation should be governed by the rules stated in the *Vienna Convention*. The EC has already demonstrated the results of applying these rules, and one way of describing the results would be to say that the purpose of the processes of salting, etc., is significant, since the conclusion of the analysis is that these processes are ones intended to preserve the meat. The EC does not see how it could be said in this context that the purpose takes precedence over the process. The purpose helps define the process, which might otherwise be presented as simply the addition of some salt, or some exposure to smoke or drying. As a practical matter for customs authorities what is important is that preserved meats have particular physical characteristics which h are readily identifiable.

By speaking of multiple purposes the EC understands the Panel to be referring to the fact that preserved meats are popular not merely because of their resistance to deterioration but also because of their taste, texture, appearance, etc. The EC does not think that these qualities can be meaningfully separated, or priorities established between them. The EC does not know any way of giving to meat

the latter group of qualities other than by subjecting it to the process of preservation. Similarly, if they are preserved by salting, etc., they will acquire those qualities.

The point that the EC is trying to make is that there is little to be gained in resolving the present dispute by trying to contrast the purpose of 'chilling' and 'freezing' in heading 02.07 (or in any of headings 02.01 to 02.08) with that of 'salting' etc., in heading 02.10.

70. Does the order of steps/activity entailed in a process to which a product is subject play a role in the classification of that product. Please explain making reference to the products at issue in this case.

The EC does not believe it can have been the intention of the drafters of Chapter 2 to make the interpretation of the headings depend on the order in which the relevant processes had been applied. What is relevant, in the EC's view, is the state the product is in at the time of importation.

As a matter of fact, in the present case, the product is immediately frozen after the addition of salt. Indeed, as pointed out in response to Panel Questions 29 and 60, to respect the ingredient list of the final processed product an additional tumbling process has to be applied after defrosting.

71. Are there different degrees to which meat can be dried, smoked or soaked in brine? If so, is it the case that meat products can only be classified under heading 0210 if the degree of drying, smoking or soaking in brine has exceeded a particular level. If so, what are those levels and how are they determined?

The degree of drying, etc., that is necessary to preserve meat varies from one kind to another. As explained in our First Written Submission (para. 37) the level of 'water activity' (Aw) is an important indicator of the degree of preservation achieved, and this can be measured with some precision. However, the use of sodium nitrite also has direct preservative effect, as does smoke, and neither of these lend themselves to precise measurement. As the EC explained in its Closing Statement at the First Substantive meeting with the Panel, in practice problems have rarely arisen in the case of preserved meats. The products are well-established and well-known; the basic products have existed for many centuries if not millenia. As the table in Exhibit EC-5 shows, their shelf life is many months. That they qualify under heading 02.10 has never been in doubt. Indeed it is obvious that it was precisely for such products that heading 02.10 was created. It is on the basis of extensive experience with these products that the EC developed its criterion of long-term preservation.

72. Does the reference to "poultry" in heading 0207 of the EC Schedule make it more "specific" within the meaning of General Rule of Interpretation 3(a) of the Harmonized System than heading 0210, which refers more generally to meat"? Please explain.

The EC is unconvinced that the application of General Rule of Interpretation 3(a) of the Harmonized System is of possible assistance in the interpretative process to determine the meaning of the term "salted" under the heading 02.10 (which is the interpretative task at stake). General Rule of Interpretation 3(a) concerns the classification of a product that falls *prima facie* under two different headings, and therefore gives as an initial interpretative task the question of the scope of the two different, potentially applicable, headings.[16]

That said, the factual answer to the Panel's question is straightforward. All poultry is meat, but not all meat is poultry. If the scope of the two were to be represented by circles, the circle

[16] Contrary to what Thailand asserts in para. 29 of its Oral Statement, the EC nowhere acknowledged that the product corresponds at the same time to the wording of the heading 0207 (frozen) and to the wording of the heading 0210(salted).

representing for poultry would be entirely within that for meat. Consequently the reference to 'poultry' is more specific.

The EC also refers to its response to Panel Question 74.

73. Is the Harmonized System "context" under Article 31.2 of the Vienna Convention? If so, please explain by demonstrating how the various elements in Articles 31.2(a) or 31.2(b) are fulfilled.

The EC believes that there may be several bases in Article 31 of the Convention for using the Harmonized System to interpret the EC's Schedule and that decision has to be taken on a case-by-case basis. For the reasons provided in response to Panel Question 76 the EC considers the Harmonized System and its Chapter and Explanatory notes to be context within the meaning of Article 31(3)(c) of the *Vienna Convention*.

74. Assuming that the Harmonized System qualifies as "context" for the interpretation of the EC Schedule under Article 31.2 of the Vienna Convention, to what extent if at all can the General Rules for the interpretation of the Harmonized System be used to determine the meaning of the headings in question?

The meaning of the heading 02.10 and specifically the term "salted" therein has to be interpreted in accordance with Article 3.2 of the DSU by applying the customary rules of treaty interpretation set forth in Articles 31, 32 of the *Vienna Convention*, in particular ordinary meaning, context, purpose and subsequent practice.

The EC notes that Thailand relies on General Rule for Interpretation 3(c) of the Harmonized System to argue that if goods cannot be classified by reference to Rule 3(a) or Rule 3(b) then they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.[17]

The EC fails to understand how Thailand can rely on such a mechanistic rule for classification in order to determine the meaning of the heading in question. Both Brazil and Thailand continuously argue that this is not a classification dispute and indeed both Complainants refused the EC's suggestion, made at the consultation stage, to bring this dispute to the WCO to the extent that it relates to classification.

In any event, Article 3.2 of the DSU does not allow for the application of a mechanistic *non liquet* rule that ensures a result in day-to-day classification practice as spelled out in General Rule for Interpretation 3(c) to determine the meaning of one heading. Article 3.2 of the DSU read in conjunction with Articles 31 and 32 of the *Vienna Convention* require consideration of all interpretative materials, in particular supplementary means to determine the meaning of the schedule. In a *non liquet* situation, the general rules on burden of proof in WTO law would require the Panel to err on the side of the defendant.

[17] Oral Statement by Thailand, para. 29.

75. How are the following to be categorised, if at all, within the framework of Articles 31 and 32 of the Vienna Convention: (a) 1981 Explanatory Note to heading 02.06 of the EC's Common Customs Tariff; (b) the 1983 Explanatory Note for subheadings 0210.11-31 and 0210.11-39 of the EC's Common Customs Tariff; (c) the 1983 *Dinter* judgement of the ECJ; (d) the 1993 *Gausepohl* judgement of the ECJ; and (e) the December 1994 Explanatory Note to subheadings 0210.11.11 and 0210.11.19 to the EC's Combined Nomenclature?

(a)-(d) form part of the EC's practice, to be considered under Article 32 of the *Vienna Convention* as circumstances of conclusion.

(e) To the extent that it is subsequent practice, it is relevant under Article 31 (3)(b) of the *Vienna Convention*.

76. Can the Harmonized System be considered as comprising "relevant rules of international law" within the meaning of Article 31.3(c) of the Vienna Convention? If so, please explain by demonstrating how the various elements in Article 31.3(c) have been fulfilled.

Paragraph 3(c) of Article 31 of the *Vienna Convention* says that there "shall be taken into account together with the context … any relevant rules of international law applicable in the relations between the parties". For this purpose the "relevant rules of international law" include those of treaties to which the parties are also party.[18] The Convention establishing the Harmonized System is an international treaty to which the vast majority of WTO Members are parties and use it as a basis for negotiating tariff concessions. The Harmonized System is relevant insofar as it sets forth headings and provides for Chapter and Explanatory Notes that elucidate the meaning of a heading. As described in our First Written Submission, and as stated by the Appellate Body in *EC – Computer Equipment*, the Harmonized System and its Chapter and Explanatory notes provide, therefore, relevant context for the interpretation of the EC Schedule.[19]

77. Apart from the issue of timing, what is the difference, if any, in the nature of evidence of classification practice that must be adduced to prove the existence of "subsequent practice" within the meaning of Article 31.3(b) of the Vienna Convention as compared to the nature of evidence that is needed regarding classification practice for the purposes of Article 32 of the Vienna Convention?

The EC believes that there is a fundamental difference in the way practice may be used in these two situations. In the case of subsequent practice (Article 31.3(b)), the practice is used both as evidence that the parties intended they should be bound by what they are practising, and as evidence of the nature and scope of the obligation. (The EC has already described in its First Written Submission (para. 170) the need for 'concordant, common and consistent' practice among the parties.)

In the second situation – that of prior practice as one of the 'circumstances of conclusion' of a treaty mentioned in Article 32 – only the second of these statements is true. The practice itself provides no evidence whatsoever as to whether the parties intended to bind themselves to observe that practice in future. That intention must be established entirely from other sources. If, on the basis of those sources, that intention is established then the practice will provide evidence as to the content of the obligation.

[18] Sinclair, op. cit., p. 117, citing *Official Records, Second Session*, 13th plenary meeting (Fleischauer).

[19] First Written Submission by the EC, para. 107; Appellate Body Report, EC – Computer Equipment, para. 89.

78. Do the parties consider that the WTO Modalities for the Establishment of Specific Binding Commitments under the Reform Programme issued on 20 December 1993 amounts to "preparatory work" within the meaning of Article 32 of the Vienna Convention? If so, please explain why and indicate the significance parties attach to this document?

The EC considers the Modalities Agreement to be at the very least a "preparatory work" because its sets out the parameters of the negotiations. However, given that it already fixes particular dates and methodologies later reflected in the Schedules, it has a status as context under Article 31 of the *Vienna Convention*.

79. What common essential feature(s) do the parties consider characterise products that fall under:

(a) Chapter 2 of the Harmonized System?

The essential features are spelled out by the headings and chapter title. Thus, in the case of the Chapter, the essential features are summed up in the phrase 'Meat and edible meat offal'.

(b) Heading 0207 of the EC Schedule?

The essential common feature of heading 0207 – Meat and edible offal, of the poultry of heading 01.05, fresh, chilled or frozen – is that it concerns poultry meat, other than preserved meat falling within heading 02.10.

(c) Heading 0210 of the EC Schedule?

In the case of heading 02.10 the common essential feature is that it is meat or edible offal preserved by one of the listed processes.

80. In paragraph 20 of its oral statement during the first substantive meeting, Brazil submits that "[i]mporting Members have ample margin to define their offers in such a way that their interests are fully protected". Does this mean that, in the process of making tariff commitments, Members must be taken to have anticipated, or at least, assumed responsibility for all possible changes in trade patterns?

The EC is unclear as to the precise meaning of the phrase in Brazil's statement. The EC accepts that trade flows may change after tariff commitments are made. This does not mean, however, that such trade developments are without parameters. Any new trade flows must fall under the scope of the tariff commitment they claim. In the present case, the new trade flow does not fall under the EC's tariff commitment in respect of salted meat.

QUESTIONS POSED BY THAILAND

1. In the course of the first substantive meeting with the parties, the EC suggested that the European Court of Justice rulings are binding on the Commission and that they provide an authentic interpretation of the EC's Common Customs Tariff. Could the EC inform the Panel whether the European Commission may make an amendment to the EC's Combined Nomenclature that are based on classification criteria for a product different from the criteria that the Court of Justice used to resolve a dispute on the classification of that product prior to the amendment? Thailand notes that in the *Dinter* case[20] concerning the classification of seasoned meat, the Court ruled:

Heading 16.02 of the Common Customs Tariff must be interpreted as meaning that it also includes poultrymeat to which salt and pepper have been added even if the pepper can be detected only microscopically . (emphasis added).

Following the *Dinter* judgment, Thailand understands that the Commission inserted an additional note 6(a) into Chapter 2 of the EC's Common Customs Tariff:

"Seasoned meat" of poultry, swine or bovine animals – excluding the products described at (c) below – falls within subheadings 16.02 B +, 16.02 B III a) and 16.02 B III b) 1 aa) respectively. "Seasoned meat" shall be uncooked meat that has been seasoned either in depth or over the whole surface of the product with seasoning either visible to the naked eye or clearly distinguishable by taste.

Is it correct that Additional Note 6(a) effectively reversed the finding of the Court in *Dinter* by requiring that the seasoning only be visible to the naked eye or clearly distinguishable by taste (namely, the objective characteristics of the product) rather than requiring that the seasoning (the pepper) could only be detectable microscopically? Could the EC advise whether it is the Court's ruling in the *Dinter* case or Additional Note 6(a) that currently governs the customs classification of products falling under heading 16.02?

The EC fails to see a conflict between the *Dinter* judgment and the additional note which Thailand refers to. In that judgment, the Court ruled that meat to which pepper has been added, even if only visible microscopically, should be classified under Chapter 16 as seasoned meat. In the Additional Note, the first criterion is whether the pepper is visible to the naked eye. In the event that the pepper is not visible (and thus could only potentially be seen microscopically), then the customs official should taste it to determine whether pepper is present. While this does not require the customs official to check the meat with the aid of a microscope it does require him to check that pepper is present, even when it cannot be seen. The EC therefore disagrees with Thailand's contention that the EC has reversed the judgment of the ECJ.

As a matter of fact, the EC exercises its legislative powers carefully, with a view to ensuring that there is no conflict. Should any such conflict occur, there can be no doubt that the judgments of the Court of Justice would prevail. This is obvious from the Court's judgment in Case C-267/94 in which the Court held:

[20] EC First Written Submission, para. 76. Reference to Case C-175/82 *Dinter v Hauptzollamt Köln-Deutz* ECR [1983] p. 969. Exhibit EC-12.

> does not authorize it to alter the subject-matter of the tariff headings which have been defined on the basis of the harmonized system established by the Convention whose scope the Community has undertaken, under Article 3 thereof, not to modify.[21]

2. In para. 37 of its Oral Statement at the First Substantive meeting with the Parties, the EC states: "... had Regulation 535/94 meant that in order to qualify under 02.10 it was sufficient to add salt which was insufficient to preserve the product, one would logically have expected that the EC's Explanatory Notes, which referred to the concept of preservation, to be modified to remove any reference to preservation. This was not the case. The following Explanatory Notes have remained in place:

> **[reference to 0210 1111 to 0210 1119, 0210 1131 and 0210 1139]."**

Thailand notes that these Explanatory Notes cover domestic swine meat, namely hams and shoulders and cuts thereof, with bone in. Could the EC advise whether it is the EC's practice to provide specifically in the Explanatory Notes whether a certain rule applies also, mutatis mutandis, to other products? For example, Thailand notes that the Explanatory Note to subheading 0210 1211 [bellies and cuts of domestic swine, salted, in brine] provides as follows: "The Explanatory Notes to subheadings 0210 11 11 and 0210 11 19, apply, mutatis mutandis." It is Thailand's understanding that there is no similar Explanatory Note for subheading 0210 99 39 (salted meat). Could the EC, therefore, explain the relevance of the Explanatory Notes it cites in para. 37 of its Oral Statement for the purposes of interpreting subheading 0210 99 39?

In citing these notes the EC wished to show that at the time of the Uruguay Round the notion of preserving was intrinsic to the EC's understanding of the meats in heading 02.10. That the specific notes refer to pigmeat is irrelevant for the purposes of this dispute. They incontrovertibly show that the EC interpreted the term "salted" at the time of the Uruguay Round as referring to salting for preservation, irrespective of the specific product which the note concerned.

The notes in question were designed to draw a distinction between pigmeat preserved in different ways: on the one hand solely by salting or pickling in brine, on the other by drying or smoking (whether or not combined with salting or pickling). The distinction is made for various cuts of pigmeat, and is therefore repeated, using the phrase *mutatis mutandis*. This distinction was relevant to pigmeat only, so there would have been no point in applying it to other kinds of meat.

QUESTIONS POSED BY BRAZIL

1. For purposes of heading 0210, what does the phrase "long-term preservation" mean?

The term can best be understood by examining the types of meat that are regularly classified under heading 02.10. In its First Written Submission the EC has provided a table giving examples of these.

2. Is there a difference between preservation and "long-term preservation"? If so, what is it?

The question is not relevant to this dispute since no one maintains that the product at issue qualifies under either criterion.

[21] Case C-267/94 *French Republic v Commission* ECR [1995] I-4845, para. 20 (Exhibit EC-22).

3. How long is "long-term preservation"?

See answer to question 1.

4. Is fresh meat of heading 0207 meant for "long-term preservation"? If not, how long must meat last before spoiling in order to be classified as fresh?

The EC does not understand the first question. The EC regards this and the following two questions as excessively theoretical and making no useful contribution to the present case. All parties have accepted that the crucial question is under what conditions products qualify under heading 02.10. It is the terms of this heading which must be interpreted.

5. Is chilled meat of heading 0207 meant for "long-term preservation"? If not, how long must chilled meat last before spoiling in order to be classified as chilled?

See answer to question 4.

6. Is frozen meat of heading 0207 meant for long-term preservation? If not, how long must frozen meat last before spoiling in order to be classified as frozen?

See answer to question 4.

7. At the time of importation, how can customs authorities assess whether certain meat of Chapter 2 is preserved or preserved for long-term?

The classification of products under heading 02.10 normally presents no problems, since the qualifying products are well-established.

8. Is "deeply and homogeneously impregnated with salt" related to how long a product is preserved? If so, how much salt is it needed to impregnate meat for preservation?

The EC understands that preservation by salt alone, a very unusual mode of preservation, is assisted if the product is 'deeply and homogeneously impregnated with salt'. The amount of salt is likely to vary according to the kind of meat. The EC notes that Brazil itself considers a salt content of 9-11% is necessary for preservation.

9. Taking into account the total imports, of Brazil to the EC, of frozen boneless chicken cuts impregnated with over 1.2% of salt from 1998 until the enactment of Regulation No. 1223/2002, please provide the percentage of imports of this product that entered the EC under heading 0207 and the percentage that entered under heading 0210.

Table 2 of the EC's First Written Submission gives data concerning imports under headings 02.07 and 02.10 from Brazil during the years in question. It can probably be assumed that virtually all the meat entered under heading 02.10 consisted of such chicken cuts.

10. In paragraph 92 of the EC's First Written Submission, the Communities state that "given the commercial importance of some of those customs offices (Hamburg, Rotterdam) substantial trade entered the Community" under heading 0210. Based on this assertion and on the allegation that imports of frozen chicken cuts impregnated with over 1.2% of salt entered the EC under heading 0207 through some customs offices, please provide the EC's understanding of what constitutes "substantial trade".

The EC meant that relatively significant volumes of the product at issue were imported through certain EC countries – corresponding to those where the customs offices were located.

11. In *Gausepohl*, it seems that the minimum 1.2% salt content required for long-term preservation of meat was established based on written observations made by the Belgian Government. Provide the studies or reports used in that case that indicate that the 1.2% salt threshold is sufficient to ensure long-tem preservation.

The European Court of Justice did not consider that 1.2% was sufficient to ensure long-term preservation. The Court did not have a study before it suggesting this. Rather, it clearly stated that 1.2% salt content would be an appropriate minimum, below which it would not even be necessary to enquire whether the meat in question had been salted for preservation.

See the EC's response to Panel Question 40.

12. If freezing is a process that can be "largely reversed", does that mean that meat after thawing will be identical or similar to what it was prior to freezing? Please explain.

No, it cannot be sold as fresh meat. Freezing and thawing of the meat brings about specific changes, as attested by the literature cited by Brazil and Thailand. Evidently, fresh, chilled and frozen meat can all be used by the processing industry to manufacture processed chicken products.

13. If not, how does freezing and thawing change the character of meat?

See answer to question 12.

14. Can meat after thawing still be used for the same purposes as prior to freezing?

See answer to question 12.

ANNEX C-8

**RESPONSES BY THE EUROPEAN COMMUNITIES
TO QUESTIONS POSED BY THE PANEL AND BRAZIL
AFTER THE SECOND SUBSTANTIVE MEETING**

(2 December 2004)

QUESTIONS POSED BY THE PANEL

FOR THE EUROPEAN COMMUNITIES

87. In EC's reply to Panel question No. 56, the EC argues that the Panel is tasked to assess the meaning of its concessions as of the date of Panel establishment according to Articles 3.2 and 11 of the DSU, namely on 7 and 21 November 2003. However, in para. 97 et seq of its second written submission and in paragraph 72 of its oral statement at the second substantive meeting, the EC submits that the relevant date for interpretation of the EC's tariff concessions on salted meat was the commencement of the Uruguay Round negotiations, i.e. 1 September 1986. Could the EC clarify the apparent inconsistency between these statements and clearly indicate when it considers the EC concessions in question should be interpreted.

1. In the EC's view, Question 56 ('the relevant time at which the meaning of headings of the EC Schedule – LXXX – should be assessed') has no single answer. The 'relevant time' depends on what precise issue is being discussed.

2. The EC reconfirms its view that in interpreting the EC schedule by applying Article 31 of the *Vienna Convention* the meaning of the concessions must be assessed as of the date of Panel establishment. Thus, for example, subsequent practice within the meaning of Article 31(3)(b) or relevant rules of international law within the meaning of Article 31(3) (c) must be assessed as of that moment.

3. The date for considering EC law is another issue. In so far as such law is relevant to determining the scope of the EC's Schedule within the context of Article 32 of the *Vienna Convention*, the common intention of the parties was expressed in the Modalities Agreement to use the level of parties' duties (or bindings) in 1986 as a base point.

88. With respect to the EC's reply to Panel question No. 32, is the EC suggesting that meat that has been "impregnated with salt" will necessarily be salted for the purposes of preservation? If not, please elaborate upon the reply.

4. No. In order to be preserved with salt, meat should be deeply and homogenously impregnated with a level of salt sufficient to ensure long-term preservation, i.e., much higher than 3%.[1] Impregnation with salt is a necessary but not sufficient condition. Whether the meat is salted for the purpose of preservation depends in particular on the level of salt content.

[1] See already EC Responses to Panel Questions 32 following the first substantive meeting and footnote 11 of the Second Oral Statement.

89. What inspections and/or analyses do EC customs officials undertake to ascertain the objective characteristics of the products at issue?

5. When a product arrives at the border, customs officials carry out:

- inspection of customs and sanitary documents accompanying the good, also of any BTI;
- physical inspection by customs officers of container, packaging, labelling;
- physical inspection of the product, in particular its temperature, smell, taste, colour;
- if necessary, samples are sent to laboratory for analytical control to verify conformity of product with customs specifications.

6. The relevant legal provisions are contained in Articles 68 to 70 of the EC Customs Code, Regulation 2913/92, which provide as follows:

Article 68

For the verification of declarations which they have accepted, the customs authorities may:

(a) examine the documents covering the declaration and the documents accompanying it. The customs authorities may require the declarant to present other documents for the purpose of verifying the accuracy of the particulars contained in the declaration;

(b) examine the goods and take samples for analysis or for detailed examination.

Article 69

1. Transport of the goods to the places where they are to be examined and samples are to be taken, and all the handling necessitated by such examination or taking of samples, shall be carried out by or under the responsibility of the declarant. The costs incurred shall be borne by the declarant.

2. The declarant shall be entitled to be present when the goods are examined and when samples are taken. Where they deem it appropriate, the customs authorities shall require the declarant to be present or represented when the goods are examined or samples are taken in order to provide them with the assistance necessary to facilitate such examination or taking of samples.

3. Provided that samples are taken in accordance with the provisions in force, the customs authorities shall not be liable for payment of any compensation in respect thereof but shall bear the costs of their analysis or examination.

Article 70

1. Where only part of the goods covered by a declaration are examined, the results of the partial examination shall be taken to apply to all the goods covered by that declaration. However, the declarant may request a further examination of the goods if he considers that the results of the partial examination are not valid as regards the remainder of the goods declared.

> 2. For the purposes of paragraph 1, where a declaration form covers two or more items, the particulars relating to each item shall be deemed to constitute a separate declaration.

90. The EC is requested to respond to the comment made in Brazil's reply to Panel question No. 13 and in paragraph 11 of its oral statement at the second substantive meeting that the EC considers the "objective characteristics" of a product to be a decisive criterion for classification.

7. It is true that under Community law in implementing the HS the objective characteristics of a product are decisive for classification. However, as noted before, the issue of classification is different from the determination of the scope of a Schedule for the purpose of Article II of the GATT 1994.

91. In the EC's reply to Panel question No. 44, the EC submits that the application of the principle of preservation has rarely been problematic because it is "normally" obvious whether a product has been preserved by one of the means mentioned in heading 02.10. What is meant by "normally" obvious? Further, please explain how a product is dealt with by customs officials when it is not obvious that a product has been preserved by one of the means mentioned in heading 02.10?

8. The EC used 'normally' in the sense of 'usually'. The EC meant simply that customs officials, applying the inspections and analyses mentioned in the EC's response to Panel Question 89 above, would have no difficulty in telling that a particular product has been preserved. The preservation techniques referred to in heading 02.10 leave the meat with specific characteristics (e.g., colour, saltiness, dryness) that are readily detectable (e.g., in Parma ham). In fact, as the EC has pointed out, this heading is not one that in practice creates difficulties, as evidenced by the very small number of instances in which it features in official records, either national or international, as an issue.

92. In its reply to Panel question No. 50, referring to a BTI concerning the classification of frozen smoked salmon, the EC submits that the German customs authorities could immediately see that the product in question there was one that had undergone one of the processes listed in heading 03.05 to ensure preservation. The EC also submits that the customs authorities checked that the product had gone through a process of preservation (i.e. smoking) by checking the products appearance, smell and taste. Please specifically identify the investigations undertaken by the customs authorities in that case to enable them to be convinced that the product was classifiable under heading 03.05? Are these investigations commonplace with respect to products that are sought to be classified under heading 03.05?

9. The EC's answer to Panel Question 50 related to the procedure followed by the German Customs Authorities in issuing one binding tariff information. The application covered only one type of product and included the following particulars:

- a detailed description of the goods permitting their identification and the determination of their classification in the Combined Nomenclature;
- the composition of the goods and any methods of identification used to determine their classification;
- samples and labelling which may assist the German Customs Authorities in determining the correct classification.

10. Actually the goods were packed, vacuum-sealed in plastic foil with the following labelling "Grande Luxe R/genuine smoked salmon". It is well known that smoking is one the oldest way of preserving food, and in particular salmon. Smoking gives the salmon flesh or fillets a 'fruity' flavour and taste which can be instantly recognized. Smoking imparts a distinctive character to the product.

11. The product at issue was examined by the German Customs Authorities in the Hamburg Customs Laboratory. Colour, smell and taste were readily identified as giving a flavour and taste indicating that the product had been smoked. In doing so the Authorities followed the Customs Laboratory Guide issued by the World Customs Organization. The Guide recommends an initial screening analysis of the good which consists of the examination of the appearance and nature of the sample. This examination is based on the sense of sight, smell and hearing. In that case the German Customs Authorities were in a position to decide immediately that the good had undergone a smoking process covered by heading 03.05.

93. Do the products at issue in this case meet the criteria set out in EC Regulation 535/94?

12. No. As the EC has explained in its various submissions, Regulation 535/94 sets a minimum salt content, a pragmatic rule, below which it cannot be considered that a product is salted for preservation. The requirement of preservation that flows directly from heading 02.10 of the Combined Nomenclature as interpreted by the Court in standing case law stands undisturbed by Regulation 535/94 (See also responses to Panel Questions 113-114). Consequently, in order to be classified under heading 02.10 a product has to meet the criteria of Regulation 535/94 and be salted in order to ensure its preservation as required by the Combined Nomenclature, heading 02.10. This was the case when Regulation 535/94 was enacted, and remains the case today.

13. The EC does not dispute that the products at issue were deeply and homogeneously impregnated with salt in all parts. However, Brazil and Thailand themselves restrict their claims to products containing more than 1.2% salt. They admit that such salt content does not suffice to ensure long-term preservation.

94. In its reply to Panel question No. 25, the EC submits that the products covered by EC Regulation 1223/2002 and EC Commission Decision 2003/97/EC of 31 January 2003 fall under heading 02.07 of the EC Schedule and are subject to the duties applicable to these tariff lines under the EC's Common Customs Tariff. Could the EC indicate precisely what those duties are.

14. The products in question fall under CN subheading 0207.14.10 and the import duties applicable to these products are 102.4€ per 100 kilogram. In addition, these products may be subject to the special safeguard mechanism provided for in Article 5 of the *Agreement on Agriculture*. The EC also notes that it has a Tariff Rate Quota (TRQ) covering this tariff line of 15,500 tonnes from which Brazil and Thailand benefit, among others. The in-quota rate is 0. This TRQ has already been the subject of WTO dispute settlement between Brazil and the EC.

95. Please comment on the price data for the products at issue referred to in paragraph 57 of Brazil's first written submission and in paragraph 11 of Thailand's first written submission. In particular, does the EC accept that these were the applicable prices at the relevant time for imports of the products at issue from Brazil and Thailand respectively?

15. The EC does not dispute the pricing data provided by the Complainants.

96. In paragraph 19 of Thailand's oral statement at the first substantive meeting and paragraph 37 of Thailand's second written submission, Thailand submits that salted products require an additional means of preservation. In support, Thailand refers to Exhibits THA-25(a), 25(b) and 25(c), which include packages of Parma ham, prosciutto and jamón serrano. Which heading of the EC's Combined Nomenclature are these products classified under? Please provide all necessary evidence in support.

16. Only very small quantities of dried or smoked hams, bone-in or boneless, are imported into the EC (2001: 250 tonnes; 2002: 240 tonnes; 2003: 235 tonnes). The Community classifies these products upon export, under heading 0210.11.31 for hams, bone-in, and under 0210.19.81 for boneless hams. The latter heading applies if the hams in question are sliced.

17. The EC is providing extracts from its agricultural exports nomenclature (Exhibit EC-31), which is based on the HS, and refers explicitly to 'Prosciutto di Parma' (which is commonly known as Parma ham) and 'Prosciutto di San Daniele' under these subheadings. There is no specific provision for 'jamón serrano' in this nomenclature, but it would be included under the same subheadings. The EC does not agree with Thailand that these types of products require additional means of preservation and is providing an expert opinion from Professor Dr. Karl-Otto Honikel, an international authority also referred to by the Complainants (see Exhibit EC-32). These products are shelf-stable for months – they can be seen hanging in tapas bars throughout the world. Slicing contaminates the surface with moulds, yeast or other microbes, nevertheless, the sliced product is still stable at ambient temperature. In practice the sliced products are chilled as yeasts/moulds but not microbes could start growing on the cut surface and the attractiveness of the product for the consumer is lessened.

97. With respect to the EC's replies to Panel questions No. 48 and 71 and paragraph 36 of its oral statement at the second substantive meeting, is the list of products set out in Exhibit EC-5 an exhaustive list of all products traditionally traded under heading 02.10? If not, please identify any other products that are traded under that heading. Please identify with all necessary proof the salt content of each of those products which are described as "salted".

18. In the table in Exhibit EC-5 the EC included representative examples of the various kinds of salted, dried and smoked meat. The list cannot be comprehensive since there are numerous small producers of ham similar to the examples give, which is cured, in some cases smoked, and then air dried in varying degrees and styles. On the other hand, the EC would wish to add bacon to the list. This also occurs in a range of forms, and in particular may or may not be smoked. The EC has described it as the only meat product that is preserved by salting alone,[2] but it would be more accurate to speak of 'curing' since a combination of common salt (NaCl) and sodium nitrite and nitrate are used. The latter have an additional preservative effect, and bring about the changes that give the meat its characteristic red colouring.[3]

19. The common salt content of the various meats is indicated in the table in Exhibit EC-5, where it is relevant to preservation, although the EC emphasises that in none of these cases, nor in the case of bacon, does salting with common salt provide the sole basis for preservation. In fact, the EC knows of no meat that is preserved by the use of common salt alone. In contrast, that is the only treatment given to chicken which is the subject of this dispute. Brazil claims that the level of salt in this chicken is enough to preserve it. To counter this claim, made at a late stage in the proceedings,[4] the EC has obtained an expert's opinion (Exhibit EC-32) which confirms that a minimum of 7% salt in the meat is necessary for this purpose. The expert, Professor Dr. Karl-Otto Honikel, is a leading authority in this field and cited as an authority in the material presented by Brazil in support of its assertions.

[2] EC First Closing Statement, para. 4.
[3] EC First Written Submission, para. 116.
[4] Brazil Second Oral Statement, para. 2.

20. It should be said that the volume of trade in these products is small. EC imports under heading 02.10 on average about 2,000 tonnes per year, about half of which consist of preserved beef from Switzerland ('*viande de grison*'). However, while frozen salted chicken cuts were being classified under this heading the annual volume of imports rose over one hundredfold.[5] This episode is instructive. The Complainants pretend that their arguments are specific to the EC's Schedule on the basis that they involve Regulation 535/94.[6] In fact they invoke this Regulation only in order to *confirm* their interpretation of heading 02.10 in the Schedule following the use of the Harmonised System as context. On their interpretation, which amounts to an interpretation of HS heading 02.10, any amount of salting, drying or smoking would be sufficient for a product to qualify under this heading. Brazil's own evidence[7] shows how classification under this heading secures significant tariff reduction for chicken cuts under many national tariff schedules. Furthermore, the Complainants' interpretation is not limited to chicken cuts, but applies to all meats. If this interpretation were adopted, wherever a Member's Schedule has a lower tariff for a meat under heading 02.10 than it has for the corresponding meat in headings 02.01 to 02.08 that Member could expect the same dramatic distortion of trade through the use of slightly salted, etc., meat that the EC experienced from salted frozen chicken.

98. Please respond to Brazil's question posed in paragraph 29 of its oral statement at the second substantive meeting on why it is necessary to "further preserve" products that are classified under heading 02.10 if they have already been subjected to a process to ensure long-term preservation.

21. One short answer to the question why meat that has been preserved for the long-term (by salting, drying, etc.) should be further preserved (by chilling or even freezing) is so that it may be preserved for an even longer term. The EC has listed[8] various factors which affect the life or presentation of preserved meat. In particular, such meat is no longer stored in the fashion originally intended, and it is often sliced in preparation for retail sale (see Exhibit EC-32).

22. The use of additional preservation techniques for meat falling with heading 02.10 is explicitly envisaged in the HS Explanatory Notes to Chapter 2 which provide that vacuum packing (Modified Atmosphere Packing) does not alter the classification of a product under Chapter 2. [9]

99. In paragraph 40 of its second written submission, the EC submits that the examples of products referred to by the complainants to support their argument that salted products may not necessarily be preserved by salting alone are almost all of fish rather than meat. The EC is requested to explain in precise terms what differences exist between fish and meat to warrant different conclusions in this regard.

23. The EC made this point in order to illustrate that the products which the Complainants had identified as being preserved by one of the processes in heading 02.10 were mostly fish products and not meat products. The EC was not suggesting that different conclusions should necessarily be drawn from fish products than would be drawn from meat products.

24. Rather, the EC would point out that it is Brazil that specifically rejects that analogies can be drawn from Chapter 3 of the HS. In the context of its comments on the WCO letter to the Cypriot

[5] EC First Written Submission, para. 58, Table 3.
[6] E.g., Thailand Second Oral Statement, para. 20.
[7] Exhibit BRA-37.
[8] E.g., Second Written Submission, para. 43.
[9] EC Second Oral Statement, para. 9.

authorities[10] Brazil argues that salted frozen fish is a product that is different from the product at issue and cannot therefore 'be seriously considered by the Panel as relevant subsequent practice'. However, Brazil appears in two minds on the issue, since it also uses examples of the classification of frozen fish in support of its arguments.[11]

25. In the EC's view the overall structure of Chapter 3 is similar to that of Chapter 2, so that the WCO's comments on fish are of significance to the present dispute.

100. In paragraph 35 of its second written submission, the EC submits that, even if the complainants were correct that heading 02.10 depends upon preparation rather than preservation, all existing practice suggests that it must be preparation which places the meat in a "recognisably different state". Is the EC suggesting that preservation may not be necessary for classification under heading 02.10 provided that the state of the product in question has been recognisably changed? If not, please explain what the EC meant by this comment. Further, please explain how the EC interprets "recognisably different state".

26. The EC made these comments by way of presenting an alternative argument should the Panel not accept that all the processes referred to in heading 02.10 involve preservation of the meat. In the EC's view the change of state is brought about by preservation, but that there *is* such a change is undeniable. By the phrase 'recognisably different' we mean in particular that the meat is obviously different from raw meat in appearance and texture. A Customs officer examining the goods would have no difficulty recognising them for what they were. We can say that all the meats which we are aware of as being classified under heading 02.10 share this characteristic (see the table in Exhibit EC-5). Furthermore, all such meats have names, either general (like 'bacon') or specific (like 'Parma ham'). Frozen chicken with added salt shares none of these characteristics. Not only does it look like chicken meat when arriving at the border, moreover, as confirmed by the expert opinion from Professor Dr. Karl-Otto Honikel (Exhibit EC-32), the effect of salting between 1.2 and 3% has none of the effects (preservation and drip loss) claimed by the Complainants to distinguish it from unsalted chicken meat.

101. In its reply to Panel question No. 69, the EC suggests that the purpose underlying the states referred to in heading 02.07 is irrelevant because those states are "instantly detectable". In contrast, the EC submits that the purpose underlying the states referred to in heading 02.10 is significant. Does the EC consider that purpose is important for heading 02.10 because the states referred to therein are considered not to be "instantly recognisable"? If so, how does the EC reconcile this with its submission in its reply to Panel question No. 69 that, as a practical matter, for customs authorities, what is important is that preserved meats have particular physical characteristics which are readily identifiable. If not, please explain in precise terms why purpose is significant for heading 02.10 but not for heading 02.07.

27. The EC finds this question difficult to answer because it seems to imply a dichotomy between meat that is chilled or frozen, and that which is salted, etc., within the meaning of heading 02.10. As the EC has pointed out, meat in heading 02.10 can also be chilled or frozen, and will not lose its classification for that reason. Consequently, the status of these terms in Chapter 2 is not the same. Once meat is found to be salted, etc., it will be classified under heading 02.10.[12] But finding that the meat is frozen does not determine which heading is appropriate; for this one must know more about it.[13]

[10] Brazil Second Written Submission, para. 63.
[11] E.g., Brazil First Written Submission, para. 94.
[12] Leaving aside heading 02.09.
[13] To be precise, this would exclude heading 02.01, and several subheadings.

28. As regards 'purpose', the EC regards it as undeniable that heading 02.10 was created to cover meats that had been processed in particular ways (salting, etc.) in order to put them in a preserved state.[14] Meats in this state are 'readily identifiable' as such, and one could also say 'instantly recognizable'.

102. In its reply to Panel question No. 49, the EC submits that the shelf life of preserved meats is many months at ambient temperatures. Is the EC submitting that ensuring a shelf-life of many months amounts to long-term preservation? If not, what is meant by long-term preservation in the context of heading 02.10 of the EC Schedule?

29. The EC has shown that the notion of preservation is at the heart of heading 02.10 in the Harmonised System, the EC's Schedule and the EC's Combined Nomenclature. The Complainants have not established that the product at issue meets this criterion, and their claims must therefore fail. The EC has observed that meats that are preserved for several months are clearly preserved for the purposes of heading 02.10. See also the EC's response to Panel Question 118.

103. In its reply to Panel question No. 14, Brazil describes the salting methods used by Brazilian producers and exporters of salted chicken meat. Which, if any, of those methods result in the deep and homogeneous impregnation of salt?

30. Dry tumbling, tumbling in brine, and injection, can achieve such impregnation.

104. With respect to the EC's reply to Panel question No. 64, which salts are used to preserve the products that the EC considers typically fall under the scope of heading 02.10?

31. Sodium chloride, sodium nitrate, sodium nitrite. Unless nitrates and nitrites are used the preserved meat will not have its customary red colour.[15] The EC does not know of any meat that is preserved with sodium chloride (common salt) alone.

105. Please comment on Brazil's reply to Panel question No. 18 and Exhibit BRA-34, which Brazils says indicate that the EC itself considers that frozen salted/dried/smoked fish should be classified under heading 03.05 and not under headings 03.03 or 0304.

32. Once the fish is sufficiently salted, etc., to preserve it, whether it is also frozen or not will not affect its customs classification. The EC has always based the classification of goods on their "objective characteristics" which are mostly based on their composition or properties, which can be established by laboratory examination whether in a Customs laboratory or a private laboratory. The state of the products at issue as being salted or in brine, dried or smoked for long term preservation can be established by laboratories by determining the moisture content and water activity.

33. For instance, frozen salted or in brine herring filets were classified on a case by case basis as either 03.05 or 03.04 (Exhibit EC-33).

106. In paragraph 42 of second written submission, the EC has identified the CCCN as the predecessor to the Harmonized System. To what extent is the structure and rationale of Chapter 2 of the CCCN different from or similar to that of the equivalent Chapter in the Geneva Nomenclature?

34. Many of the elements of Chapter 2 of the Geneva draft were carried into the CCCN.

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[14] See, e.g., the discussion of the evolution of the terms.
[15] See EC First Written Submission, para. 116

35. The strategy of dealing with most meat on an animal-type base (beef, sheep, pig, etc.) is followed in both (but 'Dead game', Item 15 in the Geneva draft, has no equivalent in the CCCN). Whether or not the meat was frozen is not a factor in the CCCN, although it was so in the Geneva draft (and became so again in the HS). It is noteworthy that the word 'preserved' is linked to refrigeration (Item 13, also in Item 19), a practice that is carried over into the Notes of the CCCN (and HS).

36. Item 17 'Bacon' in the Geneva draft is best understood by reading the accompanying Explanatory Notes, from which it becomes clear that it actually corresponds to CCCN heading 02.05 (and HS heading 02.09) on pig and poultry fat.

37. Item 18 is corresponds to CCCN heading 02.06 (HS heading 02.10), except that the phrase 'cooked or otherwise simply prepared' disappeared. The EC has addressed this point in its Second Oral Statement.[16] Cooked meats were moved into Chapter 16 of the CCCN, but traces of the word 'prepared' remained in the Explanatory Notes (and continued in those of the HS).

107. If, as submitted by the EC, the processes listed in heading 02.10 are for long-term preservation and Chapter 2 is structured according to preservation methods, what is the rationale for categorizing the processes listed in heading 02.10 – "salted", "in brine", "dried", or "smoked" – under a separate heading instead of as a tertiary item under each of the headings preceding it (i.e. headings 02.01 through 02.08) together with "fresh", "chilled" or "frozen"?

38. By way of introduction, the EC observes that, despite repeated assertions of the Complainants to the contrary, it has not submitted that Chapter 2 is 'structured according to preservation methods'. Nevertheless, preservation is clearly an important feature of the Chapter.

39. It is evident from the structures of the successive nomenclatures – 1937, CCCN, HS – that the drafters regarded meats that had been salted, etc., as having two particular characteristics. Firstly, they were markedly different to meats that had not been processed in these ways, so much so that they were not even included in the same headings. Secondly, they were so similar to each other that they could be treated under a common heading. Both of these characteristics arise from the fact the meats are preserved; meat that has been only slightly salted, or dried, etc., is not significantly different from unprocessed meat, and such meat from one animal bears no particular resemblance to slightly salted, etc., meat from another animal.

40. The importance of freezing meat has altered over the years (it was not a feature of the CCCN), but even in the HS it is evidently not regarded as such a radical process as preservation by salting, etc., since it is reflected by a categorization that is made only within animal types, and in most cases by means of subheadings.

41. The EC believes that these considerations provide the answer to the Panel's question.

108. In paragraph 119 of its second written submission, the EC submits that throughout the Uruguay Round negotiations, EC law on classification under heading 02.10, including Regulation 535/94, was based on the concept of preservation. Please explain where the concept of preservation is reflected in Regulation 535/94.

42. Regulation 535/94 did not need to explicitly restate that heading 02.10 is based on the concept of preservation. As put succinctly by the European Court in the *Gausepohl* case:

[16] Para. 42.

> It is […] clear from the scheme of that chapter that, for tariff classification purposes the meat covered by it is either fresh or chilled meat of bovine animals or meat that has undergone one of the various processes required for long-term preservation. [17]

43. As noted in our response to Panel question 40 at the first meeting, this was undisputed between all relevant Member States, the Court, Commission and the importer himself.

44. The EC explained in its response to Panel Question 93, that Regulation 535/94 sets a minimum salt content, a pragmatic rule, below which it cannot be considered that a product is salted for preservation (see also response to Panel Question 113). Consequently, in order to be classified under heading 02.10 a product has to meet the criteria of Regulation 535/94 and be salted in order to ensure its preservation.

109. In paragraph 107 of its second written submission, the EC submits that, in respect of heading 02.10 of the EC Schedule, as at 1 September 1986, the EC's law and practice supported the principle of long-term preservation. Apart from the 1983 *Dinter* judgement and the 1981 Explanatory Note to the CCT to which the EC has already referred, what other support exists for the view that, as at 1 September 1986, the principle of long-term preservation was well-entrenched in the EC?

45. Although prior to the Uruguay Round the EC had few bindings on agricultural products, its nomenclature was exactly based on the CCCN (the Member States were parties to the treaty establishing the CCCN, and bound by that to observe its terms). Heading 02.06 of the CCCN contains effectively the same wording as HS heading 02.10, and both of them, as the EC has established, enshrine the principle of preservation. This is reflected in Regulation 3331/85, which contains the EC's Common Customs Tariff for 1986, and reproduces the headings of the CCCN. Relevant extracts from this are presented as Exhibit EC-34. The same CCCN-based nomenclature had been in use in the EC since 1960 if not earlier. Consequently the principle of long-term preservation was well-entrenched in the EC and confirmed already as early as 1983 in *Dinter*.[18] Any other measures could have only restated the preservation requirement but not modified it.

110. Are ECJ judgments published? If so, how and when? Are they publicly accessible? Please indicate the means through which such judgments were publicly accessible as at: (a) 1 September 1986; (b) 15 December 1993; and (c) 15 April 1994.

46. The judgments of the European Court of Justice are delivered in open court (Article 37 of the *Statute of the Court* and Article 64, paragraph I, of the *Rules of Procedure of the Court*).

47. On the day of delivery, the judgments are accessible to the public outside the courtroom and will be sent by the Registry to anyone upon request after delivery.

48. According to *Article 68 of the Rules of Procedure of the Court*, the Registrar arranges for the publication of reports of cases before the Court and in principle all judgments are published in the European Court reports.

49. From the middle of the 1970's the Court's judgments have been accessible in a Community law database (CELEX) run by the Communities' Publications Office.

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[17] Para. 10. See EC First Written Submission, para. 82 for full extract from judgment.

[18] See Judgement in Case 175/82 *Dinter* (Exhibit EC-12), para. 6 as well as the description of the import of that case law by Advocate General Tesauro, in C-33/92 *Gausepohl* (Exhibit EC-14), para. 4. The standing case law was reconfirmed in the Court in *Gausepohl* (Exhibit EC-14), para. 16.

50. In addition, the Court notifies both the commencement of a legal proceeding as well as the judgment rendered and its conclusions in the Official Journal of the European Communities. To illustrate this, the EC attaches as Exhibit EC-35 the excerpts from the Official Journal in cases *Dinter* and *Gausepohl*.

51. The above means of publications existed at all dates specified by the Panel. From 1997 on all judgements have also been made available on the Court's own website (www.curia.eu.int).

111. Please comment on Brazil's contention in paragraph 90 of its second written submission that the Advocate-General in the *Dinter* case considered smoking to be a preparation process.

52. The EC understands that Brazil in paragraph 90 of its second submission attempts to provide counterevidence to the EC's explanation that the notion of preservation was at the heart of its classification practice on heading 02.10. The only legal document Brazil refers to is Advocate General Mancini's opinion in *Dinter*, that is the independent legal opinion provided to the Court during the proceeding, which the Court is in no way bound to follow.

53. The document Brazil refers to if at all confirms the EC position. First, Advocate General Mancini in para. 3 of his opinion distinguishes between the addition of salt under chapter 2 as "the better to preserve the product" as opposed to adding of salt by way of seasoning. That is, he expressly states that "salting" for the purposes of heading 02.10 clearly requires salting for preservation. Second the case concerned seasoning with salt and pepper and not smoking. Moreover, the Court in its judgment (which is the final and binding) authority confirmed that chapter 2 "comprises poultry meat which has undergone a preserving process" (para. 6).

112. With respect to the EC's reply to Panel question No. 47, please explain why and how it is implicit in the *Gausepohl* judgement that the amount of salt required for preservation will vary from meat to meat.

54. The Court in *Gausepohl* found support for its interpretation of heading 0210 to require salting for long-term preservation in an Explanatory Note relating to swine meat.[19] As noted in the Report for the Hearing (para. 33) that Explanatory Note to the Combined Nomenclature states that the salt content "may vary considerably between different types and cuts of meat".

113. In cases where an ECJ judgement is issued to clarify a particular Regulation, under EC law, is it necessary to read that judgement in conjunction with a Regulation enacted after the issuance of the judgment which was expressly enacted to amend the first Regulation upon which the judgement was based?

55. There is no procedure under which the European Court of Justice is tasked to "clarify a particular Regulation". Under the *EC Treaty*, a Regulation can either be directly attacked in an action for annulment (Article 230 of the *EC Treaty*) or it can be examined by the Court in the context of a preliminary ruling proceeding and be found invalid (Article 234 of the *EC Treaty*). The legal consequence is under both proceedings that the Regulation is invalid and no longer in effect *ex tunc* (unless otherwise specifically indicated by the Court).

56. A later act that replaces the invalidated act is self-standing and contains the motivation for its adoption in accordance with Article 253 of the *EC Treaty*. It is therefore generally not necessary to read it in context with a judgement that invalidated the preceding act, unless specific reference is made to that judgement in the motivation clauses.

[19] Judgement of the Court in Case C-33/92 *Gausepohl* (Exhibit EC-14), para. 12.

57. If the EC understands correctly, the Panel is interested in the relationship between judgements such as *Gausepohl* which interprets the Combined Nomenclature and a later Commission Regulation inserting an Additional Note. However, this is an issue of hierarchy of norms as opposed to a question of hierarchy between Court judgements and Commission Regulations.

58. In *Gausepohl*, for example, the Court confirmed the scope of heading 02.10 in the Combined Nomenclature (a Council Regulation). The later addition by the Commission of Additional Note 7 through Commission Regulation 535/94 is a legal act which is *inferior* to the Combined Nomenclature (Council Regulation). The Commission is not entitled to modify, through a Commission Regulation, the content of the scope of a tariff heading laid down in the Combined Nomenclature (Council Regulation implementing the Harmonised System). Therefore, any Commission act must necessarily be read together at all times with the superior norm (the Combined Nomenclature) and its interpretation by the Court. In other words, the scope of heading 02.10 which on the basis of its wording and structure already compels a requirement of preservation as confirmed by the Court in *Gausepohl* stands entirely undisturbed by any legal act subsequently adopted by the Commission. Indeed, as noted by Advocate General Tesauro in its opinion in *Gausepohl*:

> Chapter 2 of the Combined Nomenclature, as the case-law of the Court confirms, comprises meat which has undergone a preserving process that may consist of freezing or salting inter alia.[20]

59. It is the Commission act that must be read harmoniously with the Council act and its interpretation by the Court, not the other way round. To the extent there was a conflict (*quod non*), the scope of heading 02.10 in the Combined Nomenclature as interpreted by the Court would prevail.

114. Please comment on Brazil's and Thailand's submission in paragraphs 56 and 8 respectively of their oral statements at the second substantive meeting that the legal effects of an ECJ judgement may be reversed or altered by a change in the law, including the enactment of a new Regulation.

60. In the above-mentioned paragraphs, the Complainants continue their attempt to justify their selective reliance on Commission Regulation 535/95 and their misinterpretation of the import of that Regulation. Specifically, the Complainants' arguments, as the EC understands them, are as follows:

61. Brazil argues with reference to a Community law book that the legal effect of an ECJ judgement may be reversed or altered by a change in the law, including the enactment of a new Regulation, and that therefore superseding legislation is not subject to the findings of the ECJ under previous "different circumstances".[21]

62. Thailand attempts to deduce from the judgement of the ECJ in *Van de Kolk* that "in a situation of 'conflict' between a Court judgement and a subsequent Commission Regulation, the European Court of Justice has itself made clear that the subsequent Regulation will prevail".[22]

63. As will be explained below, both propositions are entirely misconceived.

64. With respect to Brazil's point, the EC notes, at the outset, that Brazil has not provided the Panel with the original quote from the Community law authority to which it refers in footnote 62 to support its statement. The EC exhibits the relevant page 495 of the Community law book, where Lasok describes the legal effects of Court judgements as follows:

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[20] C-33/92 *Gausepohl*, Opinion of Advocate General Tesauro (Exhibit EC-14), para. 4.
[21] Brazil's second oral statement, para. 56.
[22] Thailand's second oral statement, para. 8.

> The legal effect of a judgement of the Court may in principle be reversed or altered by a change in the law administered by the Court, such as by an amendment of the Treaties.[23]

65. This quote does not stand for the proposition of Brazil that the adoption of a Commission Regulation (such as 535/94) following a Court Judgement (such as *Gausepohl*) reverses the legal import of the earlier judgement. To the contrary, Lasok confirms the EC's explanation in response to Panel Question 113 that there is no rule of conflict whereby a later legislative act of the Commission or Council supersedes any previous Court Judgement. Lasok refers to a situation where the Court examined the compatibility of a measure with norms administered by the Court. Lasok refers particularly to the *EC Treaty*, because it trumps all other norms under Community law. A Council Regulation must also be compatible with principles of Community law, and international obligations of the Community. A Commission Regulation must be compatible with all these acts, plus with all Council Regulations. To illustrate this with a hypothetical, if the *HS Convention* was altered so as to provide that all meat products with a salt content above 1.2% are covered by heading 0210, an importer could attack Commission Regulation 1871/2003 as being incompatible with heading 02.10 of the Combined Nomenclature, and the Court would reverse its standing case law on the interpretation of heading 02.10. The situation in *Gausepohl* and Commission Regulation 535/94 is not such. There was no change in the superior norm looked at in *Gausepohl*, i.e., heading 02.10 of the HS and or the Combined Nomenclature. The only legislative change was a Commission Regulation introducing a minimum salt content below which a preservative effect can be excluded. As explained in response to question 113, the legal effect of such Commission Regulation can never be to change the scope of the heading 02.10 in the higher ranking Council Regulation as interpreted by the Court.

66. To explain why Thailand's attempt to assimilate Commission Regulation 535/94 to the Council Regulation 3400/84 and a very specific sequence of cases is wrong, it is useful to briefly recap this sequence of cases and regulations.

67. In *Dinter* the Court was faced with a customs decision that classified peppered and salted poultry under chapter 2. The customs authority refused to consider it as seasoned within the meaning of chapter 16 of the CN because the salt and pepper were neither organoleptically nor optically perceptible. The Court applied a general principle of interpretation according to which the classification under the Customs Tariff must be sought in the objective characteristics and properties of the product.[24] The Court considered such sensory test as subjective and not capable of meeting the requirement of a classification based on objective characteristics.

68. Shortly after *Dinter* the Council inserted Additional Note 6a, which requires organoleptic and optical test for the determination of seasoning.

69. That Additional Note was challenged in *Van de Kolk* as being incompatible with the principle of classification based on objective characteristics as interpreted in *Dinter* and the *Convention on the Nomenclature* (the predecessor of the HS). The Court found that the Council had not violated those norms for the following reasons:

> […] it must be pointed out that that judgement was delivered in different circumstances from those in the present case; there was no provision in a regulation on the interpretation of the Common Customs Tariif and at the time of the national authorities' inspection of the goods Standard ISO 4120 had not yet been devised.

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[23] Lasok, The European Court of Justice Practice and Procedure (2nd ed., London, 1994), p. 495 (Exhibit EC-36).

[24] Judgement of the ECJ in Case C- 175/82*Dinter* (Exhibit EC-12), para. 9.

> In those circumstances, it must be concluded that in laying down the abovementioned criteria, the Council did not infringe the principle of legal certainly and did not otherwise exceed the discretionary power conferred on it in that field.
>
> Nor is the note at issue contrary to the Convention on the Nomenclature under which the Contracting Parties undertake not to make changes in the chapter or section notes in a manner modifying the scope of the chapters, sections and headings (Article II (b)(ii)).
>
> Additional Note 6(a) does not change the scope of the chapters, sections and headings of the Nomenclature. It merely specifies the criteria to be taken into account for classifying certain goods under a particular heading of the Common Customs Tariff in accordance with the interpretation given in relation to that heading by the Customs Council.[25]

70. Contrary to what Thailand argues in para. 8 of its second oral statement, the reference by the Court to the fact that the Council had legislated cannot be misunderstood to mean that the Court was bound by the Council's Regulation. This is entirely non sensical, because the impugned measure at issue before the Court was precisely that Council Regulation inserting Additional Note 6a! The Court's reference to the Council legislation as part of the change of circumstances merely reflects judicial self-restraint from second guessing the Council's technical Regulation that provides for uniform standards on sensory testing throughout the Community on the basis of an ISO standard. However, the key change of circumstances noted by the Court was the ISO standard which confirmed the objectivity of sensory testing thereby rendering the Court's criticism in *Dinter* moot.

71. Moreover, Thailand conveniently ignores that Council Regulation 3400/84 was also scrutinised for whether it modified the scope of the heading contrary to the Communities obligations under the Convention on the Nomenclature. In *Van de Kolk*, the Court only upheld the Additional Note providing for sensory tests as inserted by the Council because it merely concerns the technical means for an objective assessment of the characteristics of a product, but does not alter the scope of the headings concerned. By contrast, the insertion of a criterion that all meat products with a salt content exceeding 1.2 % can be considered as " salted" under heading 02.10 even if such salting does not ensure preservation would significantly alter the scope of heading 02.10 as consistently interpreted by the Court in *Dinter* and *Gausepohl*. The EC refers to its response to Question 97 and Exhibit EC-32.

115. Which of Additional Note 6(a) to the Combined Nomenclature or the *Dinter* judgement take precedence regarding the appropriate criterion to be used to identify whether or not a meat is "seasoned" for the purposes of Chapter 16 (i.e. detection through sensory perception or by microscopic means)?

72. Currently Additional Note 6a as upheld in *Van de Kolk* applies. As the Court confirmed in that case, its criticism of sensory techniques made in *Dinter* has been superseded by a change of circumstances and is therefore moot. Yet (to avoid any misunderstanding) it should be noted that the legal effect of the *Dinter* judgement providing a preliminary ruling on compatibility with Community law of the German authority's classification decision in that particular case and providing a number of legal interpretations including the interpretation of heading 0210 remain otherwise valid.

[25] Judgement of the ECJ in Case C-233/88 *Van de Kolk* (Exhibit THA-35), paras. 16-18.

116. The minutes of a meeting of the EC Customs Code Committee in February 2002 (Exhibit THA-23) indicate that the Committee considered it necessary to amend Additional Note 7 to Chapter 2 "to introduce the condition of 'long-term preservation'" (emphasis added). Why was such an introduction necessary in light of what the EC has submitted regarding the importance and effect of the *Dinter* and *Gausepohl* judgements?

73. As explained in responses to Questions 113, it was not necessary under Community law to "introduce" a *new* legal concept of "preservation" or "long-term preservation", because that concept already existed. The term "introduce" in that context describes the act of *inserting a clarification* which the Commission had not considered necessary with a view to standing case law interpreting heading 0210 as requiring salting for long-term preservation (*Dinter* and *Gausepohl*). However, the experience of erroneous national BTIs made it desirable to restate the meaning of heading 02.10 as interpreted in *Dinter* and *Gauspohl*. The EC recalls its response to Panel Question 45 following the first meeting clarifying that minutes of the EC Customs Code Committee have no legal effect whatsoever.

117. Please provide copies of BTIs of instances where the products at issue were classified under heading 02.07 rather than heading 02.10 before the introduction of Regulation 1223/2002 and Commission Decision 2003/97 of 31 January 2003.

74. The EC can identify no such BTIs. However, the EC repeats the warning that it gave in para. 51 of its Second Written Submission about the dangers of relying on BTIs as comprehensive indication of customs practice. The EC would add that it is possible under Community law to withdraw an application for a BTI where the outcome is considered unfavourable by the importer. The absence of such BTIs has therefore no legal consequences, in particular on the scope of heading 02.10 of the Combined Nomenclature as interpreted by the Court as requiring long-term preservation. In any event, the EC recalls that it has provided some examples of BTIs interpreting 02.10 as covering meats preserved by some of the techniques mentioned therein (Exhibit EC-25).

118. What is the distinction between "preservation" and "long-term preservation"?

75. The EC believes that the distinction posited in the questions is not relevant for this case. Whereas EC law on classification contains the term 'long-term preservation', the word 'preservation' is not to be found in HS heading 02.10. Rather, the EC has shown that heading 02.10 has at its heart a concept which the EC in these proceedings has termed 'preservation' but which it might have as easily have referred to as 'long-term preservation'. Consequently, the distinction which the Panel refers to has no bearing on this dispute. 'Long-term preservation' is the phrase that the EC has used to represent the preservation criterion that is inherent in heading 02.10, whether in the Harmonised System, or the EC's Schedule, or the EC's Combined Nomenclature.

119. At the time the EC concluded its Schedule, was there evidence of the existence of trade in meats under heading 02.10 which, through salting, were preserved for less than a few months?

76. Trade in salted chicken appears to have begun only in 1996 (Thailand) and followed by Brazil in 1998. The salted beef that was at issue in the *Gausepohl* case was not classified under heading 02.10. The EC is not aware of any other trade in products of this type.

120. With respect to Brazil's suggestion in its reply to Panel question No. 3 that the Panel should draw adverse inferences regarding the EC's failure to provide certain information requested of it by the Panel, is there any basis for the Panel drawing similar inferences regarding Brazil's and Thailand's refusal to provide export classification practice for the headings at issue?

77. The EC notes there are a number of conditions for drawing of adverse inferences. The first one is refusal by the party who has evidence to cooperate. The EC never refused or failed to co-operate. The EC provided the requested BTIs in Response to Question 34 (Exhibit EC-24).

78. Since both Complainants conceded the existence of export classification practice as alleged by the EC in its statistics and sample documents and in any event failed to cast doubt on the EC's substantiated allegations by providing counter-evidence, the Panel can consider this point undisputed without drawing adverse inferences. That said, the EC considers that the conditions for drawing of adverse inferences against the Complainants would be fulfilled, because the Complainants failed to provide counterevidence despite the specific request of the Panel to do so.

121. What relative weight should the Panel accord to inferences that may be drawn for the headings at issue in this case from:

(a) the structure of Chapter 2 of the HS and its predecessors;

(b) the Explanatory Notes that are relevant to Chapter 2 of the HS and to its predecessors; and

(c) General Interpretative Rule 3 of the HS.

79. All parties to the dispute are agreed that General Interpretative Rule 3 is not applicable in the present case. The mere existence of a controversy regarding the classification of a product does not mean that the condition for applying that Rule is satisfied. From the point of view of the EC, there is ample basis for reaching a clear interpretation of heading 02.10 vis-à-vis the product at issue.

80. Regarding the relative weight to be accorded to the elements mentioned in points (a) and (b), the EC observes that, in its view, the question is hypothetical since all the factors mentioned lead in this case to the same conclusion. However, were the question to arise the EC notes, first, that Explanatory Notes are not legally binding documents, and are therefore necessarily of a subsidiary status. It is significant that the WCO did not refer to them in its letter of advice. Secondly, the HS Explanatory Notes are reproduced neither in the EC's Schedule nor in its Combined Nomenclature, nor in its Explanatory Notes. In contrast, the terms of Chapter 2, and consequently its structure, are found in both the Schedule and the CN.

81. Finally, the EC refers to its observations on the pertinence of GIR3.

82. For these reasons it is the EC's view that the structure of Chapter 2 and its predecessors is of most relevance among the factors mentioned.

122. Do the parties consider that actual knowledge during negotiations of a document or instrument is necessary on the part of some/all negotiators involved in the negotiation of a treaty in order for it to qualify for consideration as "preparatory work" and/or "circumstances of conclusion" of a treaty under Article 32 of the Vienna Convention? If so, please provide support for this view. If not, please provide support for this view.

83. Under public international law, the precise degree and nature of the knowledge of preparatory documents and circumstances of the conclusions varies between different types of treaties, and is assessed on a case to case basis depending on the status of the parties as original or acceding Members.[26] As regards WTO law, the EC believes that the fundamental criterion of the 'common intention' of the parties, as emphasised by the Appellate Body,[27] has an important bearing on the issue. The term common intention assumes "knowledge" of the parties. Yet, it is not conceivable that the interpretation of WTO obligations and concessions depends on the proof of actual knowledge of all market access negotiators. Neither can the interpretation of obligations differ between original Members and Members that acceded later. At the same time is clear that any documents relied upon in an interpretation of WTO obligations according to Article 32 of the *Vienna Convention* must have been in the public domain or accessible to WTO Members.

84. The EC considers that the Panel need not decide whether "actual" or "presumed" knowledge is determinative for the purpose of this case. The common intention of the parties negotiating the Uruguay Round Agreements was to respect the HS nomenclature and to use the level of parties' duties or bindings in 1986 as a base point. This is reflected in the Modalities Agreement.

85. Indeed, the only document that has been referred to by any party in this dispute as 'preparatory work' has been the Modalities Agreement, and there is no doubt that this was known to all the negotiating parties during the Round.[28]

86. Even if the Panel were to consider that unilateral developments of EC law as of 15 April 1994 were relevant in the interpretation of the EC's schedule as "circumstance of the conclusion", it would need to dismiss Brazil's assertion that both its negotiators and those of other parties had (actual or presumed knowledge of Regulation 535/94 but not of the preservation criterion at the heart of Community law.[29] First it should be pointed out that Brazil provided no supporting evidence for its statement that it had knowledge of Regulation 353/94.[30] Moreover, it is significant that Thailand, which also participated in the negotiations, has made no such claim. If Brazil was aware of the implications of Regulation 535/94 in early 1994 then it is perhaps surprising that it was another four years before Brazilian exporters began their exports of frozen salted chicken (1998), while Thailand started already in 1996.

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[26] The ICJ relied on presumed knowledge (something a party ought to have known) in its Advisory Opinion of 8 June 1960 – *Constitution of the Maritime safety Committee of the inter-governmental Maritime Consultative Organization*, ICJ Reports 1960, p. 170. However, see also the rulings referred to and criticised by Sinclair, *The Vienna Convention on the Law of Treaties*, (2nd Edition, Manchester 1984), pp. 141-147.

[27] Appellate Body Report, *EC – Computer Equipment*, paras. 88 and 93.

[28] The EC recalls that it has also argued that the Modalities Agreement should be considered under Article 31 of the Vienna Convention. In this respect it would like to draw the attention of the Panel to a decision of an arbitral panel established pursuant to Article 2008 of the North American Free Trade Agreement which suggested that the Modalities Agreement is part of the *travaux préparatoires* and circumstances of conclusion of the WTO Agreement on Agriculture, as well as being part of the context under Article 31(2): *Tariffs Applied by Canada to Certain US-Origin Agricultural Products*, http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/Canada/cb95010e.pdf para. 179.

[29] Brazil Second Oral Statement, para. 70; Second Closing Statement, para. 9.

[30] In delivering its Second Closing Statement Brazil's representative explained the system that it applied for monitoring national developments, but did not indicate how it had been used during the Uruguay Round.

87. In any event, the EC has demonstrated that even as of 15 April 1994, the requirement of salting for the purpose of long-term preservation was well-enshrined in Community law and remained entirely undisturbed by Commission Regulation 535/94 (See in particular Responses to Panel Questions 113 and 114). If Brazil pretends knowledge of Commission Regulation 535/94 because it suddenly took upon itself the burden to screen unilateral developments in the EC, it cannot deny the existence of the long-term preservation requirement which was well-enshrined in the interpretation of heading 02.10 of the Combined Nomenclature as interpreted by several judgements of the Court of Justice. As detailed in Response to Panel Question 110 all of these judgements were publicly available and even notified in summary in the Official Journal which is read by the Brazilian embassy in Brussels (as Brazil explained to the Panel at the second hearing).

88. Brazil cannot have it both ways. If it relies on Community law as of that date, it must accept the entire body of EC law as publicly accessible at that moment. If Brazil considers it too burdensome to continuously follow the development of complex bodies of law such as the Common Customs Tariff, it cannot selectively rely on one particular element such as Commission Regulation 535/94 taken entirely out of context.

QUESTIONS POSED BY BRAZIL

1. In paragraph 17 of the second oral statement, the EC states that it is "not distinguishing between products on the basis of their purposes, but on their essential characteristics at the time they are examined by the customs authorities". Please clarify whether the phrase "essential characteristics" is the same as the phrase "objective characteristics". If these phrases do not have the same meaning, please explain why.

1. The EC does not see any significant difference between the two expressions.

2. Is there any type of meat that deeply and homogeneously impregnated with 1.2% of salt can be preserved for "many" or "several" months without chilling or freezing? If so, please provide the types of meat.

2. The EC assumes that Brazil is speaking of common salt (sodium chloride) such as was used in the subject matter of this dispute. The EC does not know of any such meat.

3. Please indicate where in the *Gausepohl* case, or under Community law, is the principle of long-term preservation defined as preservation for "many" or "several" months.

3. Because of the paucity of disputes on this issue the matter has not been the subject of a specific definition. The EC has given ample guidance to Brazil and the Panel as to how the criterion of long-term preservation is enshrined in Community law.

4. How does the EC reconcile its position that further extension of a product's shelf-life does not change classification under heading 0210 with the reasons set out under the Annex to Regulation No. 1223/2002 that salted chicken cuts is meat frozen for long-term preservation? In other words, if freezing for further preservation is allowed under heading 0210, and does not change classification under that heading, why are salted chicken cuts, which are frozen for further preservation, not classified under heading 0210?

4. Regulation 1223/2002 described the product which it was regulating as 'chicken meat frozen for long-term conservation'. The word 'further' was not used in the Regulation, and in particular it did not describe the meat as 'frozen for further preservation'. The EC therefore does not understand the questions which Brazil poses.

5. Brazil provided Schedule LXXX in Exhibit BRA-1. Please inform whether the tariff item numbers 0207.41.10 and 0210.90.20 expressed in column no. 1 of Schedule LXXX were taken from or are the same as those in the EC's Combined Nomenclature. If they were not taken from or are not the same as the ones found in the EC's Combined Nomenclature, please provide the nomenclature from which these tariff item numbers were taken from.

5. The EC believes that it demonstrated the parallel nature of the Combined Nomenclature and Schedule LXXX in Annex 1 to its First Written Submission.

ANNEX C-9

COMMENTS BY THE EUROPEAN COMMUNITIES ON THE COMPLAINANTS' RESPONSES TO QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

(9 December 2004)

I. INTRODUCTION

1. The European Communities thanks the Panel for providing it with an opportunity to comment on the answers provided by Brazil and Thailand to the Questions from the Panel and the EC following the second substantive meeting.

2. The invitation by the Panel to comment, as the European Communities understands it, is confined to new factual or legal arguments made by the Complainants in response to the further questions from the Panel. The Complainants have, however, largely repeated points made already before. Therefore, the fact that the European Communities does not specifically comment on them does not mean that they are no longer disputed by the European Communities. The European Communities refers the Panel to its positions on facts and legal arguments as previously expressed. In addition, the European Communities has sought to limit its comments to new elements that appear relevant to the Panel's deliberations.

COMMENTS ON BRAZIL'S ANSWERS TO THE PANEL'S AND EC'S QUESTIONS

Question 81

3. Brazil persists in the pretence that the Uruguay Round 'verification period' covering the months preceding 15 April 1994 was used for negotiating modifications to parties' draft schedules, and claims that Regulation 535/94 constituted such a modification.

4. As the EC has explained,[1] the purpose of the verification period was to ensure that Members' schedules complied with the concessions they had made during the negotiations that ended on 15 December 1993. The kind of issue to which negotiators' attention was directed is reflected in the issues raised by countries participating in the following meeting of the Trade Negotiations Committee, on 30 March 1994.[2] None of these issues concerned aspects of national practice. On the contrary, all the points made by participants in the discussion on the verification process concerned matters that were apparent in the texts of the Schedules. In particular, there were suggestions that the concessions appearing in those texts did not reflect the commitments made by the participants in the course of the negotiations. In the agricultural sector, above all, the particularly complex nature of the changes being made prevented participants using the verification stage for other purposes.

5. For this and other reasons detailed in our second submission,[3] the assumption of the parties must have been that national developments would not change the substance of the concessions, at least unless they were brought to the attention of the negotiators.

[1] EC Second Written Submission, paras. 108 et seq.

[2] MTN.TNC/43, 1994 (Exhibit EC-37). For example, the US complained that the Korean Schedule did not reflect the commitment made during the negotiations regarding the 'chemical harmonization initiative', and that the EC did not intend to commence the implementation of its agriculture concessions until mid-1995.

[3] EC Second Written Submission, paras. 94 et seq.

6. Notwithstanding this, Brazil opines that had any party an "objection or an issue regarding the EC's definition of "salted meat" they had until 25 March 1994 to bring it up and discuss it with the EC". As the EC has shown, Brazil was also aware of the *Gausepohl* and *Dinter* judgements of the European Court of Justice. Had Brazil been of the view that Regulation 535/94 altered the definition of "salted meat", and that such a definition formed part of the EC's concessions, it surely would have been prudent for Brazil to check with the EC that its understanding of Regulation 535/94 is correct, in the light of those judgements. Brazil admits that it never requested such clarification.

Question 82

7. The EC's argument is that to operate a separate process of salting is economically inefficient, and has no technical advantages. The first point we have made already,[4] and the second point is made in Professor Honikel's opinion (Exhibit EC-32).

8. Brazil and Thailand were shipping to the EC over 200,000 tonnes of frozen salted chicken in 2001, and Brazil has evidenced this with invoices and other shipping documents. However, for the period following the disappearance of the tariff advantage in 2002/03 there are no such documents, although total imports of frozen chicken continued at the same level. All that Brazil has produced to support a supposed continuing demand for salted chicken are assertions from traders. Furthermore, the most recent examples (Exhibit BRA-41) refer exclusively to past behaviour, and give no indication that the firms continue to import frozen salted chicken. There are no invoices or similar documents.

9. Processors who intend to add salt to chicken may be content to receive chicken that is already salted. But the cost saving is minimal, since the processors ordinary operations permit the addition of salt with minimal cost.

10. The supposed advantage of salting in preventing drip loss is irrelevant in regard to meat that is to be further processed, because (as noted by Prof. Honikel) the processor cuts up the meat before it is unfrozen.

Question 86

11. Brazil asserts that the chicken meat currently exported to the EC is 'impregnated with a minimum of 1.2% salt', but it has provided no supporting evidence. None of the letters in BRA-30 or BRA-41 that assert the existence of a demand for salted chicken mentions the concentration of salt in the meat. This is especially notable in those that claim specific advantages for salt.

Question 118

12. Brazil apparently believes that the present proceedings consist of an indictment of the EC for making use of a criterion of 'long-term preservation' which it says is insufficiently precise. Paradoxically, Brazil at the same time maintains that the appropriate criterion for heading 02.10 is an indeterminate degree of salting, smoking or drying.

13. The real issue is quite different. It is simply whether chicken covered by the two EC measures – i.e., with up to 3% salt – was entitled to treatment under heading 02.10 of the EC's Schedule. The Complainants have not established that it was.

14. The EC has shown that the central criterion of heading 02.10 is one of preservation. However, even if it were merely one of 'preparation', that would nevertheless imply a definite change of state.

[4] EC First Written Submission, para. 27.

Question 119

15. Contrary to Brazil's statement, the EC has not suggested that 'a salt content of 1.2% alone preserved meats for a period of a few months'.

16. With regard to the WCO list presented as Exhibit BRA-43, the EC does not deny that, somewhere in the world, there may at some time have been trade in 'salted meat of chicken', any more than it denies the existence of trade in 'salted edible offal of Tibetan yak' and 'salted meat of beavers'. What it does say is that it has no knowledge of such trade. Furthermore, far from throwing any doubt on the criterion of preservation that lies at the heart of heading 02.10, the items on the list give support to it. The exotic nature of many of the meats suggests that trade would not have developed had it depended on the availability of refrigeration to preserve the meat. In other words, the salting must have brought about the preservation of the meat.

17. Brazil says that the various salted meats on the list are not recognisably different from their unprepared forms, but its claim is mere assertion since its knowledge of the meats derives exclusively from the list, and that provides no descriptions. Nor does Brazil even have support for its claim that the meats on the list do not have individual names. It is quite evident that the list does not make use of such names. For example, under heading 0210.20 there is an entry for 'dried beef'. There is no mention of 'charque', 'jerky' or 'viande de grison', although that is in practice how such meat is known.

Question 121

18. Brazil refers to a concern in the 1937 Nomenclature that whether meat was fresh or frozen should not be a major distinction. What it cannot explain is why that concern did not extend to salted, etc., meat, if, as it claims, such meat was not preserved in this way. If the salting, etc., had not preserved the meat, then it would require exactly the same treatment as fresh meat. However, the Nomenclature does not mention the possibility of refrigeration for such products. To say 'this was not a concern for salted meat because salt meat was not considered a method of preservation' is nonsense.

Question 122

19. Brazil cites *Sinclair* selectively in order to give tendentious support for its case. It fails to make clear that the topic being discussed in the extract is the very specific one of the status of preparatory work in regard to parties that *join an existing* multilateral treaty. For the benefit of the Panel the EC presents the learned author's comments in full (Exhibit EC-38). As noted by the EC in its own response to Panel Question 122 (footnote 26), there is mixed jurisprudence on the issue and the author notes that his view is at odds with some international judicial authority.

20. The Panel will note the extract the author takes from the majority opinion in the *Young Loan* arbitration. Although this case also concerned accession to a multilateral agreement, the opinion voices considerations of a more general character on what *is* preparatory work:

> A further prerequisite if material is to be considered as a component of *travaux préparatoires* is that it was actually accessible and known to all the original parties. Drafts of particular articles, preparatory documents and proceedings of meetings from which one member or some members of the contracting parties were excluded cannot serve as an indication of common intentions and agreed definitions unless all the parties had become familiar with the documents or material by the time the treaty was signed.

21. Thus, preparatory works are exemplified as "drafts of particular articles, preparatory documents and proceedings of meetings".

22. Under the vague criterion of 'circumstances of conclusion', Brazil seeks to infiltrate material that would never qualify as 'preparatory work'. In fact, if unilaterally produced documents could qualify as having influence on the interpretation of treaties merely by being pronounced to be 'circumstances of conclusion', the whole concept of 'preparatory work' would risk being undermined.

23. The EC refers to its response to Panel Question 122 where it highlighted again that the only preparatory document submitted in this dispute is the Modalities Agreement the purpose of which was precisely to avoid disparity in the interpretation of the schedules through later reference to shifting 'circumstances of conclusion'.

24. On a more general note, the EC observes that although in the present instance the interpretation proposed by the Complainants has focused on the benefit it accords to their exporters, the same interpretation would extend to all WTO Members and in respect of all measures adopted unilaterally during the Uruguay Round negotiations whether by the EC or other Members. Brazil's only qualification is that it should be established later that they had been published somewhere at some point before the signing. Apparently the evening before would have been sufficient.

25. Finally, the EC observes that, as usual in addressing such questions, Brazil is unable to explain, and indeed makes no attempt to explain, how its reference to Regulation 535/94 can be said to *confirm* the interpretation of the Schedule that it derives from the analysis of its ordinary meaning and context. Its continuing silence on this central issue speaks volumes.

Brazil's Response to EC Question

26. The extracts that Brazil has made from its supporting literature only serve to underline the fact that chicken impregnated with up to 3% salt is not preserved. Nothing that Brazil has presented in any way answers Professor Honikel's conclusion (Exhibit EC-32) that the minimum salt content for preservation of meat is 7%.

COMMENTS ON THAILAND'S ANSWERS TO PANEL'S AND EC'S QUESTIONS

Question 118

27. Contrary to Thailand's assertion, the EC has never said that 'preservation lies at the heart of Chapter 2'. Rather, it has said on several occasions that this notion lies at the heart of heading 02.10.

Question 119

28. To put the record straight regarding information on imports, the EC would like to make clear that the volumes of 'other salted meat' imported prior to the use of this subheading by frozen salted chicken (that is, prior to 1996) were extremely small. In most years it seems likely that the volume in question was achieved by the import of a single container. In this case, there is also a significant chance that the figure was the result of a recording error. Even if, after very considerable administrative effort, the date and location of the import could have been determined, there would have been no guarantee that the salt content of the particular consignment would have been recorded, even supposing the relevant records were still in existence.

29. As regards Thailand's comments on the *Gausepohl* case, the EC notes that, although the *Oberfinanzdirektion* initially issued a Binding Customs Tariff notice under subheading 0210 20 90, it later rescinded this and substituted a classification under subheading 0202 30 90. The EC does not know why the initial ruling was made, but is certain that Thailand assumes too much in saying that it implies the existence of trade in salted meat preserved for less than a few months. In any event, the

EC does not claim to know whether or not there was some trade in slightly salted meat. It merely denies that it would have been classifiable as salted, etc., meat under what is now heading 02.10.

Thailand's Response to EC Question

30. The EC notes that Thailand fails to explain why Additional Note 6(b) was not referred to in the *Gausepohl* case, if it stood for the proposition that heading 0210 referred simply to methods of preparation. Thailand can do no more than say that it was "not aware" why the note was not cited, and that the parties and the Court "could have relied on it". The reason it clear. It was undisputed in the EC (importers, Member States and Commission) that heading 0210 applied to meats which had been preserved, and it was undisputed that additional note 6(b) could not affect that understanding.

ANNEX C-10

RESPONSES BY CHINA TO QUESTIONS POSED BY THE PANEL

(14 October 2004)

China appreciates this opportunity to respond to the Panel's questions posed to third parties on 30 September 2004.

1. Has the product at issue in this case ever been imported to and/or exported from China? If so, please provide the details of classification practices that have been adopted by China concerning such product.

To China's best knowledge, China had imports and exports under subheading 02109000 of Customs Import and Export Tariff of the People's Republic of China ("Customs Tariff") in 2000 and 2001, and had no imports and exports under the same subheading since 2002. Descriptions of goods for imports and exports under subheading 02109000 read as follows:

> "Other, including meat and meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal."

China had imports and exports under subheading 02071400 of Customs Tariff in 2000, and China had no imports and exports under the same subheading since 2001. Descriptions of goods for imports and exports under subheading 02101400 read as follows:

> "Chicken cuts and offal, frozen."

For the Panel's information, relevant HS code and description of goods of China's Schedule of Concessions – Schedule CLII read as follows:

HS	Description
0210	Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal
02109000	- Other, including edible flours and meals of meat or meat offal
0207	Meat and edible offal, of the poultry of heading No. 0105, fresh, chilled or frozen"
02071400	- Of fowls of the species Gallus domesticus -- Cuts and offal, frozen

2. In paragraph 16 of its third party submission, China states that the only situation that chicken meat that has been both frozen and salted could fall under heading 0207 is when frozen chicken meat is "packed with salt as a temporary preservative during transport" rather than "impregnated with salt in all parts" with a minimum salt content of 1.2%. With regard to this statement, how does China consider chicken meat impregnated with salt in all parts could be distinguished from chicken meat packed with salt as a temporary preservative during transport?

The above-mentioned hypothetical reasoning in China's third party submission is intended to highlight the lack of textual support from the *Harmonized System* and its *Explanatory Notes* in the EC's reasoning as adopted in its Commission Regulation (EC) No. 1871/2003 of September 11, 2003.

As explained in its third party submission, China notes that the note to Chapter 2 of the *Harmonized System* and its *Explanatory Notes* explicitly provides that fresh (meat) includes meat and meat offal, packed with salt as a temporary preservative during transport. Besides, there are no identical or similar provisions or terms explaining the terms "chilled" or "frozen" in the note to Chapter 2 of the *Harmonized System* and its *Explanatory Notes*. Therefore, China understands that the note to Chapter 2 in the *Harmonized System* and its *Explanatory Notes* can not be understood as to imply that frozen meat also includes meat and meat offal, packed with salt as a temporary preservative during transport. Furthermore, even conceding that the reasoning for fresh meat could be read to apply equally to frozen meat (this concession is only made by China for argumentative purpose), frozen meat shall include meat and meat offal, packed with salt as a temporary preservative during transport only and nothing else.

China thanks this Panel for granting this opportunity to present its views on issues related to this proceeding, and hopes that this Panel will finds the above points helpful.

ANNEX C-11

RESPONSES BY THE UNITED STATES TO QUESTIONS POSED BY THE PANEL

(14 October 2004)

The United States appreciates this opportunity to respond to the Panel's questions about certain statements concerning the United States that the parties to this dispute made in their submissions. With respect to its answers to all these questions, the United States would like to recall its observation that this dispute concerns not *customs classification* as such, but rather *tariff treatment* – and in particular whether the European Communities ("EC") is providing tariff treatment to certain products that is less favorable than that provided for in its schedule of tariff concessions for the Uruguay Round, Schedule LXXX.[1] Consequently, the United States has not taken a view on the correct customs classification of the frozen boneless chicken cuts in dispute.[2] Turning now to the specific questions of the Panel:

1. With respect to the 1991 US tariff classification ruling on the classification of mechanically de-boned chicken meat from Canada referred to by Brazil in paragraph 79 of its first written submission, does the US agree with Brazil's assertion that it is possible to imply from that ruling that meat that has been frozen and cured should not be classified under heading 0207?

With respect to the 1991 US tariff classification ruling referred to by Brazil in paragraph 79 of its first written submission, the United States agrees that the product that was the subject of that ruling was classified under heading 0210. We also note, however, that the ruling does not pertain to the product that is at issue in this dispute.

2. The US is requested to comment on Brazil's argument in paragraph 95 of its first written submission that the two 1999 US classification rulings to which it refers show that frozen smoked salmon is to be classified under heading 0305 concerning, *inter alia*, fish that has been salted, in brine, dried or smoked rather than heading 0303 concerning frozen fish. In particular, is Brazil's interpretation of these rulings correct? If so, is this interpretation consistent with long-standing classification practice in the United States? Please provide all relevant support.

The two rulings to which Brazil refers in paragraph 95 of its first submission both classify frozen smoked salmon under heading 0305. The United States observes that neither of the rulings specifically discusses heading 0303 or heading 0304 (the heading referred to Brazil in paragraph 94 of its first submission), or analyzes why the fish is classified under heading 0305 rather than heading 0303 or heading 0304. Moreover, neither of the rulings specifically discusses whether the classification decision was based on the preparation or the preservation process to which the product was subject. Thus, the United States is not in a position to confirm Brazil's interpretation of the rulings reflected in paragraphs 94 and 95 of its first written submission.

[1] Third-Party Oral Statement of the United States, para. 2.
[2] *Id*. at para. 7.

3. The US is requested to comment on Brazil's argument in paragraph 96 of its first written submission that, in the US, bacon that has been salted/smoked but also frozen will be treated as salted/smoked bacon rather than frozen bacon. In particular, is Brazil's assertion correct as a general principle in the United States?

In support of its statements in paragraph 96 of its first submission, Brazil refers to a bill of lading, in which the importer claims tariff treatment for its frozen sliced bacon product under heading 0210. The United States notes that an importer's claim for tariff treatment under a particular subheading does not represent an official statement by US customs authorities on the correct classification of the product. In a 1996 ruling, however, US customs authorities ruled that frozen bacon from Denmark was properly classified under heading 0210.[3]

4. During the first substantive meeting, the EC referred to a US customs ruling of November 1993 (exhibited in EC-21) and noted that the ruling found that the product at issue fell under heading 0201 or 0202 (depending on whether it was fresh or frozen) rather than under heading 0210. Could the US indicate whether it agrees with the view expressed by the EC that this ruling stands for the proposition that frozen meat that has been deeply and homogeneously impregnated with salt should be classified under heading 0207 rather than under heading 0210 of the EC Schedule.

With respect to the 1993 ruling referred to by the EC, the United States notes that US customs authorities described the product at issue there as "similar to fresh beef sprinkled and packed in salt," whereas the product in this case is described as "deeply and evenly impregnated" with salt.[4] It is not clear how similar the two products are, and thus the United States is not in a position to confirm the proposition stated in the final sentence of this Question.

[3] New York Ruling Letter NY A80393 (March 7, 1996), as modified by Customs Ruling Letter HQ 960585 (July 20, 1998). *See* Exhibit US-1

[4] New York Ruling Letter NY A80393 (March 7, 1996), as modified by Customs Ruling Letter HQ 960585 (July 20, 1998). *See* Exhibit US-1.

ANNEX C-12

**RESPONSES BY THE WORLD CUSTOMS ORGANIZATION
TO QUESTIONS POSED BY THE PANEL
AFTER THE FIRST SUBSTANTIVE MEETING**

(29 October 2004)

This is with reference to your letter of 30 September 2004 requesting the WCO to respond to nine questions posed in connection with the WTO Dispute Settlement Panel on *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* pursuant to the requests by Brazil in document WT/DS269/3 and Thailand in document WT/DS286/5.

The WCO Secretariat's response is set out below. For ease of reference, the questions have been reproduced and the response follows immediately after each question:

1. What factors and material are considered when deciding the heading under which a product should be classified, including factors and material considered when interpreting the terms of headings and any relevant Explanatory Notes? In general terms, how are such factors and material assessed and applied to the product in question?

First of all, it should be pointed out that classification in the Harmonized System (HS) is based on the wording of the legal texts, i.e., the terms of the headings and any relative Section, Chapter and Subheading Notes and the General Interpretative Rules of the Harmonized System. Furthermore, the HS Explanatory Notes (the official interpretation of the Harmonized System), read in conjunction with the legal texts, are taken into consideration.

Note: The Explanatory Notes to the Harmonized System normally follow the systematic order of that instrument. They provide a commentary on the scope of each heading, giving a list of the main products included and excluded, together with technical descriptions of the goods concerned (their appearance, properties, method of production and uses) and practical guidance for their identification.

When goods are classified in the Harmonized System, it is always done on the basis of the objective characteristics of the product at the time of importation. The factor which determines the essential character of a product will vary from one product to another. It could, for example, be the nature of a material or the role of the constituent material. The determination of the essential character of a product can be done in several ways. The most obvious is through a visual inspection of the product, including indications on the packing. Reference can also be made to accompanying documents. In some cases, however, laboratory analysis may be required.

In the absence of clear criteria in the HS legal texts or in the HS Explanatory Notes, it is the normal perception that a term or an expression should reflect the common meaning, which would normally be the same as that used in trade. Therefore, in such cases the attributed lexicographic and commercial definitions could be applied when determining the characteristics of a product.

Since headings 02.07 and 02.10 cover "frozen" and "salted" products, respectively, it would have to be determined whether the product at issue has essentially the character of a "frozen" or of a "salted" product. It would probably be straightforward to determine whether or not the product is "frozen", whereas recourse to laboratory analysis might be required to determine whether it can be regarded as a "salted" product within the meaning of heading 02.10.

With regard to lexicographic definitions, the Tenth Revised Edition (2001) of the Concise Oxford Dictionary describes the term *"freeze" ("frozen")* as "be or cause to be very cold" and as a sub-sense "store at a very low temperature as a means of preservation", whereas the term *"salted'* refers to "season or preserve with salt".

2. What is the rationale behind the product coverage of the 4-digit heading and the 6-digit heading levels in the Harmonized System?

When the HS was developed, the principal objective was to meet the needs of all those concerned with world trade (Customs, international trade statistics, transport, etc.). Consequently, almost 60 countries and more than 20 international and national organisations (including GATT, UNCTAD, ISO, ICC, ICS, and IATA) took part in the activities by making proposals, commenting on proposals or participating in the decision making procedure by other means.

In general, the HS was developed from the former "CCC Nomenclature" (Customs Co-operation Council Nomenclature – CCCN) that was applied by a large number of countries before the HS entered into force on 1 January 1988, as well as the United Nations Standard International Trade Classification (SITC), Rev. 2, which was correlated to the CCCN. However, account was also taken of a wide range of other national Customs tariffs or statistical nomenclatures based on the CCCN (Japan, Latin American Free Trade Association, EC's statistical nomenclature (NIMEXE), for example) as well as classification systems not based on the CCCN (such as the Customs Tariffs of USA and Canada). Furthermore, several transport nomenclatures were consulted.

The separate identification of goods or group of goods was, as a general rule, approved only if there was agreement amongst participants that the goods or group of goods were significant in international trade.

Consequently, the rationale behind the product coverage in the HS was to meet the needs of those involved in international trade by including goods or groups of goods with a significant volume of international trade, taking into consideration the structure of the nomenclatures consulted.

3. What is the rationale underlying the descriptions used in the various headings contained in Chapter 2 of the Harmonized System? Among other things, why is it that, in relation to pig fat covered under heading 02.09, no distinction is drawn between, on the one hand, frozen pig fat and, on the other, salted pig fat? In other words, why were separate headings not considered necessary for frozen pig fat and salted pig fat?

Chapter 2 of the Harmonized System is based on the structure of the CCCN. For information, it should be noted that the CCCN, which had been used since 1959, was, to some extent, based on the former "Geneva Nomenclature". The structure of Chapter 2 in the Geneva Nomenclature, the CCCN and the HS is set out in the Annex to this reply.

However, the historical development of the two HS headings at issue (02.07 and 02.10) has been as follows:

Item 14	Dead poultry. *(Geneva Nomenclature)*
02.02	Dead poultry (that is to say, fowls, ducks, geese, turkeys and guinea fowls) and edible offals thereof (except liver), fresh, chilled or frozen. *(CCCN)*
02.07	**Meat and edible offal, of the poultry of heading 01.05, fresh, chilled or frozen. *(HS)***

Item 18	Meat, salted, dried, smoked, cooked, or otherwise simply prepared. *(Geneva Nomenclature)*
02.06	Meat and edible meat offals (except poultry liver), salted, in brine, dried or smoked. *(CCCN)*
02.10	**Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal. *(HS)***

With regard to the questions relating to "pig far' covered by heading 02.09, reference should also be made to the Annex. As can be seen, this heading was (subject to minor editorial amendments) copied directly from the CCCN, and since no requests for further subdivisions in the HS had been received, all "pig fat, free of lean meat" was grouped under this heading.

4. What has been the history of interpretation of headings 03.03, 03.04 and 03.05 of the Harmonized System?

The Harmonized System Committee has not considered any classification issues related to headings 03.03, 03.04 or 03.05 in the past.

The Secretariat, however, has considered the classification of "frozen, salted fish" in 1997 at the request of one of its Members. The product at issue was described as "frozen, salted fish which was salted before freezing, not only as a temporary preservative during transportation but through a normal salting process".

In its response, the Secretariat noted that the Nomenclature does not offer any specific criteria as to the salt content needed to constitute "salted fish". In general, fish sprinkled with salt water or packed with salt or fish lightly salted as a temporary preservation during transportation is classified as fresh, chilled or frozen fish.

The Secretariat subsequently concluded that salted fish, classifiable in heading 03.05, did not need to be frozen since salt was added in such a way that it penetrated into the product and preserved it. The Secretariat further indicated that it was not aware of fish which had been salted in this way but still needed to be frozen in order to be preserved. Finally, the Secretariat expressed its doubts as to whether fish that had been slightly salted and subsequently frozen was classifiable in heading 03.05.

5. What is the relationship between, on the one hand, headings 03.03 and 03.04 of the Harmonized System and heading 03.05 on the other hand, if any?

The Secretariat would like to extend this question to include heading 03.02 as well, because headings 03.02 and 03.03 cover fish that are whole, headless, gutted, or in cuts containing bones or cartilage, whereas heading 03.04 covers fish fillets and other fish meat without bones. For the whole fish etc. a distinction has been made according to the processing, i.e., heading 03.02 covers fresh and chilled fish, whereas heading 03.03 covers frozen fish.

However, this distinction has not been made in heading 03.04 for fish fillets and other fish meat without bones, since this heading covers fresh, chilled and frozen products.

In heading 03.05 no distinction has been made between fish and fish cuts with bones in and fish fillets. Consequently, this heading covers all dried, salted or smoked fish and fish meat, including fillets.

The structure of these headings also stems from the CCCN. For example, the text of HS heading 03.05 is exactly the same as that of CCCN heading 03.02. The only change was the inclusion of a new product group "flours, meals and pellets of fish, fit for human consumption".

6. In the context of headings 02.07 and 02.10, would "specific" in General Rule of Interpretation 3(a) be relevant and in what way?

Provided that the product at issue cannot be classified in accordance with General Interpretative Rule (GIR) 1, i.e., according to the terms of the headings and any relative Section or Chapter Notes, GIR 3 would have to be applied.

GIR 3(a) reads:

> The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. *(emphasis added).*

It is not possible to lay down hard and fast rules by which to determine whether one heading more specifically describes the goods than another. However, the Explanatory Notes to the Harmonized System provide the following guidelines in this respect:

(a) A description by name is more specific than a description by class (e.g., shavers and hair clippers, with self-contained electric motor, are classified in heading 85.10 and not in heading 84.67 as tools for working in the hand with self-contained electric motor or in heading 85.09 as electro-mechanical domestic appliances with self-contained electric motor).

(b) If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.

Examples of the latter category of goods are:

(1) Tufted textile carpets, identifiable for use in motor cars, which are to be classified not as accessories of motor cars in heading 87.08 but in heading 57.03, where they are more specifically described as carpets.

(2) Unframed safety glass consisting of toughened or laminated glass, shaped and identifiable for use in aeroplanes, which is to be classified not in heading 88.03 as parts of goods in heading 88.01 or 88.02 but in heading 70.07, where it is more specifically described as safety glass.

It should be noted that, in the Secretariat's view, the second part of GIR 3(a), indicating that "*when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods*" cannot be applied in this case, since it is not a "mixed or composite good".

With regard to the product at issue, it could be argued that:

- heading 02.07 provides the most specific description since it refers to *"meat of **poultry**, frozen"*, whereas heading 02.10 refers to *"**meat**, salted"*, in general;

or

- the reference to the specific type of meat (poultry) in heading 02.07 should not be taken into consideration since it is the processing *(freezing* and *salting)* that matters when determining the classification in the case at issue, giving rise to a possibility of 02.10 providing a more specific description.

7. From whose perspective are the "specific" characteristics of a product judged, i.e. consumers and/or producers or should such an assessment be made by reference to the objective intrinsic qualities of a product? If the latter, how are the intrinsic qualities of a product identified? What would be the intrinsic qualities attached to products covered by headings 02.07 and 02.10 of the Harmonized System?

When a product is classified in the Harmonized System, it is always done on the basis of the objective characteristics of the product at the time of importation and on the basis of the terms of the headings and any relative Section or Chapter Notes.

In the absence of clear criteria in the HS legal texts or in the HS Explanatory Notes, lexicographic and commercial definitions could also be applied when determining the characteristics of a product.

The Secretariat is not certain as to what is meant by the expression "intrinsic qualities". However, it has interpreted it to mean "essential character", which is a commonly known expression in connection with tariff classification (cf. for example GIR 3(b)).

As the Explanatory Note to GIR 3(b) (item (VIII) on page 4) stipulates, *"the factor which determines essential character will vary as between different kinds of goods. It may, for example, be*

determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a *constituent material in relation to the use of the goods."*

It is to be noted, however, that GIR 3(b) only relates to (i) mixtures, (ii) composite goods, consisting of different materials, (iii) composite goods consisting of different components and (iv) goods put up in sets for retail sales. Given that the product in question does not fall in any of the four categories, Rule 3(b), in the view of the Secretariat, would not operate.

In order to be classified in heading 02.07, the product should have the character of "frozen poultry meat" and it should not be more specifically covered by another heading in the Nomenclature. Similarly, a product classifiable in heading 02.10 should have (related to the Panel-case) the character of a "salted" product and it should not be more specifically covered by another heading in the Nomenclature.

See also the response to Question 1 above.

8. The WCO is requested to provide details of classification practice with respect to headings 02.07 and 02.10 of the Harmonized System.

The Harmonized System Committee has not considered any classification issues related to headings 02.07 and 02.10 in the past.

The Secretariat, however, received a Request for Classification Advice for a similar product in February 2003 from one of its Members (none of the countries involved in the WTO Panel Case). However, due to lack of precise information about the processing, the Secretariat was not in a position to express its opinion on the classification.

9. The WCO is requested to provide details of classification practice with respect to headings 03.03 and 03.05 of the Harmonized System.

Please refer to the response to Question 4 above.

ANNEX

Development of Chapter 2:

The **Geneva-Nomenclature** had the following structure with regard to "meat":

Item 13	Butcher's meat (i.e., beef, veal, mutton, Iamb, pork and horse).
Item 14	Dead poultry.
Item 15	Dead game.
Item 16	Other fresh, chilled or frozen meat, excluding bacon.
Item 17	Bacon.
Item 18	Meat, salted, dried, smoked, cooked, or otherwise simply prepared.

Chapter 2 of the **CCCN** (from 1959) was structured as follows:

02.01	Meat and edible offals of the animals falling within heading No. 01.01, 01.02, 01.03 or 01.04, fresh chilled or frozen.
02.02	Dead poultry (that is to say, fowls, ducks, geese, turkeys and guinea fowls) and edible offals thereof (except liver), fresh, chilled or frozen.
02.03	Poultry liver, fresh, chilled, frozen, salted or in brine.
02.04	Other meat and edible meat offals, fresh, chilled or frozen.
02.05	Pig fat free of lean meat and poultry fat (not rendered or solvent-extracted), fresh, chilled, frozen, salted, in brine, dried or smoked.
02.06	Meat and edible meat offals (except poultry liver), salted, in brine, dried or smoked.

Chapter 2 of the **Harmonized System** has the following structure:

02.01	Meat of bovine animals, fresh or chilled.
02.02	Meat of bovine animals, frozen.
02.03	Meat of swine, fresh, chilled or frozen.
02.04	Meat of sheep or goats, fresh, chilled or frozen.
02.05	Meat of horses, asses, mules or hinnies, fresh, chilled or frozen.
02.06	Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen.
02.07	Meat and edible offal, of the poultry of heading 01.05, fresh, chilled or frozen.
02.08	Other meat and edible meat offal, fresh, chilled or frozen.

02.09 Pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted, fresh, chilled, frozen, salted, in brine, dried or smoked.

02.10 Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal.

The principal changes from CCCN Chapter 2 to HS Chapter 2 can be described as follows:

1. CCCN heading 02.01 was split into six new HS headings (02.01 to 02.06), with offals of the animals mentioned in the first five new HS headings grouped separately in new HS heading 02.06.

2. Fresh, chilled and frozen poultry liver falling within CCCN heading 02.03 was grouped with the fresh, chilled or frozen poultry meat and other edible poultry offal of CCCN heading 02.02 to form new HS heading 02.07.

3. The reference within brackets in CCCN heading 02.05 (HS heading 02.09) to "solvent extraction" was deleted in order to complement the provisions of heading 15.01 which had been amended to reflect that "pig or poultry fat" of that heading is always first rendered and then either pressed or solvent-extracted.

4. The words "(except poultry liver)" were deleted from CCCN heading 02.06 (HS heading 02.10), with the result that HS heading 02.10 will cover (i) poultry liver salted or in brine of CCCN heading 02.03 and (ii) dried and smoked poultry livers which were classified in CCCN heading 16.02. In addition, a specific reference to "edible flours and meals of meat or meat offal" was inserted in new HS heading 02.10; this did not, however, result in a change in scope.

ANNEX C-13

RESPONSES BY THE WORLD CUSTOMS ORGANIZATION TO QUESTIONS POSED BY THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

(2 December 2004)

This is with reference to your letter of 19 November 2004 requesting the World Customs Organization Secretariat to respond to five additional questions posed in connection with the WTO Dispute Settlement case on *European Communities – Customs Classification of Frozen Boneless Chicken Cuts.*

The WCO Secretariat's response is set out below. For ease of reference, the questions have been reproduced the response immediately following each question.

10. Please provide* an *illustrative list of the kinds of products the WCO Secretariat considers would clearly qualify for classification under heading 02.10.

On the basis of the text of heading 02.10, the Secretariat would like to note that this heading covers all kinds of edible meat and meat offal salted, in brine, dried or smoked, other than products covered in heading 02.09. Some examples are also provided in the pertinent part of the Explanatory Note to heading 02.10 (on page 21). The other group of products included in the said heading comprises edible flours and meals of meat or meat offal. Thus, products such as salted or smoked bacon, ham or shoulder, as well as salted or smoked edible offal such as feet, tails, livers, throats and tongues would, in the opinion of the Secretariat, clearly fall in heading 02.10.

11. Could or do practicalities associated with verification of criteria in tariff headings affect the way in which interpretation of tariff headings and classifications are undertaken by the WCO?

The Secretariat understands your question as follows: whether or not practical aspects of verification of classification criteria are taken into account for the purposes of classification of commodities by the WCO (i.e., the Harmonized System (HS) Committee and the WCO Council).

In this respect it should be noted that when such practical aspects are recognised as being applicable worldwide, they may be incorporated in the HS Nomenclature provisions or in the Explanatory Notes on the basis of respective decisions by the HS Committee. These decisions, are subsequently approved by the WCO Council. Hence, practical aspects of verification of classification criteria are taken into account for the purposes of classification of commodities at the HS level once they have become part of the legal text or of the Explanatory Notes (see, for example, testing methods for coated paper or paperboard in the General Explanatory Note to Chapter 48 (on page 871)).

12. What was the rationale for the reference to the term "provisionally preserved" in heading 08.14? What importance should be attached to this reference, if any, for other headings in the HS for which the term "preserved" has not been explicitly mentioned?

Having consulted the background documents, the Secretariat would like to inform you that heading 08.14 was originally included in the Customs Co-operation Council Nomenclature (CCCN) dated 1950 as heading 08.13 which read: "Peel of melons and citrus and other fruit, fresh, frozen, dried, in brine, in sulphur water, or in other temporary preservative solution." However, in the 1955 Nomenclature this text was replaced with the following: "Peel of melons and citrus fruit, fresh, frozen, dried, or provisionally preserved in brine, in sulphur water or in other preservative solutions."

However, no information has been traced by the Secretariat so far as to the rationale behind this amendment of the heading text.

In the 2002 edition of the HS Nomenclature heading 08.14 covers "peel of citrus fruit or melons (including watermelons) fresh, frozen, dried or provisionally preserved in brine, in sulphur water or in other preservative solutions". The same products having been preserved by processes other than those specified in the heading text (for instance, by vinegar, acetic acid or sugar), would be covered by Chapter 20. The Secretariat understands that the term "provisionally preserved" serves to distinguish between finished products of Chapter 20, on the one hand, and peel of citrus fruit or melons subjected only to certain preservation processes, but not further prepared, on the other. This reference is apparently intended to widen the scope of heading 08.14 to include not only fresh, frozen and dried products but also those provisionally preserved by processes listed in the heading text. It is to be noted that brine and sulphur water are examples of preservative solutions for the products of heading 08.14.

By virtue of General Interpretative Rule 1, "classification shall be determined according to the terms of the headings and any relative Section or Chapter notes". Thus, in the absence of an explicit provision that the term "preserved" has a certain bearing on headings other than 08.14, this term has no importance for the classification of products in other headings of the Nomenclature, unless the same term is found in the text of a heading as is the case with heading 08.12, for example.

13. With respect to the 1997 letter from the WCO Secretariat to Cypriot Customs authorities (WCO Ref. 97.N.971 – Ma/FI):

(a) Please explain what was meant by a "normal salting process"?

(b) Insofar as the WCO Secretariat expressed doubts as to whether fish that had been slightly salted and subsequently frozen was classifiable in heading 03.05, please explain what is meant by "slightly salted"?

(c) As regards the WCO Secretariat's statement that it was unaware of frozen fish which had been really salted and still required freezing to be preserved:

(i) What is meant by "really salted"?

(ii) Does the statement indicate that, if fish existed that had been "really salted" but was not preserved, it would, nevertheless, be classifiable under heading 03.05?

(d) Does the WCO consider that the analysis in this letter would have differed had the product in question been chicken? If so, in what respects?

14. Please comment on a letter dated 2003 from the WCO Secretariat to Bulgarian Customs authorities (WCO Ref. 03NL0217 – GI/FI). In particular, in this letter, is the WCO Secretariat suggesting that the ordinary meaning of a tariff heading may be determined according to relevant national legislation ? If not, please explain why and how the WCO Secretariat considered the EC's Combined Nomenclature to be relevant in the context of the issue before the WCO Secretariat in that case.

With respect to questions 13 and 14 in your letter, I note that they are related to correspondence between two WCO Members and the WCO Secretariat. This kind of correspondence should, in my view, not be taken into account by third parties unless the parties involved have

expressed their approval in using the information contained in that correspondence. I am not aware of such approval and will, therefore, refrain from commenting on the questions at issue.

Furthermore, the correspondence at issue appears not to be relevant with respect to the scope of certain HS headings referred to in your letter and consequently not relevant with regard to the appropriate classification of the product under consideration. Moreover, both requests did not provide the information necessary for the Secretariat to give a firm opinion vis-à-vis the appropriate HS classification.

Harmonized System Dispute Settlement

For my part, it appears that the case before your panel concerns a classification question involving several Contracting Parties to the HS Convention. In this connection, I would like to call your attention to the provisions of Article 10 of the said Convention, which stipulates that "any dispute between Contracting Parties concerning the interpretation or application of this Convention shall, so far as possible, be settled by negotiation between them" and "any dispute which is not so settled shall be referred by the Parties to the dispute to the Harmonized System Committee which shall thereupon consider the dispute and make recommendations for its settlement.

That being the case, and taking into account the fact that the parties involved, which are all Contracting Parties to the HS Convention, have not followed all the provisions of Article 10 referred to above, I suggest that the settlement procedure laid down in the HS Convention should be followed first before your panel may make its decision.

If the HS Contracting Parties involved in this dispute are not prepared or not able to follow this procedure, the WTO may wish to request the WCO Secretary General to take the necessary steps with a view to inserting this issue on the agenda of the HS Committee.

The next session of the HS Committee is scheduled from 14 to 24 March 2005. If the matter is to be included in the agenda for this session, please provide the WCO Secretariat with all information required for the HS Committee to arrive at a classification decision regarding the product under consideration. It would be appreciated to receive this information as soon as possible (and preferably by mid-January 2005), thus allowing the WCO Secretariat to prepare and publish the respective working document in good time.

ANNEX C-14

COMMENTS BY BRAZIL, THAILAND AND THE EUROPEAN COMMUNITIES ON THE RESPONSES BY THE WORLD CUSTOMS ORGANIZATION TO THE QUESTIONS POSED BY THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

(16 December 2004)

COMMENTS BY BRAZIL

In accordance with the timetable established by the Panel in "*European Communities – Customs Classification of Frozen Boneless Chicken Cuts*" (WT/DS269 and 286), please find attached Brazil's Comments on the Responses by the WCO to Questions posed by the Panel.

* * * * * * *

Question 10

When asked to provide an illustrative list of the products that clearly fall under heading 0210, the WCO Secretariat's first and immediate response was that heading 0210 covers **all kinds** of edible meat salted, in brine, dried or smoked. Clearly, **all kinds** of meat cannot be reduced to a limited number, as proposed by the EC (Parma ham, prosciutto, jamón serrano, bacon).[1] We have shown that other salted/dried/smoked meats - such as rabbit meat; turkey meat; goat meat; duck meat; chicken meat; etc. - also fall under heading 0210.[2]

In sequence, the Secretariat informed that some examples of products covered by heading 0210 are provided in the Explanatory Note to heading 0210 and pointed out that "*products such as salted or smoked bacon, ham, shoulder would (…) clearly fall under heading 0210*". Regarding this part of the Secretariat's response, Brazil merely observes that the mentioned Explanatory Note refers to bacon, ham or shoulder as examples of smoked meat.[3] These examples were listed by the Secretariat precisely because they are explicitly provided in the HS Explanatory Note to heading 0210. These products, however, in **no** way make up an exhaustive list of products falling under heading 0210. In this regard, we have provided a more comprehensive list - taken from the WCO's HS Commodity Database – of examples of salted meat falling under subheading 0210.90 of the HS (1996 version). According to the HS Commodity Database, salted meat of chicken clearly qualifies for classification under heading 0210.

Question 11

Brazil would like to focus on the last part of the WCO Secretariat's response, which provides that "practical aspects of verification of classification criteria are taken into account for purposes of classification of commodities at the HS level **once they have become part of the legal text or of the Explanatory Notes**" (emphasis added). We remind the Panel that the Secretariat informed in an

[1] EC's First Written Submission, para. 41; Exhibit EC-5; EC's Closing Statement Following First Substantive Meeting, para. 4; EC's Replies to Panel's Questions Following the First Substantive Meeting, para. 91; EC's Replies to Brazil's Questions Following the First Substantive Meeting, paras. 5 and 11; EC's Second Written Submission, paras. 35 and 36; EC's Second Oral Statement, para. 36.

[2] Exhibit BRA-43.

[3] Exhibit BRA- 24 and Exhibit EC-27.

earlier response that, to date, the HS Committee had not considered any classification issues related to headings 0207 and 0210.[4] Thus, in the absence of HS Committee decisions on practical aspects of verification of classification criteria to be taken into account for purposes of classification of products under heading 0210, classification must be based simply on the wording of the legal text read in conjunction with the HS Explanatory Notes.[5] Regarding HS Explanatory Notes, we reproduce below part of a response provided by the WCO to the Panel:[6]

"*Notes: The Explanatory Notes to the Harmonized System normally follow the systematic order of that instrument. They provide a commentary on the scope of each heading, giving a list of the main products included and excluded, together with technical descriptions of the goods concerned (their appearance, properties, method of production and uses) and practical guidance for their identification*" (emphasis added)

We stress that **nowhere**, absolutely **nowhere**, in the legal text or in the HS Explanatory Note to heading 0210 are the criteria proposed by the EC in the verification of products under heading 0210 provided for ("readily detectable", "instantly recognizable", "recognizably different"). On the contrary, the only guidance provided in that Explanatory Note is that it applies to all kinds of meat which have been **prepared** as described in the heading. Furthermore, the criteria proposed by the EC are by no means "recognized as being applicable worldwide".

Question 12

In the case at hand, and as advanced by the WCO Secretariat, in the absence of an explicit provision that the term "preserved" has a certain influence on headings other than 0814 of the HS, the term "preserved" of heading 0814 has **no** importance for the classification of salted meat in heading 0210, unless that same term ("preserved") was found in the text of heading 0210. The term "preserved" is **not** found in the text of heading 0210. In fact, neither the text of heading 0210 nor the Explanatory Note to that heading refers to the terms "preserved" or "preservation". In contrast, the Explanatory Note to heading 0210 explicitly states that meat covered under that heading 0210 is that which has been **"prepared"** by salting, brining, drying and smoking.

Questions 13 and 14

To the WCO Secretariat, the correspondence mentioned in questions Nos. 13 and 14 – letters of advice to customs authorities on the classification of frozen salted fish under headings 0303 or 0305 and on the classification of frozen salted swine meat under headings 0203 or 0210 – are **not** relevant to the scope of headings 0207 and 0210 of the HS and, consequently, not relevant with regard to the appropriate classification of the product under consideration: frozen salted chicken cuts.

Apparently, the Secretariat understands that these letters of advice are **not** relevant because they dealt with products different from the one before the Panel. We agree. Within the context of interpretation of tariff concessions, we have stated that a letter of advice on a product that is different from the product at issue cannot be seriously considered as relevant subsequent practice in the application of heading 0210 of Schedule LXXX (Article 31.3(b) of the Vienna Convention).[7]

Nonetheless, we stress the fact that the WCO Secretariat letter to the Bulgarian customs authorities, mentioned in question No. 14, dealt precisely with classification under heading 0210 and

[4] WCO's Response to Panel's Questions, Question 8.
[5] WCO's Response to Panel's Questions, Question 1.
[6] *Id.*
[7] Brazil's Comments to the EC's Response to Questions Following the Second Substantive Meeting, Question No. 99.

Additional Note 7 of Chapter 2 of the CN **without ever** mentioning the EC's so-called "well-enshrined" concept of preservation.

Harmonized System Dispute Settlement

With regard to the WCO Secretariat's considerations regarding the dispute before the Panel and the HS dispute settlement, Brazil has the following comments.

Brazil is fully aware of the dispute settlement provisions of Article 10 of the HS Convention. Prior to our request for consultations at the WTO we sought guidance and clarification from the WCO with respect to the meaning of headings 0207 and 0210. At that time, the WCO provided no clarifications with respect to the interpretation of the mentioned headings and simply directed Brazil to the WCO dispute settlement provisions found in Article 10 of the HS Convention.

Brazil was, thus, aware of the settlement procedures at the WCO but deliberately chose not to pursue them. In the course of these proceedings, we have explained why Brazil decided to resort to the WTO's - and not WCO's - dispute settlement.[8]

The WCO's Secretariat does not seem to realize that the case at issue is not a classification case. It is a case of less favourable tariff treatment within the meaning of Article II of the GATT 1994. Specifically, it is a case of duties being imposed on imports of salted chicken meat in excess of the duty provided for that product in Schedule LXXX. WCO Secretariat fails to understand the nature of the instant dispute when it reduces it to "classification questions involving several Contracting Parties to the HS Convention".

In assessing whether the EC has violated Article II, the Panel must examine Schedule LXXX according to the rules of treaty interpretation found in the Vienna Convention. As already advanced, the HS and its Explanatory Notes are definitely relevant context in the interpretation of Schedule LXXX, but are **only** one part of the interpretative exercise the Panel must undertake. In turn, **WCO decisions** may be relevant in the interpretation of Schedule LXXX but as subsequent practice in the application of the treaty.[9]

We share the EC's opinion that "given the institutional frameworks of the two organizations, it is obviously important that the nature of WTO dispute proceedings should remain distinct from decision making in the WCO".[10] The two dispute settlement mechanisms are distinct in terms of obligations, timeframes, scope and procedures.

Most striking is the WCO Secretariat's advise to the Panel that, if the parties to this dispute are not prepared or able to follow the settlement procedure laid down in the HS Convention, "*the WTO may wish to request the WCO Secretary General to take the necessary steps with a view to inserting this issue on the agenda of the HS Committee.*"

The WCO Secretariat is obviously unaware of the nature of the WTO as reflected in its constituent agreements. It apparently ignores that the WTO is a Member-driven organization that does not have the power, or mandate, to act on behalf of its Members – certainly not on behalf of Brazil. Nor has any WTO representative or body been empowered to solve a dispute concerning two or more WTO Members outside the scope of the WTO.

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[8] Brazil's Response to the Panel's Question Following the First Substantive Meeting, Question No. 9.
[9] WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 90.
[10] EC's Second Oral Statement, para. 13.

It is also not clear to us who exactly is the WTO agent that would request the insertion of "this issue in the agenda of the HS Committee". The WCO Secretariat could not possibly be referring to the Panel, unless it is unfamiliar with the provisions of the DSU. Obviously, while the Panel has the right to seek information and technical advice from any individual or body which it deems appropriate, as provided under Article 13.1 of the DSU, it does **not** have the right to abdicate its function. A function that was conferred to it by the Members. Article 11 of the DSU establishes that the Panel's function is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. Accordingly, it is the Panel's task – and not the HS Committee's - to make an objective assessment of the matter before it, including the assessment of the facts of the case and the applicability of and conformity with the covered agreements. In the present case, the Panel is perfectly able to carry out its function in interpreting the precise obligations that derive from heading 0210 of Schedule LXXX.

The WCO Secretariat seems to think that if the HS Committee arrives at a classification decision, the Panel will then – and only then – be able to make its own ("*I suggest that the settlement procedure laid down in the HS Convention should be followed first before your panel may make its decision*"). As shown above, this is not so: this case is about the interpretation of tariff concessions. In this connection, we recall that the Appellate Body in *EC – Computer Equipment* considered that in interpreting tariff concessions in Schedule LXXX, **decisions of the WCO** may be relevant merely as subsequent practice in the application of Schedule LXXX.[11]

COMMENTS BY THAILAND

Thailand wishes to make the following comments on the letter dated 2 December 2004 from the Secretary-General of the World Customs Organization (WCO) responding to the Panel's five additional questions posed in connection with the referenced proceedings.

In its response to question 12 concerning the importance of the term "provisionally preserved" in HS heading 08.14, the WCO states that the reference to this term is apparently intended to widen the scope of heading 08.14 to include products provisionally preserved by processes listed in the heading text, namely those preserved in preservative solutions, such as brine or sulphur water. The WCO confirms the importance of the General Rule of Interpretation 1 which states that "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes." Thailand notes that the European Communities has stated in its response to question 118 posed by the Panel that "… the word preservation is not to be found in HS heading 02.10." The EC nevertheless continues to insist that heading 02.10 "has at its heart a concept which the EC in these proceedings has termed 'preservation' but which it might as easily have referred to as 'long-term preservation.'" However, the WCO has made clear that classification must be determined on the basis of the terms of the headings and not on any general concepts of preservation or long-term preservation that a party believes to be at the heart of a heading. The term "salted" appears in the heading text of 0210. The EC has itself provided a clear definition for the objective criteria to be taken into account for classifying goods as "salted" under heading 0210, namely the definition set out in Regulation 535/94.

On a more general note, Thailand wishes to express its strong concerns with the suggestion of the WCO Secretary-General that parties to this dispute should follow the settlement procedures laid down in the HS Convention before the Panel makes its decision, or failing the decision of the parties to take this step, that the WTO should "request the WCO Secretary-General to take the necessary steps" to place this issue on the agenda of the next HS Committee meeting. As Thailand has stated throughout these proceedings, this dispute involves the less favourable treatment accorded by the EC as a result of the classification of the product at issue and not the customs classification of the product

[11] WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 90.

per se in the Harmonized System. The main issue in this dispute, therefore, is the scope of the EC's obligations under its Schedule of Concessions at the time the EC agreed to be bound by the WTO Agreement. As the United States noted in its third-party oral statement, " … in analyzing the meaning of the terms of the relevant concession, one must consider evidence of how the EC understood those terms at the time the EC made the concession." Therefore, in Thailand's view, the issue in this dispute is not whether salted chicken that is frozen falls within heading 0210 of the Harmonized System, which the WCO may be competent to assess. The issue is whether salted chicken that is frozen falls within the terms of heading 0210 (as the EC understood the heading in 1994) of the EC's Schedule of Concessions, a matter which the WCO is not competent to assess.

Thailand is requesting the Panel to find that the EC is in violation of its WTO obligations by providing less favourable treatment within the meaning of GATT Article II by imposing ordinary customs duties on the product at issue in excess of those set forth in the EC's Schedule of Concessions. Thailand notes that Article 23 of the DSU provides that when Members seek redress of a violation of obligations under the covered agreements, they shall have recourse to, and abide by, the rules and procedures of the WTO dispute settlement system.

Furthermore, Thailand submits that the Panel's terms of reference require that it examine the matter referred to it by the Complainants in the light of the relevant provisions of the GATT. As provided in Article 11 of the DSU, the function of panels is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. The fact that the WCO has a dispute settlement mechanism for customs classification matters does not mean that the Panel is absolved from its responsibility to examine the matter in the light of the relevant provisions and to make the appropriate recommendations to assist the DSB to make its rulings.

Thailand trusts that the positive resolution of this dispute will remain within the jurisdiction of the WTO dispute settlement system.

COMMENTS BY THE EUROPEAN COMMUNITIES

Thank you for your letter dated 7 December 2004, transmitting the WCO responses to the second set of questions and inviting the EC to comment on them.

As regards the WCO's response to questions 13/14, the EC can confirm that, after having initially become aware of the 1997 letter from the WCO to the Cypriot authorities when examining the WCO's archives, it sought and obtained the agreement of the Cypriot customs authorities before submitting the correspondence to the Panel.[12]

The EC believes that such correspondence is relevant because the structure of Chapter 03 is similar in all material respects to that of Chapter 02. The WCO's letter to the Cypriot authorities clearly displays the WCO's understanding that the term "salted" in heading 0305 concerned those products which had been salted for preservation.

Finally, the EC reserves the right to comment further on the issues raised in the final four paragraphs of the WCO's letter in the event that any form of initiative is proposed in that respect.

[12] The EC would note that the Republic of Cyprus is now a Member of the EC, although in 1997 it was fully responsible for conducting its own customs and trade policy.

ANNEX D

CHAPTER 2 OF THE HARMONIZED SYSTEM (1992 VERSION)

2	**MEAT AND EDIBLE MEAT OFFAL**
0201	**Meat of bovine animals, fresh or chilled**
0201.10	-Carcasses and half-carcasses
0201.20	-Other cuts with bone in
0201.30	-Boneless
0202	**Meat of bovine animals, frozen.**
0202.10	-Carcasses and half-carcasses
0202.20	-Other cuts with bone in
0202.30	-Boneless
0203	**Meat of swine, fresh, chilled or frozen.**
	-Fresh or chilled :
0203.11	--Carcasses and half-carcasses
0203.12	--Hams, shoulders and cuts thereof, with bone in
0203.19	--Other
	-Frozen :
0203.21	--Carcasses and half-carcasses
0203.22	--Hams, shoulders and cuts thereof, with bone in
0203.29	--Other
0204	**Meat of sheep or goats, fresh, chilled or frozen.**
0204.10	-Carcasses and half-carcasses of lamb, fresh or chilled
	-Other meat of sheep, fresh or chilled :
0204.21	--Carcasses and half-carcasses
0204.22	--Other cuts with bone in
0204.23	--Boneless
0204.30	-Carcasses and half-carcasses of lamb, frozen
	-Other meat of sheep, frozen :
0204.41	--Carcasses and half-carcasses
0204.42	--Other cuts with bone in
0204.43	--Boneless
0204.50	-Meat of goats
0205	**Meat of horses, asses, mules or hinnies, fresh, chilled or frozen.**
0205.00	Meat of horses, asses, mules or hinnies, fresh, chilled or frozen.
0206	**Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen.**
0206.10	-Of bovine animals, fresh or chilled
	-Of bovine animals, frozen :
0206.21	--Tongues
0206.22	--Livers
0206.29	--Other
0206.30	-Of swine, fresh or chilled
	-Of swine, frozen :
0206.41	--Livers
0206.49	--Other
0206.80	-Other, fresh or chilled
0206.90	-Other, frozen

2	**MEAT AND EDIBLE MEAT OFFAL**
0207	**Meat and edible offal, of the poultry of heading No. 01.05, fresh, chilled or frozen.**
0207.10	-Poultry not cut in pieces, fresh or chilled
	-Poultry not cut in pieces, frozen:
0207.21	--Fowls of the species *Gallus domesticus*
0207.22	--Turkey
0207.23	--Ducks, geese and guinea fowls
	-Poultry cuts and offal (Including livers) , fresh or chilled
0207.31	--Fatty livers of geese or ducks
0207.39	--Other
	-Poultry cuts and offal other than livers, frozen:
0207.41	--of fowls of the species *Gallus domesticus*
0207.42	--of turkeys
0207.43	--Of ducks, geese or guinea fowls
0207.50	--Poultry livers, frozen
0208	**Other meat and edible meat offal, fresh, chilled or frozen.**
0208.10	-Of rabbits or hares
0208.20	-Frogs' legs
0208.90	-Other
0209	**Pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted, fresh, chilled, frozen, salted, in brine, dried or smoked.**
0209.00	Pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted, fresh, chilled, frozen, salted, in brine, dried or smoked.
0210	**Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal.**
	-Meat of swine :
0210.11	--Hams, shoulders and cuts thereof, with bone in
0210.12	--Bellies (streaky) and cuts thereof
0210.19	--Other
0210.20	-Meat of bovine animals
0210.90	-Other, including edible flours and meals of meat or meat offal

ANNEX E

REQUESTS FOR THE ESTABLISHMENT OF A PANEL

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ANNEX E-1

REQUEST FOR THE ESTABLISHMENT OF PANEL BY BRAZIL

WORLD TRADE ORGANIZATION

WT/DS269/3
22 September 2003

(03-5040)

Original: English

EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF FROZEN BONELESS CHICKEN CUTS

Request for the Establishment of a Panel by Brazil

The following communication, dated 19 September 2003, from the Permanent Mission of Brazil to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 11 October 2002, Brazil requested consultations with the European Communities (EC) pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994). That request was circulated to the WTO Members on 16 October 2002 as document WT/DS269/1, "European Communities – Customs Classification of Frozen Boneless Chicken Cuts". On 5 December 2002 and on 19 March 2003, Brazil and the EC held consultations in Geneva with a view to reaching a mutually agreed solution. Unfortunately, consultations failed to settle the dispute.

Therefore, Brazil hereby requests that a Panel be established pursuant to Article 6 of the DSU and Article XXIII of the GATT 1994,with standard terms of reference as set out in Article 7 of the DSU.

The specific measures at issue are Commission Regulation (EC) No. 1223/2002, published in the Official Journal of the EC on 9 July 2002, concerning the classification of certain goods in the Combined Nomenclature (CN), and the EC Commission Decision, published in the Official Journal of the EC on 12 February 2003, concerning the validity of certain binding tariff information (BTI) issued by the Federal Republic of Germany.

Regulation No. 1223/2002 provides a new description for the product under the CN code 0207.14.10. By virtue of Regulation No. 1223/2002, goods described as "Boneless chicken cuts, frozen and impregnated with salt in all parts. They have a salt content by weight of 1,2% to 1,9%. The product is deep-frozen and has to be stored at temperature of lower than -18°C to ensure a shelf-life of at least one year." are now classified under CN code 0207.14.10. Products under CN code 0207.14.10 are subject to a tariff of 102.4 €/100kg/net.

Prior to Regulation No. 1223/2002, the product "boneless chicken cuts, frozen and impregnated with salt in all parts", was classified as salted meat under CN code 0210.99.39. Products under CN code 0210.99.39 are subject to an *ad valorem* duty of 15.4%. Subsequent to the issuance of Regulation No. 1223/2002, the Commission of the EC published a Decision addressed to the Federal Republic of Germany reporting that all BTIs previously issued by Member States, which classified the products concerned as salted meat of CN code 0210, ceased to be valid. In particular, this Decision informed that Germany had erroneously issued BTIs classifying frozen products containing between 1.9% and 3% of salt under CN code 0210. The reason given was that products "consisting of boneless chicken cuts which have been frozen for long-term conservation and have a salt content of 1.9% to 3% are similar to the products covered by Regulation (EC) No. 1223/2002". According to the Commission of the EC, "[t]he addition of salt in such quantities is not such as to alter the products' character as frozen poultry meat of heading 0207". Thus, the Commission Decision instructed Germany to withdraw the BTIs issued on frozen poultry meat containing between 1.9% and 3% of salt.

As a result of these measures, the product boneless chicken cuts, frozen with a salt content of 1.2% or more, which was previously classified as salted meat, is now classified as frozen chicken, subject to a tariff rate in excess of the bound rate for salted meat in the EC's Schedules under GATT 1994.

Accordingly, Brazil considers that its commerce of salted chicken to the EC has been accorded treatment less favourable than that provided in the EC Schedule for the product, in contravention of the EC's obligations under Articles II:1(a) and II.1(b) of the GATT 1994. These EC measures produce distortions in trade, which nullify and impair, within the meaning of GATT Article XXIII, benefits accruing to Brazil under the GATT 1994.

Brazil asks that this request for the establishment of a Panel be placed on the agenda of the next meeting of the Dispute Settlement Body, which is scheduled to take place on 2 October 2003.

ANNEX E-2

REQUEST FOR THE ESTABLISHMENT OF PANEL BY THAILAND

WORLD TRADE ORGANIZATION

WT/DS286/5
28 October 2003

(03-5735)

Original: English

EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF FROZEN BONELESS CHICKEN CUTS

Request for the Establishment of a Panel by Thailand

The following communication, dated 27 October 2003, from the Permanent Mission of Thailand to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 25 March 2003, pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Kingdom of Thailand ("Thailand") requested consultations with the European Communities ("EC") with respect to the EC's customs classification of frozen boneless salted chicken cuts. That request was circulated to WTO Members on 31 March 2003 in document WT/DS286/1. On 21 May 2003, Thailand and the EC held consultations in Geneva with a view to reaching a mutually agreed solution. Unfortunately, consultations failed to settle the dispute. Thailand therefore requests the establishment of a panel pursuant to Article 6 of the DSU and Article XXIII of the GATT 1994.

The measure at issue is the classification of frozen boneless salted chicken cuts as provided in the EC Regulation No.1223/2002 of 8 July 2002 ("Regulation 1223/2002") published in the Official Journal of the EC on 9 July 2002 concerning the classification of certain goods in the Combined Nomenclature (CN) and elaborated in the EC Commission Decision ("Decision") of 31 January 2003 published in the Official Journal of the EC on 12 February 2003 concerning the validity of certain binding tariff information ("BTI") issued by the Federal Republic of Germany.

Regulation 1223/2002 establishes a new description for products falling under CN Code 0207.14.10. By virtue of Regulation 1223/2002, goods described as "[b]oneless chicken cuts impregnated with salt in all parts. They have a salt content by weight of 1,2% to 1,9%. The product is deep-frozen and has to be stored at a temperature of lower than -18° C to ensure a shelf-life of at least one year" are now classified under CN Code 0207.14.10. Products under CN Code 0207.14.10 are subject to a tariff of 102.4 Euros per 100 kg/net.

Prior to Regulation 1223/2002, frozen boneless chicken cuts impregnated with salt in all parts were classified as salted meat under CN code 0210.99.39. Products under CN Code 0210.99.39 are subject to an *ad valorem* duty of 15.4%.

Subsequent to the issuance of Regulation 1223/2002, the EC Commission published a Decision addressed to the Federal Republic of Germany noting that BTIs previously issued by Member States which classified the products concerned as salted meat under heading 0210 ceased to be valid. The Decision further noted that Germany had subsequently issued BTIs classifying frozen boneless chicken cuts with a salt content of 1.9% to 3% under heading 0210. The Decision stated that "the products also consisting of boneless chicken cuts which have been frozen for long-term preservation and have a salt content of 1,9% to 3% are similar to the products covered by Regulation (EC) 1223/2002. The addition of salt in such quantities is not such as to alter the products' character as frozen poultry meat of heading 0207." Therefore, the Commission Decision instructed Germany to withdraw the BTIs issued on frozen poultry meat with a salt content between 1.9% and 3%.

As a result of this measure, the product classified as frozen boneless chicken cuts with a salt content of 1.2% or more, which was previously been classified as salted meat at the *ad valorem* rate of 15.4%, is now classified as frozen chicken subject to a tariff rate in excess of the bound rate for salted meat in the EC's Schedule of Concessions (Schedule LXXX) under the GATT 1994.

In the view of Thailand, its exports of salted chicken to the EC are being accorded treatment less favourable than that provided in the EC Schedule in contravention of the EC's obligations under Articles II:1(a) and II:1(b) of the GATT 1994. The EC measure creates distortions in trade that nullify or impair, within the meaning of Article XXIII, the benefits accruing to Thailand under the GATT 1994.

Thailand requests that a panel be established with standard terms of reference at the meeting of the Dispute Settlement Body to be held on 7 November 2003.

ANNEX F

LISTS OF EXHIBITS SUBMITTED BY THE PARTIES AND THIRD PARTIES

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ANNEX F-1

LIST OF EXHIBITS SUBMITTED BY BRAZIL

EXHIBIT	DESCRIPTION
BRA-1	**Section I-A (Tariffs), Section I (Agricultural Products), Part I (Most-Favoured-Nation Tariff) of Schedule LXXX of the European Communities.**
BRA-2	**Written Question E-3046/01 by Albert Maat (PPE-DE) to the Commission, of 5 November 2001** – Published in the Official Journal of the European Communities No. C 147, 20 June 2002, p. 78.
BRA-3	**Information Note from the Italian Delegation to the Agriculture and Fisheries Council, 5360/03** – Brussels, 16 January 2003 (21.01).
BRA-4	**2481st Council Meeting, Agriculture and Fisheries – Brussels, 27 and 28 January 2003, 5433/03** (Presse 13).
BRA-5	**Informal Meeting of Heads of Delegation: Statement by the Chairman**, MTN.TNC/W/131 (21 January 1994). **Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994**.
BRA-6	**Commission Regulation (EC) No. 535/94**, of 9 March 1994 – Amending Annex I to Council Regulation (EEC) No. 2658/87 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Communities No. L 68, 11 March 1994, p. 15.
BRA-7	**Relevant Part of Commission Regulation (EC) No. 3115/94, of 20 December 1994** – Amending Annexes I and II to Council Regulation (EEC) No. 2658/87 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Communities No. L 345, 31 December 1994, p. 01.
BRA-8	**Commission Regulation (EC) No. 1223/2002, of 8 July 2002** – Concerning the Classification of Certain Goods in the Combined Nomenclature, published in the Official Journal of the European Union No. L 179, 9 July 2002, p. 8. **Corrigenda, of 13 August 2002** – Corrigendum to Commission Regulation (EC) No. 1223/2002, of 8 July 2002, Concerning the Classification of Certain Goods in the Combined Nomenclature, published in the Official Journal of the European Union No. L 217, 13 August 2002, p. 8.
BRA-9	**Commission Decision, of 31 January 2003** – Concerning the Validity of Certain Binding Tariff Information (BTI) Issued by the Federal Republic of Germany, published in the Official Journal of the European Union No. L 36, 12 February 2003, p. 40.
BRA-10	**Commission Regulation (EC) No. 1871/2003, of 23 October 2003** – Amending Annex I to Council Regulation (EEC) No. 2658/87 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Union No. L 275, 25 October 2003, p.5.
BRA-11	**Relevant Part of Commission Regulation (EC) No. 1789/2003, of 11 September 2003** – Amending Annex I to Council Regulation (EEC) No. 2658/87 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Union No. L 281, 30 October 2003, p. 1.
BRA-12	**Commission Regulation (EC) No. 2344/2003, of 30 December 2003** – Amending Annex I to Council Regulation (EEC) No. 2658/87 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Union No. L 346, 31 December 2003, p. 38.

EXHIBIT	DESCRIPTION
BRA-13	**Commission Regulation (EC) No. 1484/95, of 28 June 1995** – Laying Down Detailed Rules for Implementing the System of Additional Import Duties and Fixing Additional Import Duties in the Poultry Meat and Egg Sectors and for Egg Albumin, published in the Official Journal of the European Communities No. L 145, 29 June 1995, p. 47. **Commission Regulation (EC) No. 1148/2004, of 22 June 2004** – Fixing Representative Prices in the Poultry Meat and Egg Sectors and for Egg Albumin, and Amending Regulation (EC) No. 1484/95, published in the Official Journal of the European Union No. L 222, 23 June 2004, p. 15.
BRA-14	**1990 to 2001 Eurostat Import Statistics (Metric Tons and 1000 ECU)** – Products under Subheadings 0207.41.10 and 0210.90.20 – Total and Brazil.
BRA-15	**Ruling NY 869661, 26 December 1991** – Re: The tariff classification of mechanically deboned CHICKEN or TURKEY meat from Canada (Tariff No. 0207.39.0020; 0207.39.0040; 0207.41.0000; 0207.42.0000; 0210.90.2000).
BRA-16	**Literature on the Action of Salt in Meat**. EVANGELISTA, JOSÉ. *Tecnologia de Alimentos* – 2ª Edição. Editora Atheneu – São Paulo, SP, 2000. FORREST, JOHN C.; ABERLE, ELTON D.; HEDRICK, HAROLD B.; JUDGE, MAX D. & MERKEL, ROBERT A. *Fundamentos de Ciencia de la Carne.* Editorial Acribia, S.A. – Zaragoza, España, 1979. LAWRIE, R.A. *Ciencia de la Carne*. Editorial Acribia, S.A. – Zaragoza, España, 1984. LÜCK, E.; JAGER, M.. *Conservación Química de los Alimentos – Características, usos efectos* – 2ª Edicíon. Editorial Acribia, S.A. – Zaragoza, España, 2000. PARDI, MIGUEL CIONE; SANTOS, IACIR FRANCISCO; SOUZA, ELMO RAMPINI & PARDI, HENRIQUE SILVA. *Ciência, Higiene e Tecnologia da Carne*. VII. Editora UFG – Goiânia, GO, 1996. PRICE, JAMES F.; SCHWEIGERT, BERNARD S. *Ciencia de la Carne y de los Productos Carnicos*. Editorial Acribia, S.A. – Zaragoza, España, 1994. SILVA, JOÃO ANDRADE. *Tópicos da Tecnologia dos Alimentos*. Varela Editora e Livraria LTDA – São Paulo, SP, 2000. MONTANA MEAT PROCESSORS CONVENTION. *Ingredients in Processed Meat Products* (Basic Chemistry of Meat). 27-29 April 2001. MONTANA STATE UNIVERISTY (MSU) – ANIMAL & RANGE SCIENCES DEPARTMENT. *Presentation: Meat as an Ingredient*. www.animalrange.montana.edu/courses/meat/meat_ingredients.pdf.
BRA-17	**Brazilian Import Statistics for 2002 and 2003** – Imports of Frozen Salmon (Smoked or Not).

EXHIBIT	DESCRIPTION
BRA-18	**Ruling NY E84540, 22 July 1999** – Re: The tariff classification of smoked salmon from Australia (Tariff No. 0305.41.0000). **Ruling NY E87725, 30 September 1999** – Re: The tariff classification of smoked salmon from Chile (Tariff No. 0305.41.0000).
BRA-19	**US Ocean Import Bill of Lading** – Import of Frozen Bacon under Subheading 0210.12.
BRA-20	**The International Convention on the Harmonized Commodity Description and Coding System, done at Brussels on 14 June 1983** – As Amended by the Protocol of Amendment to the International Convention on the Harmonized Commodity Description and Coding System of 24 June 1986.
BRA-21	**Position Regarding Contracting Parties of the International Convention on the Harmonized Commodity Description and Coding System**.
BRA-22	**87/369/EEC: Council Decision, of 7 April 1987** – Concerning the Conclusion of the International Convention on the Harmonized Commodity Description and Coding System and of the Protocol of Amendment thereto. **International Convention on the Harmonized Commodity Description and Coding System** – Published in Official Journal of the European Communities L 198, 20 July 1987, p. 0003 – 0010.
BRA-23	**Relevant Part of Council Regulation (EEC) No. 2658/87, of 23 July 1987** – On the Tariff and Statistical Nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Communities No. L 256, 7 September 1987, p. 1.
BRA-24	**1992 Version of the Harmonized System Nomenclature** – Subheadings 0207.41 and 0210.90 and relative Heading, Section and Chapter Notes.
BRA-25	**General Rules for the Interpretation of the Harmonized System and Explanatory Notes to the General Rules**.
BRA-26	**Council Regulation (EC) No. 930/2003, of 26 May 2003** – Terminating the Anti-Dumping and Anti-Subsidy Proceedings Concerning the Imports of Farmed Atlantic Salmon Originating in Norway and the Anti-Dumping Proceeding Concerning Imports of Farmed Atlantic Salmon Originating in Chile and the Faeroe Islands, published in the Official Journal of the European Communities No. L 133, 29 May 2003, p. 01.
BRA-27	**German Publication – *Zeitschrift für Zölle & Verbrauchsteuern*, Nr. 4 / April 2003** – English translation of pages 139 through 141 – Comment on the Decision of the Commission, of 31 January 2003, on the Validity of Certain Binding Customs Tariff Information Issued by the German Federal Republic.
BRA-28	Communications between Brazil and the WCO.
BRA-29	Correspondences, invoices, bills of lading and purchase orders of sales of salted chicken meat from Brazil to the EC (1998-2002).
BRA-30	Letters from European Communities attesting preference to salted chicken meat.
BRA-31	BTIs issued for frozen boneless chicken cuts from Brazil under subheading 0210.99.39.
BRA-32	Extract from the minutes of the 321st meeting of the Customs Code Committee held in Brussels on 25 and 26 September 2003.
BRA-33	Description and pictures of the salting process of salted chicken meat from Brazil.
BRA-34	Information on existing BTIs issued for frozen salted/dried Alaska Pollack and frozen salted/smoked salmon under heading 0305.
BRA-35	Letter of 7 May 2003 from the WCO Secretariat to the Bulgarian Customs Department.
BRA-36	Explanation on salting methods and the effect of desalting salted chicken meat.

EXHIBIT	DESCRIPTION
BRA-37	Tariff concessions for headings 0207 and 0210.
BRA-38	Supporting Literature Listed in the Bibliography of Exhibit BRA-36.
BRA-39	US Customs Ruling NY A80393 – Bacon from Denmark Classified Under Heading 0210. US Customs Ruling HQ 960585 – Bacon from Denmark Classified Under Heading 0210. US Customs Ruling NY B85951 – Bacon from Denmark Classified Under Heading 0210. US Customs Ruling NY C83926 – Bacon from Denmark Classified Under Heading 0210. US Customs Ruling HQ 960584 – Bacon from Denmark Classified Under Heading 0210.
BRA-40	1937 Draft Customs Nomenclature of the League of Nations – Items under Chapter 2 and Explanatory Notes. 1955 Customs Co-operation Council Nomenclature – Headings Under Chapter 2 and Explanatory Notes.
BRA-41	Letters from European Processors Declaring that No Additional Salt is used in the Further Processing of Chicken Products.
BRA-42(a)	1998- *Pro-Forma* Invoice.
BRA-42(b)	1999 *Pro-Forma* Invoice.
BRA-42(c)	October 2001 Bill of Lading, Export Registration (RE) and Export Receipt.
BRA-42(d)	November 2001 Bill of Lading, Export Registration (RE) and Export Receipt.
BRA-42(e)	2001 Invoice, Bill of Lading, Packing List, Certificate of Origin, Animal and Public Health Certificate, Additional Declaration and Purchase Order Confirmation.
BRA-43	Examples of Salted Meats Falling Under Subheading 0210.90 Listed in the WCO HS Commodity Database On-Line.

ANNEX F-2

LIST OF EXHIBITS SUBMITTED BY THAILAND

EXHIBIT	DESCRIPTION
THA-1	T. Takase, "The Role of Concessions in the GATT Trading System and their Implications for Developing Countries", *Journal of World Trade*, Volume 21, Issue 5, October 1987.
THA-2	Average Annual Price of Salted Chicken meat from 1997 to 2003.
THA-3	Commission Regulation (EC) No. 535/94 of 9 March 1994, published in the Official Journal of the European Communities No. L 68, 11 March 1994, p. 15.
THA-4	Written Question E-3046/01 by Albert Maat (PPE-DE) to the Commission, 15 November 2002/C147/081.
THA-5	2481st Council Meeting, Agriculture and Fisheries Brussels, 27 and 28 January 2003, 5433/03 (Presse 13) (only relevant portion).
THA-6	Council Regulation (EEC) No. 2658/87, of 23 July 1987, on the tariff and statistical nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Communities No. L 256, 7 September 1987, p. 1 (only relevant portion).
THA-7	Informal Meeting of Heads of Delegation of 20 January 1994, Statement of the Chairman, MTN.TNC/W/131, 21 January 1994.
THA-8	Commission Regulation (EC) No. 3115/94 of 20 December 1994, amending Annexes I and II to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the common customs tariff, published in the Official Journal of the European Communities, No. L 345, 31 December 1994, p. 1.
THA-9	Commission Regulation (EC) No.1223/2002 of 8 July 2002 concerning the classification of certain goods in the Combined Nomenclature. Official Journal of the European Communities L 179, 9 July 2002, p.8.
THA-10	Corrigendum to Commission Regulation (EC) No. 1223/2002 of 8 July 2002 concerning the classification of certain goods in the Combined Nomenclature. Official Journal of the European Communities L 217, 13 August 2002, p.8.
THA-11	Commission Decision of 31 January 2003 concerning the validity of certain binding tariff information issued by the Federal Republic of Germany. Official Journal of the European Communities No. L 36, 12 February 2003.
THA-12	Commission Regulation (EC) No. 1789/2003 of 11 September 2003, amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff. Official Journal of the European Union No. L 281, 30 October 2003, p. 1.
THA-13	Commission Regulation (EC) No. 1871/2003, of 23 October 2003, amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Union No. L 275, 25 October 2003, p. 5.
THA-14	B. J. Willenberg, Department of Food Science and Human Nutrition, University of Missouri-Columbia, http://muextension.missouri.edu/xplor/hesguide/foodnut/gh1501.htm.
THA-15	Food Safety Feature, United States Department of Agriculture, December1999, http://www.fsis.usda.gov/OA/pubs/bastebrine.htm.
THA-16	Effects of Preblending, Reduced Fat and Salt Levels on Frankfurter characteristics, *Journal of Food Science*, Volume 52, No.5, p. 1149 -1151, at 1151.
THA-17	International Convention on the Harmonized Commodity Description and Coding System.

EXHIBIT	DESCRIPTION
THA-18	E. Vermulst, "EC Customs Classification Rules: Should Ice Cream Melt?", *Michigan Journal of International Law*, Volume 15, No. 4, 1994, pp. 1241 – 1328.
THA-19	F. Snyder, *International Trade Law and Customs Law of the European Union*, (Butterworths, 1998), pages 1-9.
THA-20	General Rules for the Interpretation of the Harmonized System.
THA-21	Council Regulation (EC) No. 930/2003 of 26 May 2003, terminating the anti-dumping and anti-subsidy proceedings concerning the imports of farmed Atlantic salmon originating in Norway and the anti-dumping proceedings concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands. Official Journal of the European Communities, L 133, 29 May 2003, p.01.
THA-22	Working Document TAXUD/1636/2 of the Customs Code Committee of 25 January 2002
THA-23	Extract from the Minutes of the 273rd meeting of the Tariff and Statistical Nomenclature Section (Agriculture/Chemical) of the Customs Code Committee held in Brussels from 18 to 19 February 2002
THA-24(a)-(d)	BTIs
THA-25(a)	Packet of chilled Coppa Parma
THA-25(b)	Packet of chilled Prosciutto crudo italiano
THA-25(c)	Packet of chilled Jamón Serrano
THA-26	Certification from the Thai Broiler Processing Exporters' Association (dated 12 October 2004) that it started exporting salted chicken to EC customers in 1996
THA-27	Commission Regulation (EEC) No. 2505/92 of 14 July 1992
THA-28	Commission Regulation (EEC) No. 2551/93 of 10 August 1993
THA-29	"Processing steps involved in salting chicken meat." (Thailand emphasises that the information contained in this document is confidential.)
THA-30	List of concessions under heading 0210 from various WTO Members.
THA-31	Case 38-75, Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrechten en accijnzen, 19 November 1975, ECR 1975.
THA-32	Case C-130/02, Krings GmbH V Oberfinanzdirektion Nürnberg, 4 March 2004 [not yet reported].
THA-33	Case 149-73, Otto Witt KG v Hauptzollamt Hamburg-Ericus, 12 December 1973, ECR [1973].
THA-34	Commission Regulation (EEC) no. 3678/83 of 23 December 1983 on the tariff classification of certain types of seasoned meat and amending Regulation (EEC) No 950/68 on the Common Customs Tariff [1983] O.J. L. 366/53.
THA-35	Case C-233/88, Gijs van de Kolk-Douane Expéditeur BV v Inspecteur der Invoerrechten en Accijnzen, 8 February 1990, ECR [1990].

ANNEX F-3

LIST OF EXHIBITS SUBMITTED BY THE EUROPEAN COMMUNITIES

EXHIBIT	DESCRIPTION
EC-1	"Fowl Play", Article by Felicity Lawrence on chicken nuggets, The Guardian Newspaper, 8 July 2002
EC-2	"Food: Facts and Figures - May 2004 update", McDonalds Corporation, UK
EC-3	Selected definitions taken from the Larousse Gastronomique Encyclopaedia
EC-4	Codex Alimentarius, Recommended International Code of Practice for Salted Fish CAC/RCP 26-1979
EC-5	Non-exhaustive list of Traditional European salted and dried/smoked meat products
EC-6	"How Parma ham is made" Consorzio del Prosciutto di Parma
EC-7	"Food safety of jerky", USDA
EC-8	"Dried salted meats: charque and carne-de-sol", FAO Animal Production and Health Paper No. 51, and "Charque, a Preserved meat product of Brazil", Dennis Buege
EC-9	Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, MTN.GNG/MA/W/24, 20 Dec. 1994
EC-10	EC Trade statistics – 1986-1993
EC-11	Relevant Excerpts from the Explanatory Notes to the Customs Tariff of the European Communities showing the 1981 amendments
EC-12	Case C-175/82 *Dinter v Hauptzollamt Koln-Deutz* ECR [1983] p. 969
EC-13	Relevant Excerpts from the Explanatory Notes to the Combined Nomenclature of the European Communities showing the 1987 amendments
EC-14	Case C-33/92, *Gausepohl-Fleisch v. Oberfmanzdirektion Hamburg* [1993] ECR 1-3047
EC-15	Relevant Excerpts from the Explanatory Notes to the Combined Nomenclature of the European Communities showing the 1994 Amendments
EC-16	Relevant excerpts from *Dictionary of Nutrition and Food Technology*, Arnold Bender (Sixth Edition)
EC-17	Brazilian Ministry of Development, Industry and Foreign Trade (MDIC), Statistics concerning Brazilian worldwide exports under headings 02.07 to 02.10 (inclusively) for the year 2000
EC-18	Thai Exports under headings 0207.140-000 and 0210.900-006 for the year 2000
EC-19	Letter of 17 September 1997 from the WCO Secretariat to the Cypriot Department of Customs and Excise
EC-20	Chapter 3 of the Harmonized System (1992 version)
EC-21	Ruling NY 892236 of 23 November 1993 – RE: The tariff classification of fresh or frozen boneless beef, with 3 per cent added salt, from New Zealand
EC-22	Case C-267/94 *French Republic v Commission* ECR [1995] I-4845
EC-23	Photographs of tumbling machines
EC-24	Sample BTIs corrected by Regulation 1223/2002
EC-25	BTI on frozen smoked salmon
EC-26	BTI on ham
EC-27	August 2002 version of the notes to Chapter 2 of the Harmonized System
EC-28	Minutes of the Thirty-Sixth Meeting of the Trade Negotiations Committee of 15 December 1993 MTN.TNC/40
EC-29	Statement of the Chair, Informal Meeting of Heads of Delegation, 20 January 1994, MTN.TNC/W/131

EXHIBIT	DESCRIPTION
EC-30	German Customs Tariff 1952
EC-31	Extract from Regulation 3846/87 establishing an agricultural product nomenclature for export refunds
EC-32	Expert Opinion from Professor Dr. Karl-Otto Honikel (Federal Research Centre for Nutrition and Food – Kulmbach Germany)
EC-33	Illustrative BTIs for frozen herring
EC-34	Extracts from Regulation 3331/85 amending Regulation (EEC) N° 950/68 on the Common Customs Tariff
EC-35	Extracts from EC Official Journal notifying Court proceedings and judgments in cases C-33/92 *Gausepohl-Fleisch* and C-175/82 *Dinter*
EC-36	Extract from Lasok, The European Court of Justice Practice and Procedure (2nd ed), p. 495.

ANNEX F-4

EXHIBIT SUBMITTED BY THE UNITED STATES

EXHIBIT	DESCRIPTION
US-1	New York Ruling Letter NY A80393 (March 7, 1996) as modified by Customs Ruling Letter HQ 960585 (July 20, 1998)