

**EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION  
OF FROZEN BONELESS CHICKEN CUTS**

Complaint by Thailand

*Report of the Panel*



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<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
<i>Australia – Salmon</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon</i> , 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
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>India – Quantitative Restrictions</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Turkey – Textiles</i>	Panel Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> . WT/DS285/R, circulated 10 November 2004
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Superfund</i>	GATT Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , adopted 17 June 1987, BISD 34S/136
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , 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<sup>1</sup>, 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<sup>2</sup>, 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

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<sup>1</sup> WT/DS269/3 contained in Annex E.

<sup>2</sup> 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<sup>3</sup>.

### 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

---

<sup>3</sup> 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).<sup>4</sup> 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.

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<sup>4</sup> 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<sup>5</sup>, 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.<sup>6</sup> 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.<sup>7</sup> 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)<sup>8</sup>, 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.<sup>9</sup>

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.<sup>10</sup>

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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<sup>5</sup> OJ L 302, 19.10.1992, p.1.

<sup>6</sup> OJ L 253, 11.10.1993, p.1.

<sup>7</sup> Preamble to the HS Convention.

<sup>8</sup> 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.

<sup>9</sup> Articles 6 and 7 of the HS Convention.

<sup>10</sup> 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<sup>11</sup>**

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<sup>12</sup>**

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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<sup>11</sup> 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.

<sup>12</sup> 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 homogeneously 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<sup>13</sup>

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. ...

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<sup>13</sup> 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.<sup>14</sup>

#### **4. EC Regulation No. 1223/2002<sup>15</sup>**

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."

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<sup>14</sup> 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.

<sup>15</sup> 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 (1)	CN Code (2)	Reasons (3)
<p>(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%.</p> <p>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.</p>	0207 14 10	<p>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.</p> <p>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.</p>

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

## 5. EC Decision 2003/97/EC<sup>16</sup>

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<sup>17</sup>, requires the withdrawal of 66 BTI notices issued by the German customs authority classifying products under heading 02.10 of the CN.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup> 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 of Germany is required to withdraw the BTIs issued on frozen poultry meat containing between 1.9% and 3% by weight of salt.<sup>21</sup>

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<sup>16</sup> 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.

<sup>17</sup> Article 2 of Commission Decision.

<sup>18</sup> Article 1 and Annex.

<sup>19</sup> Recital (3).

<sup>20</sup> Recital (5).

<sup>21</sup> Recital (8).

## 6. EC Regulation No. 1871/2003<sup>22</sup>

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."<sup>23</sup>

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."<sup>24</sup>

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".<sup>25</sup> 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<sup>26</sup>

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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<sup>22</sup> 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.

<sup>23</sup> Recital (3) of EC Regulation No. 1871/2003.

<sup>24</sup> Recital (4) of EC Regulation No. 1871/2003.

<sup>25</sup> Recital (5) of EC Regulation No. 1871/2003.

<sup>26</sup> 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<sup>27</sup>**

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.<sup>28</sup>

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<sup>29</sup>**

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

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<sup>27</sup> 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.

<sup>28</sup> Recital (3) of EC Regulation No. 2344/2003.

<sup>29</sup> 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<sup>30</sup>

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<sup>31</sup>

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;

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<sup>30</sup> Thailand's first written submission, paras. 157-158.

<sup>31</sup> 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<sup>32</sup> 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 Appellate 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.<sup>33</sup> When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for

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<sup>32</sup> 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."

<sup>33</sup> (*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.'"<sup>34,35</sup> (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.  
...<sup>36</sup>

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*."<sup>37</sup> (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

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<sup>34</sup> (original footnote) Appellate Body Report, *EC – Bananas III*, para. 142.

<sup>35</sup> Appellate Body Report, *US – Carbon Steel*, para. 126.

<sup>36</sup> Appellate Body Report, *Chile – Price Band System*, para. 137.

<sup>37</sup> 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."<sup>38</sup> (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

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<sup>38</sup> 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<sup>39</sup>, 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

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<sup>39</sup> 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)<sup>40</sup>.

### 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.<sup>41</sup> 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

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<sup>40</sup> The HS is described below in para. 7.9 *et seq.*

<sup>41</sup> 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<sup>42</sup> and to apply the General Rules for the interpretation of the HS (General Rules) and all the section, chapter and subheading notes.<sup>43</sup> Moreover, HS contracting parties are required to ensure that they follow the numerical sequence of the HS in their respective domestic tariff nomenclatures.<sup>44</sup>

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

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<sup>42</sup> Article 3.1(a)(i) of the HS Convention.

<sup>43</sup> Article 3.1(a)(ii) of the HS Convention.

<sup>44</sup> 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."<sup>45</sup>

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."<sup>46</sup>

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.<sup>47</sup> Brazil notes that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 were issued after

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<sup>45</sup> WT/DS269/3.

<sup>46</sup> WT/DS286/5.

<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> 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. 1871/2003 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.<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> 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

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<sup>48</sup> Brazil's reply to Panel question No. 11.

<sup>49</sup> Brazil's oral statement at the second substantive meeting, para. 5.

<sup>50</sup> Brazil's reply to Panel question No. 1.

<sup>51</sup> Thailand's second written submission, para. 6.

<sup>52</sup> Thailand's second written submission, paras. 9-11.

<sup>53</sup> EC's reply to Panel question No. 20(a).

<sup>54</sup> EC's second written submission, para. 15.

their oral statements to the Panel during the first substantive meeting.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup>

(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.<sup>58</sup> 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."<sup>59</sup>

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

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<sup>55</sup> EC's second written submission, para. 19.

<sup>56</sup> EC's second written submission, para. 20; EC's oral statement at the second substantive meeting, para. 4.

<sup>57</sup> 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.

<sup>58</sup> Panel question No. 11.

<sup>59</sup> 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.<sup>60</sup>

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.<sup>61</sup> 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.<sup>62</sup> 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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<sup>60</sup> Such rights were affirmed by the Appellate Body in *US – Carbon Steel*. Appellate Body Report, *US – Carbon Steel*, para. 126.

<sup>61</sup> 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's [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).

<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup>

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%.<sup>65</sup> 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%.<sup>66</sup>

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<sup>63</sup> We explain our interpretation of these measures in more detail below in paragraph 7.38 *et seq.*

<sup>64</sup> Brazil's reply to Panel question No. 10; Thailand's second written submission, para. 12.

<sup>65</sup> EC's first written submission, para. 17.

<sup>66</sup> 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%.<sup>67</sup>

**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.<sup>68</sup> In addition, Article 2 effectively provides that BTIs<sup>69</sup> 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.<sup>70</sup>

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<sup>67</sup> 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 homogeneously impregnated with salt, with a salt content of 1.2% - 3%, under subheading 0207.14.10 of the European Communities' CN.

<sup>68</sup> 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".

<sup>69</sup> 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.

<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup>

#### 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.<sup>73</sup>

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.<sup>74</sup>

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

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<sup>71</sup> EC's reply to Panel question No. 19(a).

<sup>72</sup> EC's reply to Panel question No. 19(c).

<sup>73</sup> Thailand's second written submission, para. 6.

<sup>74</sup> 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.<sup>75</sup>

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.<sup>76</sup> 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 homogeneously 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.<sup>77</sup>

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*.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> Brazil adds that decisions by the HS Committee of the WCO, including those that arise from dispute settlement, are not binding and

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<sup>75</sup> 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).

<sup>76</sup> EC's reply to Panel question No. 25.

<sup>77</sup> EC's reply to Panel question No. 25.

<sup>78</sup> Brazil's reply to Panel question No. 9; Thailand's second written submission, para. 17.

<sup>79</sup> 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.

<sup>80</sup> Thailand's second written submission, para. 18.

there are no effective mechanisms that guarantee implementation or enforcement of decisions in that forum.<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

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.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup>

## 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.<sup>89</sup> The parties

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<sup>81</sup> Brazil's reply to Panel question No. 9.

<sup>82</sup> Thailand's second written submission, para. 19.

<sup>83</sup> Thailand's second written submission, para. 20.

<sup>84</sup> 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.

<sup>85</sup> EC's reply to Panel question No. 74.

<sup>86</sup> EC's oral statement at the second substantive meeting, para. 13.

<sup>87</sup> EC's oral statement at the second substantive meeting, para. 12.

<sup>88</sup> Brazil's reply to Panel question No. 9 referring to Exhibit BRA-28.

<sup>89</sup> 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.<sup>90</sup>

### 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<sup>91</sup>, 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.<sup>92</sup>

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.<sup>93</sup>

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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."

<sup>90</sup> WCO's general comments in its replies to the Panel's questions to the WCO dated 2 December 2004.

<sup>91</sup> See paragraph 7.87 *et seq* below.

<sup>92</sup> 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.

<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

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.<sup>97</sup>

###### (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.

<sup>94</sup> 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.

<sup>95</sup> See Panel question No. 9.

<sup>96</sup> Brazil's first written submission, para. 192; Thailand's first written submission paras. 157-158.

<sup>97</sup> 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."<sup>98</sup>

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) ... ."<sup>99</sup>

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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<sup>98</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.

<sup>99</sup> 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.<sup>100</sup> 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%.<sup>101</sup> 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.<sup>102</sup> Thailand submits that, therefore, the measures at issue have resulted in treatment less favourable than that provided for in the EC Schedule.<sup>103</sup> 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.<sup>104</sup>

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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

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<sup>100</sup> Brazil's first written submission, paras. 9, 54 and 59; Thailand's first written submission, paras. 19-20, 54, 58 and 155.

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

<sup>102</sup> Thailand's first written submission, para. 12.

<sup>103</sup> Brazil's first written submission, paras. 9, 54 and 59; Thailand's first written submission, paras. 19-20, 54, 58 and 155.

<sup>104</sup> Brazil's first written submission, paras. 9, 54 and 59; Thailand's first written submission, paras. 19-20, 54.

<sup>105</sup> EC's reply to Panel question No. 25.

<sup>106</sup> EC's reply to Panel question No. 94.

<sup>107</sup> 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 <i>Gallus domesticus</i> :		
	--- 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 homogeneously 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.<sup>108</sup> 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.<sup>109</sup>

(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."<sup>110</sup>

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."<sup>111</sup>

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.<sup>112</sup> The European Communities has indicated that it does not dispute such pricing

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<sup>108</sup> EC's reply to Panel question No. 25.

<sup>109</sup> 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.

<sup>110</sup> Appellate Body Report, *Argentina – Textiles and Apparel*, para. 46.

<sup>111</sup> 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.

<sup>112</sup> 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.<sup>113</sup> 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*.<sup>114</sup> 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."<sup>115</sup>

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.<sup>116</sup> 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.

<sup>113</sup> EC's reply to Panel question No. 95.

<sup>114</sup> EC's reply to Panel question No. 25.

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

<sup>116</sup> 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 homogeneously 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.<sup>117</sup> 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.<sup>118</sup> According to the European Communities, the key element of heading 02.10 is the notion of preservation.<sup>119</sup> In addition, the European Communities submits that, in order to be preserved with salt, meat should be deeply and homogeneously impregnated with a level of salt sufficient to ensure long-term preservation.<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup>

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

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<sup>117</sup> EC's oral statement at the second substantive meeting, para. 14.

<sup>118</sup> EC's oral statement at the second substantive meeting, para. 16.

<sup>119</sup> EC's second written submission, para. 23.

<sup>120</sup> EC's reply to Panel question No. 88.

<sup>121</sup> EC's reply to Panel question No. 109. The *Dinter* judgement is discussed in more detail below in paragraph 7.372 *et seq.*

<sup>122</sup> 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.<sup>123</sup>

(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 homogeneously 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".<sup>124</sup>

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.<sup>125</sup> 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".<sup>126</sup> The Panel notes that the principle of "long-term preservation" is referred to in EC Regulation No. 1871/2003<sup>127</sup> and EC Regulation No. 2344/2003.<sup>128</sup>

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.<sup>129</sup> In our understanding, these measures, like EC Regulation No. 1223/2002 and EC

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<sup>123</sup> 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.

<sup>124</sup> 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.

<sup>125</sup> EC's second written submission, para. 23.

<sup>126</sup> EC's reply to Panel question No. 88.

<sup>127</sup> 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.'"

<sup>128</sup> 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.

<sup>129</sup> 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.<sup>130</sup>

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.<sup>131</sup> 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.

<sup>130</sup> 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.

<sup>131</sup> 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."<sup>132</sup>

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<sup>132</sup> 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."<sup>133</sup>

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."<sup>134</sup> 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 in 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.<sup>135</sup> 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.<sup>136</sup>

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.<sup>137</sup> The European Communities submits that, insofar as

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<sup>133</sup> Appellate Body Report, *US – Shrimp*, para. 114.

<sup>134</sup> Appellate Body Report, *US – Gasoline*, p. 23.

<sup>135</sup> Brazil's reply to Panel question No. 56; Thailand's reply to Panel question No. 56.

<sup>136</sup> Thailand's reply to Panel question No. 56.

<sup>137</sup> 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.<sup>138</sup>

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.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup>

(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.<sup>143</sup>

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

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<sup>138</sup> 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.

<sup>139</sup> Thailand's comments on the EC's reply to Panel question No. 87.

<sup>140</sup> Thailand's second written submission, para. 77.

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

<sup>142</sup> Thailand's second written submission, para. 76.

<sup>143</sup> 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*.<sup>144</sup> 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, finalized 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".<sup>145</sup> 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.<sup>146</sup> The Final Act came into force on 1 January 1995.<sup>147</sup>

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.<sup>148</sup> If we were to find that

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<sup>144</sup> 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, 2<sup>nd</sup> 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.

<sup>145</sup> MTN.TNC/40 contained in Exhibit EC-28.

<sup>146</sup> The Marrakesh Protocol is contained in Exhibit BRA-5.

<sup>147</sup> W/Let/1.

<sup>148</sup> 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, 3<sup>rd</sup> 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.<sup>149</sup>

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<sup>150</sup> and Article 11<sup>151</sup> 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<sup>152</sup>, 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:

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<sup>149</sup> 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.

<sup>150</sup> 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."

<sup>151</sup> Article 11 of the DSU is set out in para. 7.55 above.

<sup>152</sup> In relation to this point, the European Communities' arguments are set out in further detail in paragraph 7.337 below

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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.<sup>153</sup> 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).<sup>154</sup>

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.<sup>155</sup>

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).<sup>156</sup>

(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,

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<sup>153</sup> 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, 2<sup>nd</sup> edition (1984) p. 121.

<sup>154</sup> Brazil's reply to Panel question No. 66; Thailand's reply to Panel question No. 66.

<sup>155</sup> EC's reply to Panel question No. 66.

<sup>156</sup> 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.<sup>157</sup> Brazil and Thailand argue that, in essence, the term "salted" refers to meat that contains or is impregnated with salt.<sup>158</sup> Brazil also submits that the ordinary meaning of the term "salting" indicates that it is a process that prepares meat for different purposes<sup>159</sup> 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.<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup> 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.<sup>163</sup>

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".<sup>164</sup> 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.<sup>165</sup> More specifically, the European Communities observes that it knows of no meat that is preserved by the use of common salt alone.<sup>166</sup>

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.<sup>167</sup>

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<sup>157</sup> Brazil's first written submission, para. 73.

<sup>158</sup> 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.

<sup>159</sup> Brazil's oral statement at the first substantive meeting, para. 30.

<sup>160</sup> Brazil's oral statement at the first substantive meeting, para. 44.

<sup>161</sup> Thailand's second written submission, para. 21.

<sup>162</sup> Brazil's first written submission, para. 100; Thailand's first written submission, para. 82.

<sup>163</sup> Brazil's oral statement at the first substantive meeting, para. 30; Thailand's oral statement at the first substantive meeting, para. 12.

<sup>164</sup> EC's first written submission, para. 122.

<sup>165</sup> EC's reply to Panel question No. 64.

<sup>166</sup> EC's reply to Panel question No. 97.

<sup>167</sup> 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).

	<b>Brazil</b>	<b>Thailand</b>	<b>EC</b>
<b>Dictionaries Relied Upon</b>	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:

<b>Dictionaries Relied Upon</b>	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.<sup>168</sup> 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".<sup>169</sup> 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".<sup>170</sup> 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.<sup>171</sup>

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<sup>168</sup> 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.

<sup>169</sup> 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).

<sup>170</sup> 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).

<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup>

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.<sup>176</sup> 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.<sup>177</sup>

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.<sup>178</sup> Brazil and Thailand submit that none of the listed salted meats have general or specific names.<sup>179</sup> 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".<sup>180</sup>

## 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

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<sup>172</sup> EC's reply to Panel question No. 97.

<sup>173</sup> EC's second written submission, para. 35.

<sup>174</sup> EC's reply to Panel question No. 100.

<sup>175</sup> EC's second written submission, para. 35; EC's reply to Panel question No. 100.

<sup>176</sup> Thailand's comments on the EC's reply to Panel question No. 100.

<sup>177</sup> Thailand's oral statement at the second substantive meeting, para. 15.

<sup>178</sup> Excerpted in Exhibit BRA-43.

<sup>179</sup> 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.

<sup>180</sup> 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.<sup>181</sup>

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.<sup>182</sup> 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.<sup>183</sup> 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%.<sup>184</sup>

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.<sup>185</sup>

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.<sup>186</sup> 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.<sup>187</sup>

### 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

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<sup>181</sup> 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; Brazil's 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.

<sup>182</sup> EC's first written submission, para. 49.

<sup>183</sup> EC's first written submission, para. 22.

<sup>184</sup> EC's second written submission, paras. 14 and 36.

<sup>185</sup> Thailand's reply to Panel question No. 86.

<sup>186</sup> Brazil's reply to Panel question No. 86.

<sup>187</sup> 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.<sup>188</sup>

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.<sup>189</sup>

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.<sup>190</sup> The European Communities also submits that press reports regarding the products at issue suggest that salt can be removed from a salted product.<sup>191</sup> 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.<sup>192</sup> 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.<sup>193</sup> 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.<sup>194</sup>

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

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<sup>188</sup> Thailand's first written submission, paras. 77, 79 and 128; Thailand's reply to Panel question No. 61.

<sup>189</sup> 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.

<sup>190</sup> EC's reply to Panel question No. 37.

<sup>191</sup> EC's first written submission, para. 14 referring to Exhibit EC-1.

<sup>192</sup> EC's reply to Panel question No. 37.

<sup>193</sup> EC's reply to Panel question No. 37; EC's oral statement at the second substantive meeting, para. 8.

<sup>194</sup> 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.<sup>195</sup>

#### 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.<sup>196</sup>

7.130 In response, the **European Communities** submits that the addition of salt for the purposes of heading 02.10 is for preservation.<sup>197</sup> 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.<sup>198</sup> 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.<sup>199</sup>

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.<sup>200</sup>

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).<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup> 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.<sup>204</sup>

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<sup>205</sup> 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.<sup>206</sup> 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

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<sup>195</sup> 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.

<sup>196</sup> Brazil's first written submission, paras. 75, 90-103.

<sup>197</sup> EC's first written submission, para. 50; EC's second written submission, para. 23.

<sup>198</sup> EC's first written submission, para. 35.

<sup>199</sup> EC's first written submission, para. 37.

<sup>200</sup> Brazil's first written submission, para. 103.

<sup>201</sup> EC's first written submission, para. 9.

<sup>202</sup> EC's reply to Panel question No. 97 referring to Exhibit EC-32.

<sup>203</sup> EC's reply to Panel question No. 26 referring to Brazil's first written submission, para. 85.

<sup>204</sup> EC's reply to Panel question No. 49.

<sup>205</sup> This case is discussed below in para. 7.372 *et seq.*

<sup>206</sup> 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.<sup>207</sup>

7.134 **Brazil** acknowledges that it is possible for some meat, prepared by salting, drying or smoking, to also be preserved by those processes.<sup>208</sup> 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.<sup>209</sup>

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.<sup>210</sup>

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.<sup>211</sup> 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.<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup> 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.<sup>215</sup>

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.<sup>216</sup> The European Communities submits that meats that are preserved for several months are clearly preserved for the purposes of heading 02.10.<sup>217</sup>

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<sup>207</sup> Thailand's comments on the EC's reply to Panel question No. 97.

<sup>208</sup> Brazil's oral statement at the first substantive meeting, para. 40.

<sup>209</sup> Brazil's oral statement at the first substantive meeting, para. 42; Brazil's reply to Panel question No. 4.

<sup>210</sup> Thailand's oral statement at the first substantive meeting, para. 19; Thailand's second written submission, para. 37.

<sup>211</sup> EC's reply to Panel question No. 96 referring to Exhibit EC-31 and Exhibit EC-32.

<sup>212</sup> EC's second written submission, para. 30.

<sup>213</sup> EC's oral statement at the second substantive meeting, para. 9.

<sup>214</sup> EC's second written submission, para. 41.

<sup>215</sup> EC's oral statement at the second substantive meeting, para. 9; EC's replies to Panel question Nos. 96 and 98.

<sup>216</sup> EC's replies to Panel question Nos. 49 and 96.

<sup>217</sup> 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".<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> 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.<sup>221</sup>

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.<sup>222</sup> 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.<sup>223</sup>

#### 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<sup>224</sup>, products that are "similar" to those contained in Exhibit EC-5 and bacon.<sup>225</sup> 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

<sup>218</sup> Brazil's reply to Panel question No. 118.

<sup>219</sup> Brazil's comments on the EC's reply to Panel question No. 97.

<sup>220</sup> Brazil's reply to Panel question No. 4.

<sup>221</sup> Brazil's comments on the EC's reply to Panel question No. 97.

<sup>222</sup> EC's oral statement at the second substantive meeting, para. 36.

<sup>223</sup> EC's second written submission, para. 122.

<sup>224</sup> Exhibit EC-5, identified by the European Communities as a "Non-exhaustive list of Traditional European salted and dried/smoked meat products", refers to bündler fleisch/viande de grisons, parma ham, san daniele, prosciutto, jamon serrano, jamon iberico, bayonne ham, südtiroler speck and schwarzwälder schinken.

<sup>225</sup> 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<sup>226</sup> 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.<sup>227</sup>

#### 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<sup>228</sup>; reduces the aqueous or water level of food<sup>229</sup>; contributes to the solubilization of muscle proteins and the emulsification of fats<sup>230</sup>; eliminates water-soluble ingredients, such as body minerals, vitamins and proteins<sup>231</sup>; reduces the solubility of oxygen in water<sup>232</sup>; acts as a pro-oxidant of fats<sup>233</sup>; and favours the development of rancidity<sup>234</sup>.

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.<sup>235</sup> 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.<sup>236</sup> Again, we do not consider that this factor undermines the conclusion that salt changes the physical properties of meat to which salt has been

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<sup>226</sup> Excerpted in Exhibit BRA-43.

<sup>227</sup> 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.

<sup>228</sup> Exhibit BRA-16: Lück, E. & Jager, M., *Chemical Food Preservation*, 2<sup>nd</sup> 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.

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

<sup>230</sup> 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.

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

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

<sup>233</sup> Exhibit BRA-16: Lawrie, R.A., *Meat Science*, pp. 301 - 302.

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

<sup>235</sup> EC's first written submission, para. 49.

<sup>236</sup> EC's first written submission, para. 22.

added, for example through its contribution to the solubilization of muscle proteins and the emulsification of fats.<sup>237</sup>

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.<sup>238</sup> The European Communities has also stated that desalting does not occur commercially.<sup>239</sup> We consider that the fact that tumbling<sup>240</sup> 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.<sup>241</sup> 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.<sup>242</sup> 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".<sup>243</sup> 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.<sup>244</sup>

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<sup>237</sup> 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.

<sup>238</sup> EC's reply to Panel question No. 37.

<sup>239</sup> EC's reply to Panel question No. 37.

<sup>240</sup> 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).

<sup>241</sup> 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.

<sup>242</sup> Exhibit BRA-16: Evangelista, José, *Food Technology*, 2<sup>nd</sup> 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*, 2<sup>nd</sup> 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.

<sup>243</sup> See paragraph 7.114 above, including footnotes thereto.

<sup>244</sup> 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.<sup>245</sup> Finally, the application of the food in question may affect the salt content required for its preservation.<sup>246</sup> For example, it appears that 2% - 3% salt content is the level usually found in commercially processed meat products<sup>247</sup> whereas a salt content level of 26.5% eliminates larvae of *cisticercos bovis* and *celulosae*.<sup>248</sup> 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.<sup>249</sup>

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<sup>250</sup> or many or several months as indicated by the European Communities during these proceedings<sup>251</sup> 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.<sup>252</sup>

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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".

<sup>245</sup> Exhibit BRA-16: Price, J.F. & Schweigert, B.S., *Science of Meat and Meat Products*, p. 394.

<sup>246</sup> 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.

<sup>247</sup> 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*, 2<sup>nd</sup> 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.

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

<sup>249</sup> 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.

<sup>250</sup> 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.*

<sup>251</sup> EC's replies to Panel question Nos. 49 and 96.

<sup>252</sup> 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<sup>253</sup>, 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<sup>254</sup> 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;

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<sup>253</sup> 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.

<sup>254</sup> 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."<sup>255</sup> (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."<sup>256</sup>

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).<sup>257</sup>

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

<sup>255</sup> *Yearbook of the International Law Commission*, 1966, Vol. II, p. 221, para. 13.

<sup>256</sup> Ian Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 2<sup>nd</sup> edition (1984) p. 129.

<sup>257</sup> 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).<sup>258</sup>

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.<sup>259</sup> 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.<sup>260</sup> 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.<sup>261</sup> The European Communities argues that, therefore, heading 02.10 is based on a comprehensive and exclusive list of traditional methods of preserving meat.<sup>262</sup>

7.159 The various dictionary definitions relied upon by the parties are contained in the table set out immediately below:<sup>263</sup>

	<b>Brazil</b>	<b>Thailand</b>	<b>EC</b>
<b>Dictionaries Relied Upon</b>	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 ( <i>dried egg; dried fruit; dried flowers</i> )	-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 ( <i>smoked salmon</i> )	-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:

<sup>258</sup> 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.

<sup>259</sup> 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.

<sup>260</sup> EC's first written submission, paras. 129, 130, and 132.

<sup>261</sup> EC's oral statement at the second substantive meeting, para. 30.

<sup>262</sup> EC's oral statement at the second substantive meeting, para. 31.

<sup>263</sup> Brazil's first written submission, para. 74; Thailand's first written submission, para. 68; EC's first written submission, paras. 130 and 132.

<b>Dictionaries Relied Upon</b>	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".<sup>264</sup>

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".

<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup>

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.<sup>267</sup> 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.<sup>268</sup> 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.<sup>269</sup> 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.<sup>270</sup> 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.<sup>271</sup>

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

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<sup>265</sup> Thailand's first written submission, para. 89; Thailand's second written submission, paras. 24-25.

<sup>266</sup> Thailand's second written submission, para. 27.

<sup>267</sup> EC's first written submission, para. 138.

<sup>268</sup> EC's oral statement at the first substantive meeting, paras. 12-16.

<sup>269</sup> EC's first written submission, para. 138; EC's second written submission, paras. 27, 30, 41 and 45.

<sup>270</sup> EC's oral statement at the first substantive meeting, paras. 12-16.

<sup>271</sup> EC's first written submission, para. 137.

not separately as a different heading.<sup>272</sup> 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.<sup>273</sup> 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.<sup>274</sup> Thailand submits that the fact that salted meat is subsequently frozen should not affect its classification under heading 02.10.<sup>275</sup> 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.<sup>276</sup>

#### 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

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<sup>272</sup> Brazil's oral statement at the second substantive meeting, para. 22.

<sup>273</sup> Thailand's second written submission, para. 35.

<sup>274</sup> Brazil's oral statement at the second substantive meeting, para. 24.

<sup>275</sup> Thailand's oral statement at the second substantive meeting, para. 15.

<sup>276</sup> 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".<sup>277</sup> 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.<sup>278</sup> 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.<sup>279</sup> 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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<sup>277</sup> 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".

<sup>278</sup> EC's first written submission, para. 138; EC's second written submission, paras. 27, 30, 41 and 45.

<sup>279</sup> 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.<sup>280</sup> 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."<sup>281</sup> 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.<sup>282</sup>

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.<sup>283</sup>

#### 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

<sup>280</sup> Thailand's oral statement at the first substantive meeting, para. 13.

<sup>281</sup> 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).

<sup>282</sup> Thailand's oral statement at the first substantive meeting, paras. 14-15.

<sup>283</sup> 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.<sup>284</sup>

#### 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.<sup>285</sup> 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

<sup>284</sup> WCO's reply to Panel question No. 12 to the WCO.

<sup>285</sup> 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.<sup>286</sup> 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.<sup>287</sup> 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.<sup>288</sup>

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.<sup>289</sup>

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.<sup>290</sup> 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".<sup>291</sup> 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 should have been taken into account.<sup>292</sup> 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.<sup>293</sup>

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*.<sup>294</sup> 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.<sup>295</sup>

#### 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

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<sup>286</sup> Brazil's first written submission, paras. 106-108; Thailand's first written submission, paras. 97-101; EC's reply to Panel question No. 73.

<sup>287</sup> Brazil's first written submission, para. 111.

<sup>288</sup> Thailand's second written submission, paras. 30 and 31; Thailand's oral statement at the second substantive meeting, para. 25.

<sup>289</sup> Brazil's reply to Panel question No. 73; Brazil's second written submission, para. 27.

<sup>290</sup> Thailand's reply to Panel question No. 73; Thailand's second written submission, para. 31.

<sup>291</sup> Thailand's second written submission, para. 32; Thailand's reply to Panel question No. 121.

<sup>292</sup> Thailand's reply to Panel question, no. 73 referring to the Appellate Body Report in *EC – Computer Equipment*, para. 89.

<sup>293</sup> Thailand's reply to Panel question No. 73; Thailand's second written submission, para. 31.

<sup>294</sup> EC's reply to Panel question No. 73.

<sup>295</sup> EC's oral statement at the second substantive meeting, para. 28.

Customs Tariffs (Brussels Tariff Nomenclature or BTN)<sup>296</sup>, 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.<sup>297</sup> Further, the HS was used as a basis for the preparation of the Uruguay Round GATT schedules. This is apparent from the Modalities Agreement<sup>298</sup>, which provides that agricultural products in respect of which tariff commitments are to be established are based on the HS<sup>299</sup> and from the fact that the HS has been used to define product coverage under the Agreement on Agriculture.<sup>300</sup>

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*."<sup>301</sup>

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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<sup>296</sup> 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.

<sup>297</sup> 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.

<sup>298</sup> The Modalities Agreement is referred to above in para. 7.96.

<sup>299</sup> See paragraph 3 of Annex 3 of the Modalities Agreement.

<sup>300</sup> See paragraph 1 of Annex 1 of the Agreement on Agriculture.

<sup>301</sup> 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.<sup>302</sup> 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".<sup>303</sup>

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.<sup>304</sup>

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".<sup>305</sup> 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.<sup>306</sup> 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".<sup>307</sup> 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.<sup>308</sup> According to Brazil, if preservation determined classification under heading 02.10, that objective would be undermined.<sup>309</sup> 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".<sup>310</sup> 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.<sup>311</sup> 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.<sup>312</sup> 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".<sup>313</sup>

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<sup>302</sup> Brazil's first written submission, para. 112; Thailand's first written submission, para. 107.

<sup>303</sup> Thailand's first written submission, para. 109.

<sup>304</sup> Brazil's oral statement at the second substantive meeting, para. 32; Brazil's closing statement at the second substantive meeting, para. 14.

<sup>305</sup> Brazil's second written submission, paras. 33-47. Brazil submitted the GN and its Explanatory Notes in Exhibit BRA-40(a).

<sup>306</sup> Brazil's second written submission, para. 37; Brazil's closing statement at the second substantive meeting, para. 14.

<sup>307</sup> 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.

<sup>308</sup> 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.

<sup>309</sup> Brazil's oral statement at the second substantive meeting, para. 27.

<sup>310</sup> Brazil's second written submission, para. 44.

<sup>311</sup> Brazil's second written submission, para. 45.

<sup>312</sup> Brazil's second written submission, para. 47.

<sup>313</sup> 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.<sup>314</sup> 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.<sup>315</sup> 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.<sup>316</sup>

*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)

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<sup>314</sup> 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.

<sup>315</sup> EC's oral statement at the second substantive meeting, paras. 34-36.

<sup>316</sup> 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)<sup>317</sup>

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.<sup>318</sup>

*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.*<sup>319</sup>

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

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<sup>317</sup> WCO's reply to Panel question No. 3 to the WCO.

<sup>318</sup> WCO's reply to Panel question No. 2 to the WCO.

<sup>319</sup> 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.<sup>320</sup> 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.<sup>321</sup> Brazil bases both arguments on the following Explanatory Note to Item 13 in the GN<sup>322</sup>:

"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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<sup>320</sup> 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.

<sup>321</sup> Brazil's oral statement at the second substantive meeting, para. 27.

<sup>322</sup> 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".<sup>323</sup> 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.<sup>324</sup>

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.<sup>325</sup> 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.<sup>326</sup>

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.<sup>327</sup> Thailand submits that, therefore, any meat that has been prepared in a manner described in the heading must be classified under heading 02.10.<sup>328</sup> 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.<sup>329</sup> According to Brazil, to read in the requirement that salting is a process used to ensure long-

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<sup>323</sup> See para. 7.114 above.

<sup>324</sup> 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.

<sup>325</sup> EC's oral statement at the first substantive meeting, para. 17.

<sup>326</sup> EC's first written submission, para. 156; EC's oral statement at the second substantive meeting, para. 46.

<sup>327</sup> 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.

<sup>328</sup> Thailand's first written submission, para. 120; Thailand's reply to Panel question No. 67.

<sup>329</sup> 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.<sup>330</sup> 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.<sup>331</sup>

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.<sup>332</sup>

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 homogeneously impregnated with salt.<sup>333</sup> 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.<sup>334</sup> 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.<sup>335</sup>

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.<sup>336</sup>

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.<sup>337</sup> 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.<sup>338</sup> Brazil maintains that the Explanatory Notes to Chapter 2 do not provide that the "states" represent methods of preservation.<sup>339</sup> 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

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<sup>330</sup> EC's first written submission, para. 157.

<sup>331</sup> EC's oral statement at the first substantive meeting, para. 21; EC's oral statement at the second substantive meeting, para. 39.

<sup>332</sup> Thailand's reply to Panel question No. 67.

<sup>333</sup> Brazil's first written submission, para. 141; Thailand's first written submission, para. 114.

<sup>334</sup> Thailand's first written submission, para. 114.

<sup>335</sup> Brazil's first written submission, para. 140.

<sup>336</sup> EC's first written submission, para. 150.

<sup>337</sup> Brazil's first written submission, para. 125; Thailand's reply to Panel question No. 79(a).

<sup>338</sup> Brazil's first written submission, para. 125.

<sup>339</sup> 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.<sup>340</sup> 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.<sup>341</sup>

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.<sup>342</sup> Brazil submits that only headings 02.09 and 02.10 relate to meat that has undergone a process of preparation.<sup>343</sup> 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.<sup>344</sup> 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.<sup>345</sup> 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.<sup>346</sup>

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").<sup>347</sup> 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.<sup>348</sup>

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.<sup>349</sup>

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<sup>340</sup> Thailand's second written submission, para. 35.

<sup>341</sup> Brazil's oral statement at the first substantive meeting, para. 5.

<sup>342</sup> Brazil's first written submission, para. 128; Brazil's second written submission, para. 28.

<sup>343</sup> Brazil's first written submission, para. 129.

<sup>344</sup> Brazil's first written submission, para. 132.

<sup>345</sup> Brazil's first written submission, para. 133; Brazil's oral statement at the first substantive meeting, para. 39.

<sup>346</sup> Brazil's oral statement at the first substantive meeting, para. 39.

<sup>347</sup> Thailand's first written submission, para. 122.

<sup>348</sup> Thailand's second written submission, para. 36; Thailand's reply to Panel question No. 121.

<sup>349</sup> 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.<sup>350</sup>

*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.<sup>351</sup>

*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.<sup>352</sup> 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.<sup>353</sup> 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) ... ."<sup>354</sup> (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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<sup>350</sup> Brazil's second written submission, paras. 28-29; Thailand's second written submission, paras. 33-35.

<sup>351</sup> WCO's reply to Panel question No. 1 to the WCO.

<sup>352</sup> See United States' arguments in Appellate Body Report, *EC – Computer Equipment*, para. 38.

<sup>353</sup> WCO's reply to Panel question No. 1 to the WCO.

<sup>354</sup> 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.<sup>355</sup> 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.<sup>356</sup>

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*.<sup>357</sup>

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.<sup>358</sup>

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.<sup>359</sup>

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<sup>355</sup> 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".

<sup>356</sup> 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.

<sup>357</sup> EC's oral statement at the second substantive meeting, para. 54.

<sup>358</sup> Thailand's first written submission, para. 124; Thailand's reply to Panel question No. 121.

<sup>359</sup> 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.<sup>360</sup> 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)."<sup>361</sup>

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.<sup>362</sup> Brazil submits that the adjective "specific" means "clearly defined", "relating to, characterizing, or distinguishing a species" or "special, distinctive, or unique".<sup>363</sup> Brazil and Thailand submit that salting confers meat with specific, distinctive characteristics that distinguish salted meat from unsalted meat.<sup>364</sup> 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 homogeneously impregnated with salt cannot be thoroughly unsalted and the fact that such meat has more limited and specific uses.<sup>365</sup> Brazil and Thailand submit that, in contrast, the freezing of chicken does not modify the characteristics of the meat.<sup>366</sup>

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.<sup>367</sup> 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.<sup>368</sup> 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.<sup>369</sup> 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.<sup>370</sup>

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).<sup>371</sup> The European Communities submits that, in any

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<sup>360</sup> 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.

<sup>361</sup> 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.

<sup>362</sup> Brazil's first written submission, para. 150; Thailand's first written submission, para. 127.

<sup>363</sup> Brazil's first written submission, para. 150.

<sup>364</sup> Brazil's second written submission, paras. 50-51; Thailand's second written submission, paras. 24-29 and 45-47.

<sup>365</sup> 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.

<sup>366</sup> Brazil's first written submission, para. 154; Thailand's first written submission, para. 129.

<sup>367</sup> Brazil's reply to Panel question No. 72.

<sup>368</sup> Thailand's second written submission, paras. 26-27.

<sup>369</sup> Brazil's second written submission, para. 50.

<sup>370</sup> 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.

<sup>371</sup> 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.<sup>372</sup>

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.<sup>373</sup> 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.<sup>374</sup>

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.<sup>375</sup>

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."<sup>376</sup> 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.<sup>377</sup> 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.<sup>378</sup>

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<sup>372</sup> EC's oral statement at the second substantive meeting, para. 58.

<sup>373</sup> Brazil's oral statement at the second substantive meeting, para. 34; Thailand's second written submission, para. 48.

<sup>374</sup> 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.

<sup>375</sup> EC's reply to Panel question No. 74.

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

<sup>377</sup> Thailand's second written submission, para. 49.

<sup>378</sup> 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.<sup>379</sup>

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

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<sup>379</sup> 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.<sup>380</sup>

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.<sup>381</sup>

##### 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

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<sup>380</sup> Brazil's reply to Panel question No. 59 referring to Exhibit BRA-37.

<sup>381</sup> 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,<sup>382</sup> what is under examination is the meaning and scope of the tariff concession for heading 02.10 in the EC Schedule.<sup>383</sup> 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*.<sup>384</sup> 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.<sup>385</sup> 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.<sup>386</sup> 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.<sup>387</sup>

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<sup>382</sup> Brazil's reply to Panel's question No. 16.

<sup>383</sup> Brazil's reply to Panel question No. 77; Brazil's second written submission, para. 75.

<sup>384</sup> Brazil's second written submission, para. 69.

<sup>385</sup> Brazil's oral statement at the second substantive meeting, para. 42.

<sup>386</sup> Brazil's replies to Panel's question Nos. 16 and 77.

<sup>387</sup> 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*.<sup>388</sup> 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.<sup>389</sup>

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.<sup>390</sup>

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.<sup>391</sup> 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.<sup>392</sup>

#### *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.<sup>393</sup>

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

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<sup>388</sup> Thailand's oral statement at the first substantive meeting, para. 20; Thailand's second written submission, para. 68.

<sup>389</sup> Thailand's oral statement at the first substantive meeting, para. 21.

<sup>390</sup> EC's second written submission, para. 50.

<sup>391</sup> Brazil's oral statement at the second substantive meeting, para. 45.

<sup>392</sup> Brazil's oral statement at the second substantive meeting, paras. 46-48.

<sup>393</sup> 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, 2<sup>nd</sup> 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.<sup>394</sup>

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."<sup>395</sup>

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.<sup>396</sup> 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."<sup>397</sup>

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

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<sup>394</sup> We deal with the question of "consistency" of practice in paragraph 7.258 *et seq* below.

<sup>395</sup> *Yearbook of the International Law Commission* (1966) Vol. II, p. 222, para. 15.

<sup>396</sup> 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.

<sup>397</sup> Appellate Body Report, *EC – Computer Equipment*, para. 93.

European Communities.<sup>398</sup> It appears that, among these Members, the European Communities is the only one that imports the products at issue.<sup>399</sup> 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%.<sup>400</sup>

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.<sup>401</sup>

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.<sup>402</sup> 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.<sup>403</sup>

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.<sup>404</sup> The European Communities argues that, in any event, information taken from BTIs

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<sup>398</sup> EC's reply to Panel question No. 59.

<sup>399</sup> 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."

<sup>400</sup> Thailand's first written submission, para. 7.

<sup>401</sup> Brazil's first written submission, paras. 177-178; Exhibit BRA-14.

<sup>402</sup> EC's first written submission, paras. 52, 91-92.

<sup>403</sup> EC's first written submission, para. 178.

<sup>404</sup> 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.<sup>405</sup> The European Communities submits that a BTI gives no indication of the volume of imports to which it is applied.<sup>406</sup> 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.<sup>407</sup> 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.<sup>408</sup> 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.<sup>409</sup>

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.<sup>410</sup> 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.<sup>411</sup> 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."<sup>412</sup> Brazil submits that, in addition, the Appellate Body made clear that adverse inferences could and should be drawn in cases of refusal to cooperate.<sup>413</sup> 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.<sup>414</sup> 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.<sup>415</sup>

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

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<sup>405</sup> EC's second written submission, para. 51; EC's reply to Panel question No. 117.

<sup>406</sup> EC's second written submission, para. 51.

<sup>407</sup> EC's second written submission, para. 51; EC's reply to Panel question No. 117.

<sup>408</sup> EC's second written submission, para. 51; EC's reply to Panel question No. 117.

<sup>409</sup> EC's reply to Panel question No. 53.

<sup>410</sup> Brazil's second written submission, para. 72.

<sup>411</sup> 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.

<sup>412</sup> Brazil's comments on the EC's reply to Panel question No. 117 referring to Appellate Body Report, *Canada – Aircraft*, para. 187.

<sup>413</sup> Brazil's comments on the EC's reply to Panel question No. 117 referring to Appellate Body Report, *Canada – Aircraft*, para. 204.

<sup>414</sup> Brazil's comments on the EC's reply to Panel question No. 117.

<sup>415</sup> 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.<sup>416</sup> 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.<sup>417</sup> 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.<sup>418</sup> 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.<sup>419</sup>

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.<sup>420</sup> 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.<sup>421</sup>

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<sup>416</sup> 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.

<sup>417</sup> Brazil's second written submission, para. 76.

<sup>418</sup> Brazil's second written submission, para. 70.

<sup>419</sup> Thailand's oral statement at the first substantive meeting, para. 42.

<sup>420</sup> EC's reply to Panel question No. 54.

<sup>421</sup> 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.<sup>422</sup>

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."<sup>423</sup>

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.<sup>424</sup>

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*.<sup>425</sup>

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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<sup>422</sup> 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*.

<sup>423</sup> Appellate Body Report, *EC – Computer Equipment*, para. 96.

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

<sup>425</sup> 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.<sup>426</sup> 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.<sup>427</sup> 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.<sup>428</sup>

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,<sup>429</sup> these Exhibits indicate that, until September 2002, the products at issue, which were apparently covered by these BTIs, were classified under heading 02.10.<sup>430</sup> 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.<sup>431</sup> 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.<sup>432</sup> 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<sup>433</sup> and the European Communities<sup>434</sup> 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

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<sup>426</sup> EC's first written submission, paras. 52 and 91-92.

<sup>427</sup> Panel question No. 54.

<sup>428</sup> EC's first written submission, paras. 91-92.

<sup>429</sup> These BTIs are contained in Exhibit EC-24, Exhibit BRA-31 and Exhibits THA-24(a), 24(b) and 24(c).

<sup>430</sup> The earliest BTI among the ones the Panel has been provided is contained in Exhibit THA-24(a) and is dated May 1998.

<sup>431</sup> 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.

<sup>432</sup> This BTI is contained in Exhibit EC-26.

<sup>433</sup> See Tables at para. 177 of Brazil's first written submission and Exhibit BRA-14.

<sup>434</sup> 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.<sup>435</sup>

7.273 Concerning the *minutes of meetings of the EC Customs Code Committee*<sup>436</sup>, Brazil refers to an extract of the minutes of a meeting of the EC Customs Code Committee held on 25-26 September 2003<sup>437</sup> at which the classification of frozen salted/smoked bacon was discussed.<sup>438</sup> 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<sup>439</sup> and the minutes of a meeting of the EC Customs Code Committee held on 18 - 19 February 2002<sup>440</sup>.<sup>441</sup> Brazil also refers to these minutes.<sup>442</sup> We note the European Communities' statement that these minutes are non-binding.<sup>443</sup> 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.<sup>444</sup> 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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<sup>435</sup> 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.

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

<sup>437</sup> These minutes are contained in Exhibit BRA-32.

<sup>438</sup> Brazil's reply to Panel question No. 4.

<sup>439</sup> 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.

<sup>440</sup> These minutes are contained in Exhibit THA-23.

<sup>441</sup> Thailand's oral statement at the first substantive meeting, para. 39.

<sup>442</sup> Brazil's reply to Panel question No. 10 referring to Exhibit THA-22 and Exhibit THA-23.

<sup>443</sup> EC's reply to Panel question No. 45.

<sup>444</sup> EC's first written submission, paras. 52 and 91-92.

Communities under heading 02.10.<sup>445</sup> 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.<sup>446</sup> 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.<sup>447</sup> 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.<sup>448</sup> 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.<sup>449</sup>

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.<sup>450</sup> Thailand submits that, at the time of the conclusion of the WTO Agreement, Thailand did not import frozen salted chicken.<sup>451</sup> Further, Thailand submits that it has never imported salted frozen chicken

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<sup>445</sup> 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.

<sup>446</sup> Brazil's reply to Panel question No. 16.

<sup>447</sup> Thailand's second written submission, para. 68.

<sup>448</sup> Thailand's second written submission, para. 70.

<sup>449</sup> Thailand's second written submission, para. 72.

<sup>450</sup> Brazil's reply to Panel question No. 16.

<sup>451</sup> Thailand's second written submission, para. 70.

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

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.<sup>454</sup>

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.<sup>455</sup>

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.<sup>456</sup> 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*.<sup>457</sup> 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.<sup>458</sup>

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.<sup>459</sup> Similarly, Thailand submits that shipping companies hired by exporters handle export procedures and paperwork, including custom classification on export declaration forms.<sup>460</sup>

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

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<sup>452</sup> Thailand's oral statement at the first substantive meeting, para. 44.

<sup>453</sup> Thailand's reply to Panel question No. 16.

<sup>454</sup> EC's first written submission, paras. 57 and 180; EC's oral statement at the second substantive meeting, para. 49.

<sup>455</sup> 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.

<sup>456</sup> Brazil's oral statement at the first substantive meeting, para. 55; Brazil's reply to Panel's question No. 16.

<sup>457</sup> Brazil's reply to Panel's question No. 16.

<sup>458</sup> Brazil's comments on the EC's reply to Panel question No. 120 referring to Exhibits BRA-42(c) and BRA-42(d).

<sup>459</sup> Brazil's reply to Panel question No. 85.

<sup>460</sup> 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".<sup>461</sup> 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.<sup>462</sup>

*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.<sup>463</sup> As for export classification data, this appears to be inconsistent at least with respect to Brazil.<sup>464</sup> 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.<sup>465</sup> 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.<sup>466</sup> 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.<sup>467</sup>

7.286 In relation to the US bill of lading, the **United States**<sup>468</sup> 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

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<sup>461</sup> L/5470/Rev. 1.

<sup>462</sup> EC's reply to Panel question No.28 citing Appellate Body Report, *EC – Computer Equipment*, para. 109.

<sup>463</sup> 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.

<sup>464</sup> 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.

<sup>465</sup> 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.

<sup>466</sup> Exhibit BRA-39.

<sup>467</sup> Exhibit BRA-19.

<sup>468</sup> 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.<sup>469</sup>

7.287 **China**<sup>470</sup> 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.<sup>471</sup> 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.<sup>472</sup>

#### *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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<sup>469</sup> 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.

<sup>470</sup> China is a third party to this dispute.

<sup>471</sup> China's reply to Panel question No. 81.

<sup>472</sup> 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.<sup>473</sup> 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.<sup>474</sup> 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*.<sup>475</sup>

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*.<sup>476</sup>

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.<sup>477</sup> 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.<sup>478</sup> 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.<sup>479</sup> 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.<sup>480</sup>

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<sup>473</sup> Brazil's reply to Panel question No. 18.

<sup>474</sup> 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.

<sup>475</sup> Brazil's oral statement at the second substantive meeting, para. 37.

<sup>476</sup> Thailand's second written submission, paras. 57-66.

<sup>477</sup> EC's first written submission, para. 174.

<sup>478</sup> EC's first written submission, para. 175.

<sup>479</sup> EC's first written submission, para. 176.

<sup>480</sup> 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.<sup>481</sup>

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.<sup>482</sup> **Thailand** submits that the 1997 WCO Secretariat letter is of little probative value to the dispute before the Panel as its conclusions are tentative and are based on unclear facts.<sup>483</sup>

*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.<sup>484</sup> 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.<sup>485</sup> 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.<sup>486</sup> 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.<sup>487</sup>

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<sup>481</sup> EC's oral statement at the first substantive meeting, paras. 27-31 referring to Exhibit EC-19.

<sup>482</sup> Brazil's second written submission, para. 65.

<sup>483</sup> Thailand's second written submission, paras. 61 and 66.

<sup>484</sup> Brazil's second written submission, para. 65 referring to Exhibit BRA -35.

<sup>485</sup> Brazil's reply to Panel question No. 18.

<sup>486</sup> Brazil's reply to Panel question No. 18.

<sup>487</sup> 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*.<sup>488</sup>

#### 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.<sup>489</sup>

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*.<sup>490</sup>

#### 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

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<sup>488</sup> EC's second written submission, para. 39; EC's oral statement at the second substantive meeting, para. 48.

<sup>489</sup> WCO's reply to Panel question No. 8 to the WCO.

<sup>490</sup> 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*.<sup>491</sup> 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.<sup>492</sup>

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.<sup>493</sup> 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.<sup>494</sup> 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.<sup>495</sup> Brazil also adds that the Explanatory Notes to the European Communities' CN are non-binding instruments and are not part of EC legislation.<sup>496</sup>

#### 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*.

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<sup>491</sup> EC's reply to Panel question No. 75.

<sup>492</sup> EC's oral statement at the second substantive meeting, para. 70.

<sup>493</sup> Brazil's second written submission, para. 93; Thailand's second written submission, para. 92.

<sup>494</sup> Brazil's second written submission, para. 94.

<sup>495</sup> Thailand's second written submission, para. 92.

<sup>496</sup> 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.<sup>497</sup> 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.<sup>498</sup> 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.<sup>499</sup>

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.<sup>500</sup>

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.<sup>501</sup> Brazil argues that this criterion ensures legal certainty and facilitates classification and verification by customs authorities at the border.<sup>502</sup> Thailand further submits that customs classification must depend on the assessment of the objective characteristics of the product at the border<sup>503</sup> and notes that this principle has been clearly recognised by the ECJ.<sup>504</sup>

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.<sup>505</sup> 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.<sup>506</sup> 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

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<sup>497</sup> Brazil's first written submission, para. 160; Thailand's first written submission, para. 90.

<sup>498</sup> Brazil's first written submission, para. 160.

<sup>499</sup> Brazil's first written submission, para. 161.

<sup>500</sup> Thailand's first written submission, paras. 92-93.

<sup>501</sup> 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.

<sup>502</sup> Brazil's reply to Panel question No. 13.

<sup>503</sup> Thailand's oral statement at the first substantive meeting, paras. 8, 51-53.

<sup>504</sup> Thailand's second written submission, para. 3.

<sup>505</sup> EC's replies to Panel question Nos. 90 and 105.

<sup>506</sup> EC's reply to Panel question No. 89.

issue in the *Gausepohl* case<sup>507</sup> and in the present dispute, in practice, there has been little dispute regarding the type of product that falls under heading 02.10.<sup>508</sup> 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.<sup>509</sup> 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).<sup>510</sup> The European Communities submits that it applies the principle of preservation irrespective of the origin of imports.<sup>511</sup>

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.<sup>512</sup>

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'".<sup>513</sup>

#### 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.<sup>514</sup> 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

<sup>507</sup> This case is discussed below in paras. 7.372 *et seq.*

<sup>508</sup> EC's reply to Panel question No. 23.

<sup>509</sup> EC's reply to Panel question No. 44.

<sup>510</sup> EC's reply to Panel question No. 91.

<sup>511</sup> EC's reply to Panel question No. 44.

<sup>512</sup> Brazil's comments on the WCO's reply to Panel question No. 11 to the WCO.

<sup>513</sup> 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.

<sup>514</sup> 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.<sup>515</sup>

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.<sup>516</sup> 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.<sup>517</sup>

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.<sup>518</sup> 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.<sup>519</sup>

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.<sup>520</sup>

(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

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<sup>515</sup> EC's first written submission, para. 164.

<sup>516</sup> Brazil's oral statement at the first substantive meeting, paras. 46-50.

<sup>517</sup> Brazil's reply to Panel question No. 80.

<sup>518</sup> Thailand's oral statement at the first substantive meeting, para. 46.

<sup>519</sup> Thailand's oral statement at the first substantive meeting, para. 6.

<sup>520</sup> 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.<sup>521</sup> 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.<sup>522</sup>

(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.<sup>523</sup>

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

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<sup>521</sup> WCO's reply to Panel question No. 1 to the WCO.

<sup>522</sup> WCO's reply to Panel question No. 11 to the WCO.

<sup>523</sup> 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."<sup>524</sup>

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.<sup>525</sup>

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."<sup>526</sup>

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.<sup>527</sup> 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.<sup>528</sup> However, despite questioning by the Panel and by Brazil<sup>529</sup>, the European

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<sup>524</sup> Appellate Body Report, *EC – Computer Equipment*, para. 82.

<sup>525</sup> Appellate Body Report, *EC – Computer Equipment*, paras. 82 and 84.

<sup>526</sup> Appellate Body Report on *Argentina – Textiles and Apparel*, at para. 47.

<sup>527</sup> 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.

<sup>528</sup> 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.

<sup>529</sup> Panel question No. 118. Brazil's question Nos. 13 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.<sup>530</sup> 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<sup>531</sup> but submits that this is not problematic because products classifiable under heading 02.10 are "readily detectable".<sup>532</sup> However, if a product arrives at the EC border that is salted and then frozen, (as in the case of the products at issue)<sup>533</sup>, 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,<sup>534</sup> 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?"<sup>535</sup>

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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<sup>530</sup> 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.

<sup>531</sup> EC's reply to Panel question No. 23.

<sup>532</sup> EC's replies to Panel question Nos. 44 and 91.

<sup>533</sup> 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).

<sup>534</sup> 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.

<sup>535</sup> 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.<sup>536</sup>

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.

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<sup>536</sup> 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, 2<sup>nd</sup> 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 it 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*.<sup>537</sup> 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*

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<sup>537</sup> 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.<sup>538</sup> 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.<sup>539</sup> 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.<sup>540</sup> 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.<sup>541</sup> 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.<sup>542</sup> 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.<sup>543</sup> 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.<sup>544</sup>

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.<sup>545</sup> 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.<sup>546</sup> 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.<sup>547</sup>

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*)."<sup>548</sup> 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

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<sup>538</sup> EC's second written submission, para. 107.

<sup>539</sup> EC's second written submission, paras. 103 and 107 relying upon Exhibit EC-9.

<sup>540</sup> EC's second written submission, paras. 104-105.

<sup>541</sup> EC's reply to Panel question No. 58.

<sup>542</sup> EC's second written submission, para. 107.

<sup>543</sup> EC's second written submission, paras. 96 and 110.

<sup>544</sup> EC's second written submission, para. 118.

<sup>545</sup> Thailand's reply to Panel question No. 78.

<sup>546</sup> Thailand second written submission, para. 76.

<sup>547</sup> Thailand's comments on the EC's reply to Panel question No. 87.

<sup>548</sup> The Modalities Agreement is contained in Exhibit EC-9.

accordance with customary rules of interpretation of public international law"<sup>549</sup>, 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.<sup>550</sup>

### 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.<sup>551</sup> 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.<sup>552</sup> 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.<sup>553</sup> 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.<sup>554</sup> According to the European Communities, in any event, the critical date should not be later than 15 December 1993.<sup>555</sup> 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".<sup>556</sup> The European Communities concedes that, strictly speaking, events occurring after 15 December 1993 may qualify as "circumstances of the conclusion".<sup>557</sup> 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

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<sup>549</sup> Article 3.2 of the DSU.

<sup>550</sup> Brazil's reply to Panel question No. 78.

<sup>551</sup> EC's reply to Panel question No. 58; EC's second written submission, para. 107.

<sup>552</sup> EC's second written submission, para. 62.

<sup>553</sup> EC's second written submission, para. 109.

<sup>554</sup> EC's second written submission, para. 107.

<sup>555</sup> EC's second written submission, paras. 96 and 110.

<sup>556</sup> EC's second written submission, paras. 110-111.

<sup>557</sup> 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.<sup>558</sup> 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.<sup>559</sup>

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".<sup>560</sup> 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.<sup>561</sup> 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.<sup>562</sup> 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.<sup>563</sup> 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.<sup>564</sup> 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.<sup>565</sup>

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.<sup>566</sup> 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.<sup>567</sup>

#### 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

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<sup>558</sup> EC's second written submission, para. 112.

<sup>559</sup> EC's second written submission, para. 96.

<sup>560</sup> Brazil's oral statement at the second substantive meeting, para. 64.

<sup>561</sup> Brazil's oral statement at the second substantive meeting, para. 66.

<sup>562</sup> Brazil's oral statement at the second substantive meeting, para. 67.

<sup>563</sup> Brazil's oral statement at the second substantive meeting, para. 68.

<sup>564</sup> Brazil's oral statement at the second substantive meeting, para. 69 referring to Appellate Body Report, *EC – Computer Equipment*, para. 109.

<sup>565</sup> Brazil's oral statement at the second substantive meeting, para. 70.

<sup>566</sup> Brazil's reply to Panel question No. 122; Thailand's reply to Panel question No. 122; EC's reply to Panel question No. 122.

<sup>567</sup> 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.<sup>568</sup>

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*.<sup>569</sup>

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.<sup>570</sup>

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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<sup>568</sup> 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, 2<sup>nd</sup> edition (1984) p. 141.

<sup>569</sup> Appellate Body Report, *EC – Computer Equipment*, paras. 92 and 94.

<sup>570</sup> 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 circumstances 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".<sup>571</sup> 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.<sup>572</sup>

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.<sup>573</sup> 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

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<sup>571</sup> 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, 2<sup>nd</sup> edition (1984) p. 116.

<sup>572</sup> 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.

<sup>573</sup> 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*.<sup>574</sup>

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.<sup>575</sup> 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.<sup>576</sup> 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.<sup>577</sup> 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.<sup>578</sup> According to Brazil and Thailand, WTO Members negotiated tariff concessions based on that definition of "salted" meat.<sup>579</sup> 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".<sup>580</sup> 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

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<sup>574</sup> 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 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 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, 2<sup>nd</sup> 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*.

<sup>575</sup> Brazil's reply to Panel question No. 58; Thailand's first written submission, paras. 135-136.

<sup>576</sup> Brazil's reply to Panel question No. 56; Thailand's reply to Panel question No. 75; Thailand's second written submission, para. 78.

<sup>577</sup> Brazil's first written submission, para. 21; Thailand's first written submission, paras. 136-137.

<sup>578</sup> Brazil's first written submission, para. 98.

<sup>579</sup> Brazil's first written submission, para. 176; Thailand's second written submission, para. 79.

<sup>580</sup> 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.<sup>581</sup>

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.<sup>582</sup> 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.<sup>583</sup>

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.<sup>584</sup> 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.<sup>585</sup> 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.<sup>586</sup> 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.<sup>587</sup> Brazil argues that the tariff concession and corresponding definition were accepted by the other Members when they signed the Marrakesh Protocol.<sup>588</sup> According to Brazil, the evidence of such acceptance is the signature of the Marrakesh Protocol on 15 April 1994.<sup>589</sup>

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.<sup>590</sup> 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.<sup>591</sup> 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.<sup>592</sup>

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<sup>581</sup> Brazil's reply to Panel question No. 56.

<sup>582</sup> 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.

<sup>583</sup> EC's comments on Brazil's reply to Panel question No. 81.

<sup>584</sup> Brazil's reply to Panel question No. 58.

<sup>585</sup> Brazil's reply to Panel question No. 77.

<sup>586</sup> Thailand's first written submission., para. 30.

<sup>587</sup> Brazil's reply to Panel question No. 77.

<sup>588</sup> Brazil's reply to Panel question No. 57.

<sup>589</sup> Brazil's reply to Panel question No. 81.

<sup>590</sup> EC's oral statement at the first substantive meeting, paras. 39-43.

<sup>591</sup> EC's second written submission, para. 8.

<sup>592</sup> 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.<sup>593</sup> 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.<sup>594</sup> 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.<sup>595</sup>

7.353 In response, the **European Communities** disputes that EC Regulation No. 535/94 was an act implementing the Uruguay Round Agreements.<sup>596</sup> 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.<sup>597</sup> 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.<sup>598</sup>

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.<sup>599</sup> 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.<sup>600</sup>

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.<sup>601</sup> 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.<sup>602</sup> Brazil and Thailand note that the

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<sup>593</sup> Thailand's first written submission, paras. 33-35.

<sup>594</sup> Thailand's comments on the EC's reply to Panel question No. 113.

<sup>595</sup> Thailand's first written submission, para. 139.

<sup>596</sup> EC's first written submission, paras. 88-89.

<sup>597</sup> EC's first written submission, paras. 88-89.

<sup>598</sup> EC's first written submission, para. 206.

<sup>599</sup> Brazil's reply to Panel question No. 122.

<sup>600</sup> Thailand's comments on the EC's reply to Panel question No. 87.

<sup>601</sup> Thailand's first written submission, para.137; Brazil's first written submission, para. 172.

<sup>602</sup> 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.<sup>603</sup> 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.<sup>604</sup> 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.<sup>605</sup>

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.<sup>606</sup> 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.<sup>607</sup> Further, the European Communities argues that, in *Gausepohl*<sup>608</sup>, 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.<sup>609</sup> 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.<sup>610</sup> 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.<sup>611</sup>

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.<sup>612</sup> 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.<sup>613</sup>

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.<sup>614</sup> Further, the European Communities rejects the argument that EC Regulation No. 535/94 excluded the principle of preservation because

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<sup>603</sup> Brazil's first written submission, para. 98; Brazil's reply to Panel question No. 77; Thailand's first written submission, para. 137.

<sup>604</sup> Thailand's oral statement at the first substantive meeting, para. 27.

<sup>605</sup> Thailand's second written submission, paras. 80-81.

<sup>606</sup> EC's first written submission, para. 201.

<sup>607</sup> EC's first written submission, para. 203.

<sup>608</sup> This case is dealt with in paragraph 7.372 *et seq.*

<sup>609</sup> EC's reply to Panel question No. 45.

<sup>610</sup> EC's first written submission, paras. 88-89; EC's reply to Panel question No. 93.

<sup>611</sup> EC's first written submission, paras. 88-89; EC's reply to Panel question No. 93.

<sup>612</sup> Brazil's comments on the EC's reply to Panel question No. 108.

<sup>613</sup> Brazil's comments on EC's reply to Panel question No. 93.

<sup>614</sup> 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.<sup>615</sup> 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.<sup>616</sup> The European Communities submits that, therefore, such documents provide no basis for interpreting EC law.<sup>617</sup>

#### *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."<sup>618</sup> 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.<sup>619</sup> 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".<sup>620</sup>

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,<sup>621</sup> 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*

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<sup>615</sup> EC's reply to Panel question No. 45.

<sup>616</sup> EC's reply to Panel question No. 45.

<sup>617</sup> EC's second written submission, para. 87.

<sup>618</sup> Appellate Body Report, *EC – Computer Equipment*, para. 94.

<sup>619</sup> 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.

<sup>620</sup> EC's second written submission, paras. 96 and 112.

<sup>621</sup> 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 homogeneously 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.<sup>622</sup> 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.<sup>623</sup> 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]."<sup>624</sup>

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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<sup>622</sup> 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.

<sup>623</sup> We refer to our conclusions regarding EC classification practice for the products at issue during 1996-2002 in paragraph 7.303.

<sup>624</sup> 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.<sup>625</sup> 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.<sup>626</sup>

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.<sup>627</sup> 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.<sup>628</sup> 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.<sup>629</sup>

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.<sup>630</sup>

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.<sup>631</sup>

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.<sup>632</sup> 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.<sup>633</sup>

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.<sup>634</sup> **Thailand** explains that negotiators could not have been

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<sup>625</sup> Brazil's reply to Panel question No. 75; Thailand's reply to Panel question No. 75.

<sup>626</sup> Brazil's oral statement at the first substantive meeting, para. 57.

<sup>627</sup> EC's reply to Panel question No. 75.

<sup>628</sup> EC's second written submission, para. 68.

<sup>629</sup> EC's second written submission, para. 73.

<sup>630</sup> Brazil's second written submission, para. 84; Thailand's reply to Panel question No. 75.

<sup>631</sup> EC's second written submission, para. 76.

<sup>632</sup> EC's reply to Panel question No. 110.

<sup>633</sup> EC's reply to Panel question No. 122.

<sup>634</sup> 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.<sup>635</sup>

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<sup>636</sup>, nor to the products at issue.<sup>637</sup> 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.<sup>638</sup> 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.<sup>639</sup>

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".<sup>640</sup>

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.<sup>641</sup> 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.<sup>642</sup>

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.<sup>643</sup> 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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<sup>635</sup> Thailand's comments on the EC's reply to Panel question No. 87.

<sup>636</sup> 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.

<sup>637</sup> Brazil's oral statement at the first substantive meeting, para. 66.

<sup>638</sup> Thailand's oral statement at the second substantive meeting, para. 3.

<sup>639</sup> Brazil's second written submission, para. 90.

<sup>640</sup> EC's reply to Panel question No. 111.

<sup>641</sup> 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.

<sup>642</sup> Thailand's second written submission, para. 93.

<sup>643</sup> Brazil's second written submission, para. 91; Thailand's reply to Panel question No. 75.

was not sufficient to ensure "long-term preservation".<sup>644</sup> 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.<sup>645</sup> 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.<sup>646</sup> 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.<sup>647</sup> Brazil accepts that all parties in the *Gausepohl* case assumed that salting constitutes a meat preserving process.<sup>648</sup>

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.<sup>649</sup> 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.<sup>650</sup> 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.<sup>651</sup> 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".<sup>652</sup> 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.<sup>653</sup>

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.<sup>654</sup> 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.<sup>655</sup> 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

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<sup>644</sup> 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.

<sup>645</sup> Brazil's oral statement at the first substantive meeting, paras. 79-82; Thailand's second written submission, para. 93.

<sup>646</sup> Brazil's oral statement at the first substantive meeting, paras. 79-82; Thailand's oral statement at the first substantive meeting, paras. 24-26.

<sup>647</sup> Thailand's oral statement at the first substantive meeting, paras. 24-26.

<sup>648</sup> Brazil's oral statement at the first substantive meeting, para. 70.

<sup>649</sup> EC's reply to Panel question No. 40.

<sup>650</sup> EC's reply to Brazil question No. 11.

<sup>651</sup> EC's reply to Panel question No. 47.

<sup>652</sup> EC's reply to Panel question No. 112.

<sup>653</sup> EC's second written submission, para. 74.

<sup>654</sup> Brazil's comments on the EC's reply to Panel question No. 112; Thailand's second written submission, para. 92.

<sup>655</sup> Thailand second written submission, para. 92.

transportation."<sup>656</sup> 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.<sup>657</sup> 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.<sup>658</sup>

7.384 The **European Communities** submits that, within the European Communities, the authoritative source of interpretation of the HS is the ECJ.<sup>659</sup> The European Communities submits that, should any conflict occur between EC legal instruments and ECJ judgements interpreting the HS, ECJ judgements would prevail.<sup>660</sup> 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.<sup>661</sup>

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."<sup>662</sup> 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.<sup>663</sup> 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.<sup>664</sup> 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.<sup>665</sup>

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.<sup>666</sup> However, the European Communities submits that, there is nothing to suggest that Additional Note 6(a) reversed the ECJ's judgement in *Dinter*.<sup>667</sup> According to the European Communities, in *Gijs van de Kolk-Douane Expéditeur BV*, the

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<sup>656</sup> 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.

<sup>657</sup> Brazil's comments on the EC's reply to Panel question No. 112 referring to Exhibit EC-32.

<sup>658</sup> Brazil's comments on the EC's reply to Panel question No. 112.

<sup>659</sup> EC's reply to Panel question No. 41.

<sup>660</sup> EC's reply to Panel question No. 113; EC's reply to Thailand question No. 1.

<sup>661</sup> EC's oral statement at the first substantive meeting, paras. 34-38.

<sup>662</sup> Thailand's oral statement at the second substantive meeting, para. 7 referring to Exhibit THA-31; Thailand's second written submission, para. 80.

<sup>663</sup> Thailand's oral statement at the second substantive meeting, para. 8.

<sup>664</sup> Thailand's oral statement at the second substantive meeting, para. 7; Thailand's second written submission, paras. 87-89.

<sup>665</sup> Thailand's oral statement at the second substantive meeting, para. 10.

<sup>666</sup> EC's reply to Panel question No. 115.

<sup>667</sup> 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*.<sup>668</sup>

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.<sup>669</sup> **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.<sup>670</sup> 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.<sup>671</sup> 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.<sup>672</sup>

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.<sup>673</sup> 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.<sup>674</sup> 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

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<sup>668</sup> EC's reply to Panel question No. 114.

<sup>669</sup> Brazil's comments on the EC's reply to Panel question No. 115.

<sup>670</sup> Thailand's reply to Panel question No. 114.

<sup>671</sup> Thailand's comments on the EC's reply to Panel question No. 114.

<sup>672</sup> Thailand's comments on the EC's reply to Panel question No. 113.

<sup>673</sup> EC's reply to Panel question No. 113.

<sup>674</sup> 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.<sup>675</sup>

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.<sup>676</sup> 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.<sup>677</sup> 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.<sup>678</sup> 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.<sup>679</sup> 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.<sup>680</sup>

#### *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

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<sup>675</sup> EC's oral statement at the first substantive meeting, paras. 34-38; EC's reply to Panel question No. 41.

<sup>676</sup> Brazil's oral statement at the second substantive meeting, para. 57; Brazil's comments on the EC's reply to Panel question No. 93.

<sup>677</sup> Exhibit BRA-23, Article 1.1 of Regulation No. 2658/87.

<sup>678</sup> Exhibit BRA-6.

<sup>679</sup> Brazil's comments on the EC's reply to Panel question No. 113.

<sup>680</sup> Brazil's comments on the EC's reply to Panel question No. 113.

*Vienna Convention*.<sup>681</sup> 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.<sup>682</sup> 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<sup>683</sup>, 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.<sup>684</sup> 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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<sup>681</sup> 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.

<sup>682</sup> Brazil's second written submission, para. 84; Thailand's reply to Panel question No. 75.

<sup>683</sup> 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.

<sup>684</sup> 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."<sup>685</sup>

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".<sup>686</sup> 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".<sup>687</sup> 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".<sup>688</sup> 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."<sup>689</sup>

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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<sup>685</sup> Exhibit EC-14: *Gausepohl-Fleisch GmbH v Oberfinanzdirektion Hamburg*, ECR [1993], p. I -3047 and p. I -3066, para. 16.

<sup>686</sup> Exhibit EC-14: *Gausepohl-Fleisch GmbH v Oberfinanzdirektion Hamburg*, ECR [1993], p. I -3066, para. 10.

<sup>687</sup> Exhibit EC-14: *Gausepohl-Fleisch GmbH v Oberfinanzdirektion Hamburg*, ECR [1993], p. I -3066, para. 11.

<sup>688</sup> Exhibit EC-14: *Gausepohl-Fleisch GmbH v Oberfinanzdirektion Hamburg*, ECR [1993], p. I -3067, para. 12.

<sup>689</sup> 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.<sup>690</sup>

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].<sup>691</sup>

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.<sup>692</sup> 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<sup>693</sup> 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

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<sup>690</sup> We again refer to our conclusions regarding EC classification practice regarding the products at issue during 1996-2002 in paragraph 7.303.

<sup>691</sup> Exhibit THA-22.

<sup>692</sup> EC's reply to Thailand's question No. 1 following the first substantive meeting.

<sup>693</sup> 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).<sup>694</sup> 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.<sup>695</sup> 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.<sup>696</sup> 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'".<sup>697</sup> 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

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<sup>694</sup> EC's reply to Panel question No. 115.

<sup>695</sup> Case 38-75, *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrichten en accijnzen*, 19 November 1975, ECR [1975], page 01439, at para. 10 contained in Exhibit THA-31.

<sup>696</sup> See paragraph 7.401 above where aspects of these minutes have been excerpted.

<sup>697</sup> 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.<sup>698</sup> 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.<sup>699</sup> 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.<sup>700</sup>

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.<sup>701</sup> 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.<sup>702</sup>

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.<sup>703</sup> 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.<sup>704</sup> Therefore, according to Thailand, if the Additional Note contains a clear rule, the Explanatory Notes cannot modify its meaning.<sup>705</sup> 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.<sup>706</sup> 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.<sup>707</sup> Thailand

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<sup>698</sup> EC's reply to Panel question No. 75.

<sup>699</sup> EC's reply to Thailand's question No. 2 following the first substantive meeting.

<sup>700</sup> EC's oral statement at the first substantive meeting, paras. 34-38.

<sup>701</sup> Brazil's second written submission, para. 83; Thailand's reply to Panel question No. 75.

<sup>702</sup> Brazil's reply to Panel question No. 75.

<sup>703</sup> 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.

<sup>704</sup> 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.

<sup>705</sup> 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.

<sup>706</sup> Brazil's oral statement at the first substantive meeting, para. 66; Thailand's second written submission, para. 82.

<sup>707</sup> 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*.<sup>708</sup>

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.<sup>709</sup>

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.<sup>710</sup> 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.<sup>711</sup>

#### *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.<sup>712</sup> 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.<sup>713</sup> In contrast, the ECJ has made it clear that Additional Notes become part of the headings to which they relate and have binding effect.<sup>714</sup> 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

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<sup>708</sup> Thailand's reply to Panel question No. 75; Thailand's second written submission, para. 92.

<sup>709</sup> EC's oral statement at the second substantive meeting, para. 70.

<sup>710</sup> Brazil's second written submission, para. 93; Thailand's second written submission, para. 92.

<sup>711</sup> Brazil's second written submission, para. 94.

<sup>712</sup> 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.

<sup>713</sup> Case 149-73, *Otto Witt KG v Hauptzollamt Hamburg-Ericus*, 12 December 1973, ECR [1973] page 01587, para. 3 contained in Exhibit THA-33.

<sup>714</sup> Case 38-75, *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrichten 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.<sup>715</sup> 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).<sup>716</sup>

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.<sup>717</sup>

##### *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.<sup>718</sup>

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<sup>715</sup> Thailand's second written submission, paras. 90-91; Thailand's oral statement at the second substantive meeting, paras. 11 and 26.

<sup>716</sup> Thailand's oral statement at the second substantive meeting, para. 12.

<sup>717</sup> EC's reply to Panel question No. 109 referring to Exhibit EC-34.

<sup>718</sup> 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".<sup>719</sup>

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.<sup>720</sup>

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.<sup>721</sup> 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.<sup>722</sup> 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.<sup>723</sup>

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."<sup>724</sup>

#### 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 –

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<sup>719</sup> EC's oral statement at the first substantive meeting, para. 33.

<sup>720</sup> US reply to Panel question No. 86.

<sup>721</sup> Brazil's oral statement at the second substantive meeting, para. 71; Thailand's second written submission, paras. 54-55.

<sup>722</sup> Brazil's oral statement at the second substantive meeting, para. 71 referring to Exhibit BRA-39.

<sup>723</sup> Thailand's oral statement at the second substantive meeting, paras. 30-31.

<sup>724</sup> 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*.<sup>725</sup> 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.<sup>726</sup>

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<sup>725</sup> 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, 2<sup>nd</sup> edition (1984) p. 138.

<sup>726</sup> 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 Thailand.

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.

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