ANNEX C

RESPONSES TO QUESTIONS BY THE PANEL AND OTHER PARTIES

ANNEX C-1

RESPONSES BY BRAZIL TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(14 October 2004)

FOR BRAZIL:

1. In its Panel request, Brazil identifies "the measures at issue" as EC Regulation 1223/2002 and EC Commission Decision of 31 January 2003. Is Brazil challenging these measures as independent and autonomous measures? If not, please explain.

In the request for the establishment of a Panel, Brazil identified the following as the specific measures at issue:

(1) Commission Regulation (EC) No. 1223/2002, published in the Official Journal of the EC on 9 July 2002, concerning the classification of certain goods in the Combined Nomenclature (CN); and

(2) EC Commission Decision of 31 January 2003, published in the Official Journal of the EC on 12 February 2003, concerning the validity of certain binding tariff information (BTI) issued by the Federal Republic of Germany.

These are the measures being challenged.

Nonetheless, Brazil considers that certain measures, namely Regulations No. 1871/2003 and No. 2344/2003, came to pass as a result of the changes in classification and tariff treatment brought about by Regulation No. 1223/2002 and Commission Decision of 31 January 2003. To be exact, because Regulation No. 1223/2002 and EC Commission Decision modified – or gave a new interpretation to – the scope and definition of products falling under subheading 0207.14.10 so as to include "other salted meat" of subheading 0210.99.39; the EC was required to adjust the then existing definition of "salted meat" of heading 0210 in its Combined Nomenclature to avoid conflict with the new interpretation of the definition and scope of subheading 0207.14.10. This change in the definition of "salted meat" of heading 0210 occurred by means of Regulations No. 1871/2003 and No. 2344/2003. These measures were published in the EC's Official Journal a little over a month after Brazil made its formal request for the establishment of a Panel.

Brazil considers that if Regulation No. 1223/2002 and Commission Decision of 31 January 2003 are found to be inconsistent with the EC's obligations under Article II of the GATT 1994 and the Panel recommends that the EC bring these measures into conformity; Regulations No. 1871/2003 and No. 2344/2003, which stem from Regulation No. 1223/2002 and Commission Decision, would consequently also have to be brought into conformity.

In line with our understanding, the Panel in *Argentina – Footwear* concluded that measures not listed in the panel request or legal acts that occur subsequent to the listed measure may properly fall within a Panel's terms of reference if they are "closely related" to a measure listed in the Panel request.[1] The Implementation Panel in *Australia – Salmon*[2] and the Panel in *Japan – Film*[3] also

[1] WT/DS121/R, paras. 8.23 to 8.46.
[2] WT/DS18/RW, para. 7.10.
[3] WT/DS44/R, para. 10.8.

considered "closely related measures", "implementing measures" or measures which have a "clear relationship" to be within the terms of reference.

Moreover, the Panel in *EC – Bananas III*[4] established that the identification of the general banana "regime" was sufficient to permit the complainants' challenge against "subsequent" legislation. Regulations No. 1871/2003 and No. 2344/2003 were issued after the establishment of the Panel in the present case, therefore, these regulations could not have been mentioned in the request for establishment of the Panel. Paragraph 8.34 of the panel report in *Argentina – Footwear (EC)* mentions that: *"Argentina's procedural objections concern modifications of the definitive safeguard measure which is a situation quite similar to the "subsequent EC legislation, regulations and administrative measures ... which implement, supplement and amend [the EC banana] regime" and were found to be within that panel's terms of reference."*

Regulations No. 1871/2003 and No. 2344/2003 "further refine and implement the basic regulation"[5]: EC Regulation No. 1223/2002. Therefore, in order to secure a positive solution to the dispute, as required by article 3.7 of the DSU, these Regulations also fall within the Panel's terms of reference and shall also be brought into conformity if found to be in violation of the WTO Agreement.

2. Brazil is requested to provide proof of its assertion in paragraph 3 of its first written submission that it commenced exporting salted chicken to the EC in 1998 in response to requests from the European processing industry.

Brazil is providing in Exhibit BRA-29 correspondences, invoices, bills of lading and purchase orders of sales of salted chicken meat from Brazil to the EC dated as far back as 1998. Brazil stresses that all documents contained in Exhibit BRA-29 and all information therein (including names of importers and processors) are highly sensitive and **confidential** and should be treated as such during and after these proceedings.

We understand that the EC does not dispute that Brazil effectively started exporting salted chicken to the EC, in 1998, under heading 0210. We understand that the EC is questioning whether there is "demand" in Europe for the product salted chicken meat. In that regard and in addition to Exhibit BRA-29, Brazil is submitting Exhibit BRA-30 with letters from European companies attesting why they prefer salted chicken meat over unsalted chicken meat. We note that the last two letters in Exhibit BRA-30 show precisely the opposite situation: European companies that sell chicken meat for direct consumption and cannot use salted meat for that end-use. Brazil again emphasises that all letters and information contained in Exhibit BRA-30, specially names of importers and processors, are **confidential** and should be treated as such during and after these proceedings.

3. With reference to paragraphs 50, 177 and 178 of its first written submission, Brazil is requested to provide copies of BTIs that prove that the specific products at issue in this dispute (i.e. frozen boneless chicken cuts with a salt content of more than 1.2%) were classified under heading 0210.90.20 up until the enactment of EC Regulation 1223/2002.

To the best of Brazil's knowledge, binding tariff information (BTI) means tariff information issued by customs authorities of EC Member States that is binding on the administration of all Community Member States.[6] Once BTIs are issued, they are introduced into a data-base run by the EC Commission and are legally valid in all Member States, regardless of the issuing Member State. The holder of a BTI, the person in whose name the binding information is issued, must be able to

[4] WT/DS27/R, para. 7.27.

[5] *Id*.

[6] Article 5.1 of Commission Regulation (EEC) No. 2454/93, of 2 July 1993, laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code.

prove that for tariff purposes the goods declared correspond in every respect to those described in the information.[7] BTIs are generally valid for a period of six years, counting from the date they are issued.[8]

Considering the above, Brazil notes that BTI is information that EC authorities and BTI holders (importers) have easy access to; it is not information that non-EU producers/exporters or the Brazilian Government can easily obtain. Brazil stresses that the Communities are the only Party to this dispute that has full and immediate access to the BTIs issued by its Member States and that, under Article 13 of the DSU, the Panel has the right to request this information from the EC. In *Canada – Aircraft*, the Appellate Body concluded that Members are "*under a duty and an obligation to 'respond promptly and fully' to requests made by panels for information under Article 13.1 of the DSU.*"[9] In addition, the Appellate Body made clear that adverse inferences could and should be drawn in case of refusal to cooperate: "*a refusal to provide information requested by the panel may lead to inferences being drawn about the inculpatory character of the information withheld*."[10]

Nonetheless, in seeking to provide the Panel a proper response, Brazil was able to attain copies of some BTIs issued for frozen boneless chicken cuts with a salt content of more than 1.2% from Brazil that were classified under subheading 0210.99.39.[11] Furthermore, Brazil points out that Thailand submitted as Exhibits THA-24(b) and THA-24(c) BTIs for frozen salted chicken with a salt content of over 1.2% under subheading 0210.99.39 that also came from Brazil.

Moreover, Brazil again recalls that the EC has not denied that BTIs classifying the product at issue under heading 0210 have been issued since Brazil started exporting it to the European market.

We also recall that at the first meeting of the Panel with the parties, Brazil asked the EC for means of accessing BTIs issued by the Member States. The EC delegation did not offer any indication of what Brazil could do, or would have to do, to obtain such information.

4. In paragraph 102 of Brazil's first written submission, Brazil relies upon scientific literature which it says indicates that when used "in conjunction with other preserving processes, such as refrigeration, dissection (*sic*) and smoking (…) salt exerts a good microbicidal effect at concentrations as low as 1-3%". Could Brazil comment on the fact that the reference to "smoking" in this quotation indicates that smoking, being one of the terms contained in heading 0210 of the EC Schedule, is used as a preservative.

Brazil has previously provided that it is possible for some meat, prepared by salting, drying or smoking, to also be preserved by those processes.[12] We have also submitted that salting is a preparation process that may serve many purposes, including – but not limited to – preservation.[13] In addition, preservation is not an absolute and unequivocal concept. A product may undergo a process that allows preservation for entirely different time spans: from a few hours to indefinite duration. Therefore, and within our understanding, preparation by smoking may in some cases also serve to preserve meat for varying spans of time but that is certainly not the only or main reason why meat is smoked.

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[7] Article 12.3.4 of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code.
[8] Article 12.4 of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code.
[9] WT/DS70/AB/R, para. 187.
[10] *Id*, para.204.
[11] Exhibit BRA-31.
[12] Brazil's First Written Submission, para. 40.
[13] Brazil's First Written Submission, para. 23.

In Exhibit BRA-16, we have submitted some literature regarding the process of smoking and its characteristics. In particular, we have provided that "*smoking is understood as the process of applying smoke to food products, in which the smoke is produced by the incomplete combustion of some previously selected woods. Smoked products can be defined as being those products which (…) are submitted to smoking process in order to confer them a characteristic aroma and flavor, in addition to a longer shelf life, by means of partial dehydration. The smoking process is not solely used with the purpose of preserving food, but also as part of a technology capable of conferring on smoked products organoleptic characteristics such as a pleasing color, flavor, and aroma. (…). They obtain an aroma and taste which are characteristic of smoked meat products*".[14] We have also provided that "*even though the majority of smoked meat products present greater stability and a longer shelf-life (…); still, in order to prevent alterations, other means of preservation are required.*"[15] We have also cited in our oral statement that some smoked processes are **insufficient** to inhibit outgrowth of certain poisonous organisms and to avoid risk some smoked fish must remain frozen from the time of production to cooking and/or consumption.[16]

But perhaps more important and revealing is the fact that some EC Member States concede that salting and/or smoking is what gives meat its character even when freezing is required to preserve the product. In that sense, Brazil is submitting as Exhibit BRA-32 extract from the minutes of an EC Customs Code Committee meeting that unequivocally show that Denmark and other Member States consider that bacon, which is salted/smoked **and** frozen, should "remain" classified in heading 0210, even when frozen. If, as proposed by the EC, freezing is what confers the character (and classification) of a product then why is salted/smoked bacon that requires freezing to be classified under heading 0210? We know why. Bacon is classified under heading 0210 because the salting/smoking process is what gives the product its character and not the fact that it was frozen.

5. With respect to the 1991 US tariff classification ruling on the classification of mechanically de-boned chicken meat from Canada referred to by Brazil in paragraph 79 of its first written submission:

(a) Brazil is requested to provide further explanation of how this ruling supports the view that the products at issue which are *both* frozen and salted should be classified under heading 0210 rather than heading 0207 of the EC Schedule.

As provided in our First Submission, the 1991 US ruling relates to mechanically deboned chicken meat, which is marketed "*either fresh **or** frozen **and** with **or** without cure*".[17] In other words, the products at issue in that case were: cured fresh meat; fresh meat without cure; cured frozen meat; and frozen meat without cure. The ruling provided that fresh chicken meat, **not cured**, and frozen chicken meat, **not cured**, should be classified under subheadings 0207.39.0020 and 0207.41.0000, respectively, of the Harmonised Tariff Schedule of the US (HTSUS).[18] Based on this ruling, it is safe to say that the authority considered that only fresh or frozen chicken meat that had **not** been cured fell under heading 0207. The ruling further established that chicken that **has been cured** (whether fresh or frozen) should be classified under subheading 0210.90.2000 of the HTSUS.[19]

This ruling was provided as an example that **unprepared** poultry meat falls under heading 0207 and **prepared** poultry falls under heading 0210. We understand that the same reasoning applies

[14] Literature on the Action of Salt in Meat. João Andrade Silva at page 175. Exhibit BRA-16.
[15] Literature on the Action of Salt in Meat. John C. Forrest at page 247. Exhibit BRA-16.
[16] Brazil's Oral Statement at the First Substantive Meeting, para. 42.
[17] Paragraph 2 of Ruling NY 869661. Exhibit BRA-15.
[18] Paragraphs 3 and 5 of Ruling NY 869661. Exhibit BRA-15.
[19] Paragraph 7 of Ruling NY 869661. Exhibit BRA-15.

in the instant case. Salted chicken cuts are prepared poultry meat and should be classified under heading 0210, irrespective of whether it is fresh, chilled or frozen.

(b) With respect to the definition of "curing" in Annex 2 of the EC's first written submission, does Brazil agree with that definition? Further, does Brazil agree that, given the definition of "curing", the ruling suggests that salted meats falling within heading 0210 must be preserved?

Brazil does not agree with the EC's interpretation that the term "cure" can only refer to a treatment designed to preserve meat.[20] The term "cure", for example, also means "to prepare or alter esp. by chemical or physical processing for keeping or use".[21] Brazil understands that, much like salting, curing was an ancient form of preservation of foodstuff; but, nowadays, its exclusive use for preservation is relatively rare.[22] We do not affirm this because we "think" this is so. We affirm this because scientific literature says so.

Below we provide several passages, from several authors, that confirm that even though curing was originally used for preservation, this is no longer its chief purpose. Today, curing is less known for its preservative effect than for imparting special properties on meat, such as: flavor, colour, yield, etc. By and large, for cured products to be preserved they must be held in cool or refrigerated conditions.

What is in a Cure?

The most frequently used curing agents are sodium chloride, nitrate, nitrite, sugar, spices, glycerin, etc., where salt is the fundamental curing agent.[23] In fact, *"salt (…) is the only ingredient necessary for curing*".[24]

The Modern Use of Cure / Curing Process

*"From a historical point of view, **curing** of meat may be defined as the process of adding salt (ClNa) to meat with the purpose of preservation. The exact origin of the cure is lost in time. (…) The term '**curing**' of meat eventually **came to mean the addition of salt**, sugar, nitrate and/or nitrite. (…) With the arrival of an efficient commercial refrigeration and the almost universal domestic refrigerator, the need to **preserve** meat **by curing** has **greatly decreased** and **other factors**, such as flavor, color and yield **are** today **of greater** importance than the preserving effect obtained.*"[25]

This view is shared by other authors that state that: "*With the arrival of modern food preservation methods, particularly those based on low temperatures, salting **lost** much of its importance as a food preservation process; however, the application of salt, separately or together with other substances, is still largely used in order to **cure** the product, which is **characterized by food organoleptic modifications**, greatly pleasing to consumers.*",[26] and that "*(…) the objective of the **process of curing is not to preserve meat** in a similar state as that of the fresh product. It is more, the*

[20] EC's First Written Submission, para. 117.

[21] *The Merriam Webster's Collegiate Dictionary – Tenth Edition*, Merriam-Webster, Incorporated, 1993, p. 284 (emphasis added).

[22] EC's First Written Submission, paras. 37 and 39.

[23] Literature on the Action of Salt in Meat. José Evangelista at page 409. Exhibit BRA-16.

[24] Literature on the Action of Salt in Meat. Montana Meat Processors Convention at page 11. Exhibit BRA-16.

[25] Literature on the Action of Salt in Meat. James F. Price at pages 393 and 394. Exhibit BRA-16.

[26] Literature on the Action of Salt in Meat. José Evangelista at page 408. Exhibit BRA-16.

value of the cured meat depends on the different organoleptic quality it acquires as a consequence of that process."[27]

Today's Cured Products Cannot Be Preserved Without Cooling / Refrigeration

US meat processors also concur that meat curing no longer serves to preserve meat. In particular, they provide that "*meat **curing** was used originally almost entirely as a means of preserving meat during times of plenty to carry over to times of scarcity. (…) The almost universal availability of home refrigerators has, however, greatly altered the reasons for **curing**. Today, **cured meat products** are generally mild-cured and **must be stored under refrigeration***."[28]

Specifically with respect to preservation, the literature provides that "*(…) in current practice, where 2 to 3% of salt is added so that the **cured** product presents a pleasing taste, the salt **lacks a significant preserving effect** in products with a humidity content of 60% or more*",[29] and that "*during storage, **cured meats** **are usually altered** mainly by changes experienced in color, followed by the consequent rancidity of fat oxidation and, in third place, **by the action of microorganisms***".[30]

For the Panel to assume and narrowly interpret that "curing" in the 1991 US ruling meant for purposes of preservation, it would have to ignore the above mentioned literature and the fact that, in that case, the salt and sodium nitrite concentrations in the cure varied according to customers' needs[31] and not to the need of preservation.

FOR THE COMPLAINANTS:

9. Why did the parties decide to bring this dispute to the WTO rather than the World Customs Organization?

Brazil decided to bring the present dispute to the WTO, and not the WCO, because it understands this to be a case of less favourable tariff treatment, within the meaning of Article II of the GATT 1994, and not a reclassification case per se. In particular, this is a case of duties being imposed on imports of salted chicken meat in excess of the duty provided for that product in Schedule LXXX. As Brazil pointed out during the first meeting with the parties, this is precisely the position taken by the EC during the proceedings of *EC – Computer Equipment*: "*(…) the EC considered that (…) the case was about duty treatment and **not** about product classification. A decision of the WCO **could not** affect the balance of concessions of the respective parties agreed upon during the Uruguay Round. (…) Customs classification, thus, was **only** the background for such tariff negotiations, but **not** its subject matter. If it were different, tariff negotiations would be carried out in the framework of the WCO and not in the WTO. (…)*".[32]

In examining whether the EC has violated Article II of the GATT 1994, the Panel will have to assess the meaning and scope of the tariff concession for "salted meat" of heading 0210 in Schedule LXXX. This is done according to the rules of treaty interpretation in the Vienna Convention. As context within the rules of the Vienna Convention, the Harmonized System and its Explanatory Notes are a relevant part in the holistic exercise of interpretation. However, the meaning and scope of tariff

[27] Literature on the Action of Salt in Meat. R.A. Lawrie at pages 301 and 302. Exhibit BRA-16.
[28] Literature on the Action of Salt in Meat. Montana Meat Processors Convention at page 10. Exhibit BRA-16.
[29] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 723. Exhibit BRA-16.
[30] Literature on the Action of Salt in Meat. R.A. Lawrie at pages 301 and 302. Exhibit BRA-16.
[31] Paragraph 2 of Ruling NY 869661. Exhibit BRA-15.
[32] *EC – Computer Equipment*, Panel Report, WT/DS62/R, WT/DS67/R, WT/DS68/R, para. 5.13 (emphasis added).

concessions at the WTO are not necessarily the same as the meaning and scope of HS headings and subheadings.

Furthermore, and to the best of Brazil's knowledge, decisions by the HS Committee of the WCO – decisions arising from dispute settlement included – are not binding and Brazil knows of no effective mechanisms that guarantee implementation or enforcement of decisions in that forum. We remind the Panel that Members ultimately bring cases to the WTO so as to obtain relief for trade that is being curtailed in a manner that is inconsistent with the obligations assumed at the WTO.

As a last note, Brazil recalls that prior to its request for consultations at the WTO, it sought guidance and clarification from the WCO with respect to the meaning of headings 0207 and 0210, in view of the case at issue. At that time, the WCO provided no clarifications with respect to the interpretation of these headings and simply directed Brazil to the WCO dispute settlement provision found in the HS Convention.[33]

10. The complainants are requested to indicate in specific terms which products they are claiming have been accorded less favourable treatment under Article II of the GATT 1994? In particular, are the products at issue: (a) frozen, boneless, salted chicken cuts; (b) frozen, boneless, salted chicken cuts with a salt content of 1.2% or more; (c) frozen, boneless, salted chicken cuts with a salt content between 1.2% – 1.9%; (d) frozen, boneless, salted chicken cuts with a salt content between 1.2% – 3%; and/or (e) any other category of chicken cuts. In addition, could the complainants indicate whether or not the products at issue have been deeply and homogenously impregnated with salt.

The products that have been accorded less favourable treatment under Article II of the GATT 1994 are frozen, boneless, salted chicken cuts, deeply and homogeneously impregnated with salt in all parts with a total salt content of not less than 1.2% by weight. This is the product at issue: "salted meat" of heading 0210, as defined by the EC in Additional Note 7 of Chapter 2 of the Combined Nomenclature prior to the conclusion of Schedule LXXX.

That this product is deeply and homogeneously impregnated with salt is a fact that has not been disputed by the parties and has actually been acknowledged by the EC. In Exhibits THA-22 and THA-23, Thailand presented minutes of meetings of the EC Customs Code Committee on the tariff classification of salted and frozen poultry meat. In the minute of the meeting of 25 January 2002, the Committee reported with respect to poultry meat from Brazil and Thailand that the issue "*concerns more specifically imports of chicken breast meat, boneless, frozen and with 1.2% to 1.4% by weight of added salt. According to the information received, the* ***salting meets the criteria established by the Additional Note 7 of Chapter 2 of the CN.***"[34] More precisely, in the extract from the minutes of the meetings held from 18 to 19 February 2002, the Committee assured that "*Member States who had carried out* ***analysis*** *of the products* ***confirmed*** *that the salt was* ***evenly distributed throughout the meat*** *and the salt content was not less than 1.2% by weight, i.e., the* ***salting met the criteria laid down in Additional Note 7 to Chapter 2*** *Hence, the frozen and salted products in question were classifiable under heading 0210.*"[35]

There is, therefore, no doubt that when frozen, boneless, salted chicken cuts from Brazil and Thailand were imported into the EC they were deeply and homogeneously impregnated with salt in all parts with a total salt content of not less than 1.2% by weight.

[33] Exhibit BRA-28.
[34] Exhibit THA-22 (emphasis added).
[35] Exhibit THA-23 (emphasis added).

11. The complainants are requested to indicate whether or not they are seeking to specifically challenge EC Commission Regulations 1871/2003, 1789/2003 and 2344/2003 in these proceedings. If so, they are requested to indicate the basis for such a challenge making reference to their respective Panel requests.

As provided in our response to question no. 1 above, the cited in the request for the establishment of the panel are Regulation No. 1223/2002 and EC Commission Decision of 31 January 2003.

Still, Brazil understands that Regulations No. 1871/2003, No. 1789/2003 and No. 2344/2003 follow and actually result from the classification and tariff changes promoted by Regulation No. 1223/2002 and EC Commission Decision of 31 January 2003. Once Regulation No. 1223/2002 and Commission Decision of 31 January 2003 changed the scope and definition of the products falling under subheading 0207.14.10 so as to include "other salted meat" of subheading 0210.99.39, the EC was forced to change the then existing definition of "salted meat" of heading 0210 as provided in its Combined Nomenclature. This change in the definition of "salted meat" of heading 0210 came about through Regulations No. 1871/2003 and No. 2344/2003.

In sum, even though these Regulations were not cited in the request for establishment of the panel, Brazil understands, as a logical consequence, that if Regulation No. 1223/2002 and EC Commission of 31 January 2003 are found to be inconsistent with Article II of the GATT 1994 and the EC is asked to bring these measures into conformity; the new definition for the term "salted meat" of heading 0210, as introduced by Regulation No. 1871/2003 and currently found in Regulation No. 2344/2003, would also have to be brought into conformity. As pointed out in the response to question one, these measures "further refine and implement the basic regulation" – EC Regulation Nº 1223/2002 – and are therefore within the Panel's terms of reference.

12. Assuming that freezing has a permanent and irreversible impact upon meat, is there some way to distinguish that impact from the impact that salting, brining, drying and smoking have on meat?

For the sake of argument, if we were to assume that "*freezing has a permanent and irreversible impact upon meat*", what distinguishes it from salting, brining, drying or smoking is that, different from those other processes, freezing does not alter the basic characteristics of meat.

This conclusion is not only supported by common sense – since frozen salted meat when thawed will still be salted meat used for the same purposes as prior to freezing – but also by the discussion incurred by the EC in another instance, an anti-dumping and anti-subsidy proceeding concerning imports of salmon from Norway, Chile and the Faeroe Islands.[36]

In that case, the issue raised was whether fresh and frozen salmon should be distinguished for the purpose of that investigation. After assessing the various types and presentations of salmon, the EC Commission considered that "*(…) freezing of salmon was [not] sufficient to alter the basic characteristics of the product. Rather than adding value to the product that was appreciated by certain users, it was considered that one of the main reasons for freezing the product was to facilitate its transport to the Community*."[37]

From the above, it seems that the Commission considers that freezing does not have a permanent and irreversible impact upon meat, at least not to the extent that will change the basic characteristics of the product. Salting/brining/drying/smoking, on the other hand, do. We have

[36] Exhibit BRA-26.
[37] Recital (19) of Regulation No. 930/2003. Exhibit BRA-26.

provided in paragraphs 81 to 89 of our First Written Submission, in paragraph 26 of our Oral Statement, and in Exhibit BRA-16 specific information, with literary support, on the action of salt and the changes it promotes on meat.

13. Brazil and Thailand suggest in their oral statements for the first substantive meeting (paragraph 16 in the case of Brazil and paragraphs 8 and 53 in the case of Thailand) that, for the purposes of the Panel's analysis under Article II of the GATT 1994, the decisive criterion for characterising the products at issue are the objective characteristics of the product at the time of importation. What role, if any, do Brazil and Thailand consider that production processes, end-uses and the perspective of end-users should play in the characterisation of the products at issue for the purposes of the Panel's analysis under Article II?

Brazil considers that production processes, end-uses, and the perspective of end-users should not play a role in the characterisation of the product frozen salted chicken cuts for the purposes of an Article II analysis.

Here, we take a moment to remind the Panel members that the issue before them is not whether Brazil's exports to the EC of frozen salted chicken cuts, which are evenly and deeply impregnated with over 1.2% of salt, are identical to or interchangeable with frozen chicken cuts that are not salted. They are **not**, but that is beside the point here. The question before the Panel is whether frozen salted chicken cuts, which are **in fact** evenly and deeply impregnated with over 1.2% of salt, correspond to the scope and definition of "salted meat" of heading 0210 in EC's Schedule LXXX. If they do, then the EC's treatment of the product under heading 0207 is a violation of Article II of the GATT 1994.

In its question, the Panel articulates that for Brazil and Thailand the decisive criterion for characterising the product at issue are the "objective characteristics" of the product at the time of importation. That assertion is correct. But, **more importantly**, it is the EC that considers the "objective characteristics" of a product to be a decisive criterion for classification.[38] According to the EC, this criterion serves a dual purpose, it ensures: legal certainty and ease of verification by customs authorities.[39]

When, prior to the conclusion of the Uruguay Round, the EC defined the objective characteristics of "salted meat" in Regulation No. 535/94; the EC was, in fact, providing legal certainty that meat deeply and evenly impregnated with salt in all parts with a total salt content of more than 1.2% was "salted meat" for the purposes of heading 0210.

To a large extent, Brazil has included the arguments cited in the question simply to pre-empt or rebut the EC's allegation that the salted chicken cuts and the chicken cuts *in natura* are identical or interchangeable. In the event the Panel finds that it needs to address this issue, Brazil stands by the evidence it provided showing that the two products are neither identical, nor interchangeable.

14. The complainants are requested to provide details regarding the processes to which the products at issue are subjected prior to being exported to the EC. In particular, please provide details including supporting material regarding:

(a) the physical processes that are applied to the products at issue;

(b) the effects of these processes on the products at issue;

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[38] Exhibit EC-12, pages 969 and 977 (paragraph 10); Exhibit THA-18, page 1276; and Exhibit BRA-27.

[39] Exhibit EC-12, pages 982 and 983 (paragraph 6); Exhibit BRA-27 (fourth paragraph after point 3).

(c) the time taken to complete these processes; and

(d) the costs and benefits that such processes entail.

(a) the physical processes that are applied to the products at issue

Brazil would start by emphasising that the information provided in this answer, especially that contained in Exhibit BRA-33, is sensitive to the Brazilian industry and is to be treated as **confidential** in all phases of these proceedings.

Brazilian producers and exporters of salted chicken meat essentially use two salting methods: dry salting (manual / tumbling) or brine (immersion / injection). The most common method used by Brazilian producers is the dry salting. Below, the Panel will find information regarding these two salting methods.

Dry salting – After chicken meat has been cleaned and put in the production line, cuts are selected, weighed and left to rest in a cooling chamber, at a controlled temperature, for a certain period. Cooling is done throughout this process to facilitate salt penetration at subsequent stages. Very low temperatures, however, deter salt penetration; while very high temperatures facilitate microbial development.[40] After the chicken cuts have rested, salt is applied on the surface of the meat. The contact of the dry salt with the meat is done by manual friction of salt on the meat surface to cause superficial dilacerations of the connective tissue.[41] These dilacerations cause an increase in the osmotic pressure and favour salt penetration.[42] Mere sprinkling or depositing salt in the meat surface does not produce an effective penetration.[43] After chicken cuts have been manually salted, they are directed to a tumbling barrel (tumbler). Meat is then tumbled/massaged for a certain period to promote even and thorough salt impregnation. After tumbling, the salted cuts are once again left to rest in a cooling chamber, at a controlled temperature, for a certain period. As observed, cooling throughout the salting process facilitates salt impregnation. The product is then put in a freezing tunnel, packaged and put in cardboard boxes for shipment. In general, this salting process takes approximately 30 to 40 hours.

Brazil is providing as Exhibit BRA-33 a more detailed description, with pictures, of the dry salting process carried out by one Brazilian producer of salted chicken meat. Brazil reiterates that all information contained in Exhibit BRA-33 shall receive confidential treatment.

Brine – Brine is a simpler method of salting. It may be done by immersion in a saline solution for a certain period or by intra-muscular or intra-arterial long needle injection to faster distribute the brine in the tissues' inner portion.[44] We further point out other factors that may also influence salt penetration: thickness of meat (better/quicker penetration in thinner pieces); temperature applied during the process; and, the size of salt crystals.[45]

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[40] Literature on the Action of Salt in Meat. Miguel Cione Pardi at pages 724 and 725; João Andrade Silva at page 184. Exhibit BRA-16.

[41] Literature on the Action of Salt in Meat. Miguel Cione Pardi at pages 723 and 724; João Andrade Silva at page 184. Exhibit BRA-16.

[42] Literature on the Action of Salt in Meat. João Andrade Silva at page 184. Exhibit BRA-16.

[43] Id.

[44] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 725; João Andrade Silva at page 184. Exhibit BRA-16.

[45] Literature on the Action of Salt in Meat. Miguel Cione Pardi at pages 724 and 725; João Andrade Silva at page 184. Exhibit BRA-16.

(b) the effects of these processes on the products at issue

The effects of salt on meat are many. However, from a purely commercial perspective, salting is good because it reduces "drip loss". "Drip loss" is the inability of the muscle tissue to retain water; it occurs from the moment chicken is slaughtered until after meat is thawed for usage. "Drip loss" represents weight loss of the product, which may translate into lower quality meat (reduction in softness and juiciness) and possible reduction in prices of the product sold. Accordingly, "drip loss" is a substantial economic problem for the chicken industry. In particular, the process of freezing and thawing greatly increases "drip loss". Frozen chicken meat (salted or not) will have to be thawed prior to usage, be it for direct consumption or for the further processing industry. If salting reduces "drip loss", it is quite reasonable that importers / further processing industry would prefer salted over unsalted meat. This is one of the main reasons why European clients request and import salted chicken meat from Brazil, because the presence of salt reduces "drip loss".[46]

Obviously the salting also affects the organoleptic characteristics of the product, which are a crucial element defining the basic characteristics of the product (flavor and texture). Salt also promotes other changes, such as in the meat's water activity and protein, which make it more suitable and appropriate for the further processing industry. This is evident from the scientific literature provided by Brazil in Exhibit BRA-16 and is also attested by the declarations contained in Exhibit BRA-30.

(c) time taken to complete these processes

As indicated in section "a" above, the salting process may take from 30 to 40 hours.

(d) the costs and benefits that such processes entail

The benefits of the salting process have been outlined in section "b" above. The costs associated with the process include: raw material (chicken cuts and salt); the acquisition and maintenance of the necessary equipment (tumblers); allocation of facilities necessary to conduct the several stages of the process (refrigerating room for example); labour used in the manual part of the process; utilities; and, also the expenses incurred by the increase of time of production by 30 to 40 hours.

15. Are the processes applied to the products at issue when they are exported to the EC from Brazil and Thailand the same as those processes applied to the products at issue when they are exported to other countries?

The salting processes applied by Brazilian producers may vary depending on the producer. Usually, salting occurs by tumbling or by needle injection.[47] However, each producer/manufacturing plant applies only one of these processes on chicken meat to obtain salted chicken cuts. Therefore, the salting process of any given producer would not change according to the intended export market.

The three major export markets for chicken meat products from Brazil are: the Middle East, Asia, and Europe. The market profile and product demand in these three regions is different. In particular, two major reasons drive exports of salted chicken cuts from Brazil to the European market.

The first one is that the EC is the only market where the Brazilian product is significantly used for further processing. As the EC itself admits, the salted chicken cuts are used by the further processing industry. Although the Communities have deceitfully argued that the salted cuts and the *in natura* cuts are interchangeable, this is simply not true. The interchangeability alleged by the EC may

[46] Exhibit BRA-30.
[47] We observe that tumbling or needle injection is just one step of the salting process.

occur only in the further processing market. The salted product cannot be sold to the final consumer or to the "foodservice industry" (supermarkets, restaurants, hotels, etc.). Almost all of Brazil's other mentioned major markets – in the Middle East and Asia – import non-prepared, cuts or whole, chicken for the foodservice industry.

The second reason is that the structure of the Schedules of the other major importers of Brazilian poultry make imports of the salted chicken cuts unattractive, even if the product were to be used by the further processing industry. Brazil refers the Panel to the table contained in Exhibit BRA-37. That table shows that, of the other 17 relevant markets of WTO Members for the Brazilian poultry industry only three, like the EC, have a higher tariff concession for heading 0207 as compared to heading 0210: Czech Republic, Japan, and South Africa. The situation is essentially the same for Saudi Arabia and Russia, which are not WTO Members yet. By and large, these markets do not use the imported product in the further processing industry to any significant extent. The vast majority, if not all of the *in natura* poultry imported from Brazil go to the foodservice industry of those countries. The same happens in Bahrain, Cuba, Hong Kong, Paraguay, Singapore, and the United Arab Emirates, which have bound identical tariffs for headings 0207 and 0210. The other eight importers (Angola, Argentina, China, Egypt, India, Oman, Qatar, and Korea) have in their Schedules higher tariffs for heading 0210 than for 0207.

16. The complainants are requested to provide details of their classification practice in relation to imports and exports of the products at issue.

Brazil does **not** import salted chicken cuts. Thus, there is no classification practice in relation to imports of this product. In fact, 2002 and 2003 import statistics show that the only chicken products imported into Brazil during that period were dehydrated chicken meat from the US under subheading 0210.99 and frozen chicken hearts from Argentina under subheading 0207.14.

With respect to Brazil's inconsistent export classification practice of frozen salted chicken the following observations are in order.

Firstly, there are no export duties assessed on exports of frozen salted chicken meat nor on frozen chicken meat *in natura*. In situations where duties do not have to be assessed, authorities are usually less rigorous when it comes to classification and will not always ascertain whether goods declared by a producer/exporter correspond to what is actually being exported. Thus, because in most cases imports are subject to duties, import classification practice turns out to be a more reliable and accurate source of classification information. It is an unfortunate but true situation. On the other hand, producers of salted chicken meat are concerned with selling their products. To do so, they will produce and sell according to customer demand. They are not particularly alert to classification issues when this has no impact whatsoever on their commercial operations or profits, which is the case of export classification in Brazil. For instance, Brazilian producers have exported the product at issue, frozen salted chicken, and described it as spiced/spicy chicken, which – if one were strictly concerned with classification – would fall under heading 1602 and not under heading 0210. Because importers are the ones paying duties, they are the ones "tuned into" such requirements. That is precisely why import classification is more accurate than export classification. There is a natural classification mechanism of "checks and balances" that is done by customs authorities and importers. In Brazil, export statistics mostly reflect the classification attributed by the exporter (or by its customs agent) to the product that is being shipped abroad. Customs authorities at the border are not as attentive as with imports, and certainly would not conduct tests to check whether the frozen chicken cuts are *in natura* or whether they are, in fact, evenly and deeply impregnated with over 1.2% of salt.

Second, we do not believe that Brazil's classification practice is relevant for the interpretation of Schedule LXXX. Here, we note that the classification practice we are talking about is "*any*

subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation".[48]

In the present case, the rules of interpretation are being applied to interpret the EC's tariff concessions for heading 0210 under Schedule LXXX. In other words, the treaty language being examined is that of Schedule LXXX. Schedule LXXX is the **EC's** Schedule of Commitments and not Brazil's, Thailand's or any other Member's Schedule of Commitment. It is the understanding of the scope and meaning of the tariff concessions assumed by the EC in Schedule LXXX that is precisely at issue here. Even though *all* Members must agree on the scope of a tariff concession made by the EC in Schedule LXXX, that tariff concession applies only to the EC. There may well be situations where Schedules of different Members are identical in all respects, including with regard to their domestic legislation. But this is not the case here. How then can the classification of other WTO Members, even those that do not trade frozen salted chicken cuts, be relevant to the interpretation of Schedule LXXX?

In this case, the EC's subsequent 4-year classification practice under heading 0210 of salted chicken meat secured the common agreement parties had at the time Schedule LXXX was concluded that for purposes of the EC's tariff concession for heading 0210, "salted meat" was "*meat (…) which has been deeply and homogeneously impregnated with salt in all parts, having a total salt content not less than 1.2% by weight*".[49]

17. Could the complainants comment on the fact that Explanatory Notes to Chapters 2 and 16 of the Harmonized System characterise both preservation and preparation as "processes".

In providing examples of meat that falls under Chapter 16 and not under Chapter 2, the HS Explanatory Notes to Chapter 2 explicitly list "*meat (…) otherwise prepared or preserved by any process not provided for in this Chapter (…)*.[50] Accordingly, the HS Explanatory Notes to Chapter 16 also provide that "*This Chapter does not cover meat (…) prepared or preserved by the processes specified in Chapter 2(…)*".[51] From the language of these notes, it is clear that processes under both Chapters are grouped either as preparation or as preservation processes. We call attention to the fact that the **only** heading under Chapter 2 that explicitly applies to meat "prepared" by certain processes (salted, in brine, dried or smoked) is heading 0210.[52]

We note that the fact that the terms "preserved" and "prepared" are both characterised as "processes" in no way prejudices their meanings or makes them similar. A process is simply a "continuous and regular action or succession of actions, taking place or carried on in a definite manner" (see answer to question 67). To preserve a product is a process, to prepare a product is a process, to package a product is a process, to clear a product through customs is a process. The fact that all these actions are "processes" does not make them in any way similar or even related.

Furthermore, if as proposed by the EC, Chapter 2 of the HS was structured exclusively according to methods of preservation, there would be no need for the explicit reference in the notes to Chapter 2 and to heading 0210 of preparation processes and the term "prepared". Yet, these notes clearly and intentionally provide for preparation processes (different from preservation processes) and further establish that salting, brining, drying and smoking are such processes.

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[48] Article 31.3 (b) of the Vienna Convention.
[49] Exhibit BRA-6.
[50] Exhibit BRA-24 (emphasis added).
[51] EC's First Written Submission, para. 142 (emphasis added).
[52] Exhibit BRA-24.

18. The complainants are requested to comment on the advice provided by the WCO Secretariat as set out in paragraph 29 of the EC's oral statement during the first substantive meeting concerning the classification of fish under Chapter 3 of the Harmonized System.

To begin with, Brazil understands that a letter of advice or opinion provided by the WCO Secretariat as a response to an inquiry made by a customs authority does not constitute an official WCO position or interpretation of the Harmonized System nomenclature. As the EC itself recognized, such letter "*(…) is, of course, not the same as a classification ruling or opinion made by the Harmonized System Committee*".[53] In fact, the WCO Secretariat discloses that in the event the customs authority does not agree with the views presented in its letter of advice, the Secretariat is ready to re-examine the question on the basis of further information provided by the customs authority.

On this note, the Panel should bear in mind that the Appellate Body in *EC – Computer Equipment* considered that "***decisions*** *of the WCO* ***may*** *be relevant*"[54] in the interpretation of tariff concessions in Schedule LXXX. If, as suggested by the Appellate Body, WCO decisions, which are taken by the HS Committee and approved by the Customs Co-operation Council, are questionable (*may*) as relevant means of interpretation, then opinions given by the WCO Secretariat are even more so.

Even though Brazil has not had the benefit of examining the precise terms in which the questions posed by the Cypriot authority were made and the factual circumstances surrounding that inquiry; Brazil will endeavour nonetheless to comment on the advice concerning the classification of frozen salted fish and to make a correlation between that product and the one at issue in this case.

In doing so, the first thing that stands out is the Cypriot authorities' primary concern as to "whether there is a minimum percentage of salt for salted fish on the final product and if there is any different percentage for salted fillets and salted fish in the whole". The immediate and direct response provided by the WCO Secretariat to this concern was that: "The Nomenclature does **not** offer any specific criteria as to the salt content needed to constitute 'salted fish' (…)".[55] The Panel will be able to verify that this is also true for salted meat of Chapter 02. The HS Nomenclature does not offer any specific criteria as to the salt content needed to constitute salted meat of heading 0210. However, and this is the catch, the EC's Combined Nomenclature at the time of the conclusion of the Uruguay Round negotiations did offer a very specific criteria as to the salt content needed to constitute "salted meat" of heading 0210. At the time of the Uruguay Round, "salted meat" of heading 0210 was "meat (…) which has been deeply and homogeneously impregnated with salt in all parts, having a total salt content not less than 1,2% by weight". This was the specific criteria needed to constitute "salted meat" of heading 0210, established by the EC by means of Additional Note 8 of Chapter 2 of the Combined Nomenclature. This criteria existed in the EC's Combined Nomenclature when Schedule LXXX was concluded and remained there until Regulation No. 1871/2003 changed it.

The letter of advice goes on to state that fish sprinkled with salt water or packed with salt as a temporary preservative during transportation are classified as fresh, chilled or frozen fish under headings 0302 and 0303.[56] We agree. It could not be otherwise, since this is exactly what is provided in the Explanatory Notes to these headings. Let's see. For heading 0302, the HS Explanatory Notes state that: "*This heading covers fish, fresh or chilled, whether whole, headless, gutted, or in cuts containing bones. However, the heading does not include fish fillets and other fish meat of heading*

[53] EC Oral Statement at the First Substantive Meeting, para. 27.
[54] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 90 (emphasis added).
[55] Exhibit EC-19 (emphasis added).
[56] Id.

03.04. The fish may be packed with salt or ice or sprinkled with salt water as a temporary preservative during transport. (…)".[57] For heading 0303, the notes state that: "*The provisions of the Explanatory Note to heading 03.02 apply, mutatis mutandis, to the products of this heading*".[58] Under Chapter 02 of the HS, similar language is found **only** in the HS Explanatory Notes to that chapter. Specifically, the Explanatory Notes to Chapter 2 provide that: "*This Chapter covers meat and meat offal in the following states only, whether or not they have been previously scalded or similarly treated by not cooked: (1) Fresh (including meat and meat offal, packed with salt as a temporary preservative during transport) (…)*".[59] With respect to this note, the Panel can confirm that Brazil has already specifically commented this language in paragraphs 139 through 143 of its first written submission. We do not intend to repeat those arguments but will remind the Panel that: 1) the salt reference in this note relates to fresh and not frozen meat; and 2) the packing of fresh meat with salt as a temporary preservative for purposes of transportation is **quite different** from the addition of salt to a product, through a process of preparation, that renders the product deeply and homogeneously impregnated with salt (and irreversibly different from the unsalted product).

Nowhere do the Harmonized System and its Explanatory Notes provide that Chapter 02, or Chapter 03 for that matter, is structured according to methods of preservation. In fact, we have found no WCO decisions on the subject.

The letter from the WCO Secretariat further indicates that the fish in question was subjected to a "normal" salting process before freezing and that it was not clear what exactly was meant by "normal" process. What was clear was the guidance provided that if the "normal" process mentioned by the Cypriot authority covered "*packed with salt or sprinkled with salt water as a temporary preservative during transport*" it was classifiable in heading 0303. In the present case, the salting process applied to chicken meat deeply and evenly **impregnates** the meat with salt. Hence, this process does not qualify as "*packed with salt or sprinkled with salt water*".

In the end of its letter, the WCO Secretariat cautiously volunteered that "salted" fish classifiable in heading 0305 is not **normally** lightly salted to render it necessary for freezing and declared to be unaware of frozen fish, which had been really salted and still required freezing to be preserved. This statement of the Secretariat is not supported by the facts however. Brazil has provided in paragraphs 40 through 43 of its oral statement examples of how there are meat, including fish, that have been salted and/or smoked that still need to be kept in cool or refrigerated conditions for purposes of preservation.

More importantly, the EC itself seems to consider that frozen salted/dried/smoked fish should be classified under heading 0305 and not under headings 0303 or 0304. In Exhibit BRA-34, Brazil is providing information on existing BTIs issued by an EC customs authority classifying frozen salted/dried Alaska Pollack (a type of cod fish) and frozen salted/smoked salmon under heading 0305 of the EC Combined Nomenclature and not under headings 0303 or 0304, even though these products are frozen.

Most importantly, the letter of the Secretariat merely expresses the technical opinion of one individual (Mr. I. Kusahara, who signs the letter) or possibly more. This opinion does not bind WCO Members in any way and has no legal value. This is perfectly illustrated if we take a look at other similar letters of the Secretariat.

Brazil brings to the attention of the Panel another letter of advice from the WCO Secretariat, also regarding the meaning of the term "salted". This time, however, it is the term "salted" of

[57] Exhibit EC-20 (emphasis added).
[58] Id.
[59] Exhibit BRA-24 (emphasis added).

heading 0210.[60] This time, unlike the EC, that selected a letter dated September 1997, Brazil refers to a letter much closer to us: one that is dated May 2003, slightly over a year ago. The letter in question is signed by Mr. Holm Kappler, Head of the Nomenclature and Classification Directorate, the same area where Mr. Kusahara worked when he signed his letter seven years ago. Mr. Kappler's letter was in response to a question posed by the Bulgarian Customs Administration on whether imports *"de poitrines de l'espece porcine, desosees, congelees, qui avant la congelation ont subis un salage en surface (sic)"*[61] should be classified under subheading 0203.29 or subheading 0210.12. In that case, *"les resultats du l'analyse de laboratoire, apres la decongelation, indiquent que le sel n'a penetre que dans une couche tres limitee (celle situee sous la surface du produit) et non pas en profondeur* (sic)"[62] and the authority believed, guided by the language under Additional Note 7 of Chapter 2 of the EC Combined Nomenclature, that the product should be classified under heading 0203 because it was not deeply and homogeneously impregnated with salt. The importer, on the other hand, argued that the product was classified under heading 0210 because the total salt content was approximately 1.9% by weight. Faced with this dilemma, the authority requested advice from the WCO Secretariat.

Before we go any further, we highlight that the authority's inquiry in that case was founded precisely on the fact that the product only met part of the description / criterion for "salted meat" of heading 0210, found in Additional Note 7 of Chapter 2 of the CN. In the case at hand, there is no doubt. Frozen salted chicken cuts exported from Brazil **fully** met the definition of "salted meat" of heading 0210 under the Combined Nomenclature. The Panel can verify this by looking at Exhibits THA-22 and THA-23, which show that EC Member States carried out analysis of the products that confirmed that the salting met the criteria laid down in Additional Note 7 of Chapter 2; and by looking at the BTIs provided in Exhibit BRA-31.

Back to the question posed by the Bulgarian authority, the first and foremost advice provided by the Secretariat was that "En ce qui concerne le terme "salé", **aucun** texte official **ni** Note explicative de la Nomenclature du Système harmonisé **n'en donne une définition**".[63] The Secretariat was clear: there is **no** official definition in the Harmonized System and its Explanatory Notes for the term "salted". This, we recall, was in May 2003.

The Secretariat went even further and acknowledged that the EC Combined Nomenclature had a specific criterion to define salted meat of heading 0210 and that the Bulgarian authority should turn to the EC for clarification. Here, we draw attention to the fact that the authority specifically asked for guidance with respect to the salting degree and method of heading 0210. Yet, in the exchange of letters and opinions neither the Bulgarian Authority nor the WCO Secretariat considered or even raised the point that salting had to **preserve** the product for it to merit classification under 0210. It seems reasonable that if, as the EC suggests, heading 0210 of the Harmonized System only covered meat that was preserved (as opposed to prepared) by salting, drying or smoking, the WCO Secretariat, and the Bulgarian authority itself, would have mentioned this in their letters. But the truth is that they did not.

In fact, if Mr. Kappler had the same understanding of the EC or, apparently, of Mr. Kusahara, his answer should have been quite simple: if the product is frozen, then the salting is not intended for long-term preservation and, therefore, it must be classified under heading 0207. That was not the conclusion of Mr. Kappler however, who ended his letter stating that the Secretariat was not in a position to decide on the classification of the product.

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[60] Exhibit BRA-35.
[61] *Id* (emphasis added).
[62] *Id* (emphasis added).
[63] *Id* (emphasis added).

More significantly, Mr. Kappler (i) notes that Bulgaria bases its tariff classification on the Combined Nomenclature (CN) of the EC; (ii) indicates that the CN has a definition of "salted meat"; and (iii) refers the Bulgarian Administration to the Communities: "*vous devriez vous adresser à la Communauté européene pour connâitre son interpretation de cette définition*".

FOR ALL PARTIES:

56. Do the parties agree that the relevant time at which the meaning of headings of the EC Schedule – LXXX – should be assessed is the time at which that Schedule was annexed to the Marrakech Protocol on 15 April 1994? If not, at what time/during what period should such an assessment be made?

To be exact, the relevant time at which the meaning of headings in Schedule LXXX should and could have been assessed was on 15 April 1994, when the Contracting Parties signed the Final Act of the Uruguay Round and at which time Members' schedules of concessions were annexed to the Marrakech Protocol. In principle, 15 April 1994 was the last opportunity a Contracting Party had to refuse or accept adherence to the Protocol.

Members were also afforded a specific period to verify the scope and meaning of tariff concessions in other Members' Schedules. In this regard, the Appellate Body in *EC – Computer Equipment* confirmed that "*(…) a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed Uruguay Round participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions.*"[64]

We underline that, from 15 February until 25 March of 1994, Members were given the opportunity to check and control the scope and definition of each others tariff concessions. It was prior to the end of this verification process, that the EC issued Regulation No. 535/94 with its definition of "salted meat" of heading 0210. More precisely, Regulation No. 535/94, of 9 March 1994, was published in the EC's Official Journal on 11 March 1994 and came into force 21 days after publication, ironically enough on 1 April 1994.

The EC itself recognizes that Regulation No. 535/94 was published within the period for verification of tariff schedules, but argues that said Regulation only entered into force after the verification period had ended.[65] With this statement, it seems the EC is arguing that even though it made its definition of "salted meat" public prior to the end of the verification period, because Regulation No. 535/94 only entered into force after that period its definition of "salted meat" of heading 0210 did not exist at that time.

In this regard, we draw attention to the fact that previous WTO and adopted GATT panels "have always considered that mandatory legislation of a Member, even if not yet in force or not applied, can be challenged by another WTO Member".[66] If mandatory legislation not yet in force can be challenged by another WTO Member; it seems that the EC's definition of "salted meat" in Regulation No. 535/94, that was public but not in force during the period of verification of schedules, could also have been challenged by a negotiating partner during the period of verification. After all, this was to be the EC's understanding of what constitutes "salted meat" of heading 0210 in its Schedule LXXX. The rationale here is that even though the EC's definition of "salted meat" of

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[64] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 109 (emphasis added).

[65] EC's First Written Submission, para. 200.

[66] Turkey – Restrictions on Imports of Textiles and Clothing Products, Panel Report, WT/DS34/R, para. 9.37 and footnote 263; and United States – Taxes on Petroleum and Certain Imported Substances, Panel Report, BISD 34S/136, paras. 5.2.1-5.2.2 (emphasis added).

heading 0210 was not yet in force, thus not applicable to current trade, it would be applicable to future trade. Publication of what the EC considered to be "salted meat" of heading 0210 gave negotiating partners the predictability needed to plan future trade. Thus, the mere knowledge by the EC's negotiating partners of what the EC considered to be "salted meat" of heading 0210 was enough for purposes of check and control of the scope and definition of tariff concessions.

57. Was the EC Schedule in question negotiated on the basis of series of offers and requests or, rather, was it based on a unilateral offer that was made by the EC?

As stated in our First Written Submission, Brazil has not found any specific document on the preparatory work of Schedule LXXX with respect to headings 0207 and 0210.[67] Nevertheless, regardless of whether Schedule LXXX was negotiated based on a series of offers and requests or on a unilateral offer by the EC, all offers made by a Member throughout a negotiating process are, in a sense and ultimately, unilateral and it is up to the negotiating partners to either accept or decline that Member's offer. Thus, in either situation – series of offers and requests or a unilateral offer – Members negotiating tariff concessions must take account of each other's definition of the products being negotiated. The tariff concessions and corresponding definitions were accepted by the other Members when they signed the Marrakech Agreement.

58. Was EC Regulation 535/94 enacted in response in whole or in part to requests made of the EC by other Members during the conclusion of the Uruguay Round for clarification regarding the headings in the EC Schedule at issue in this case?

The manner in which the above question has been framed leads Brazil to believe that perhaps it has not been clear with respect to its arguments regarding Regulation No. 535/94. Brazil has presented Regulation No. 535/94 in its First Written Submission as EC legislation on customs classification that existed at the time of the conclusion of the Uruguay Round negotiations.[68] To us, Regulation No. 535/94 is part of the circumstances surrounding the conclusion of Schedule LXXX, within the meaning of Article 32 of the Vienna Convention.

We have presented Regulation No. 535/94 in this way based on the Appellate Body's acknowledgement that "If the classification practice of the importing Member at the time of tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, **surely** that Member's legislation on customs classification at that time is also relevant."[69] The reason the Appellate Body found it so obvious that an importing Member's classification legislation, at the time of tariff negotiations, was relevant in the interpretation of tariff concessions is because a Member's legislation sheds light as to the scope and definition of the tariff commitment that Member undertook.

That being so, we turn to the Panel's question. Brazil understands that Regulation No. 535/94 was not enacted as a response to requests made by Members to the EC for clarification regarding heading 0210 in Schedule LXXX. Regulation No. 535/94 was enacted as a response to a case that seems quite similar to the one at issue here: whether salted and frozen meat should be classified under heading 0207 or under heading 0210. As a result of that case, the EC amended its Combined Nomenclature and inserted a very specific criterion that had to be met for meat to be considered "salted meat" of heading 0210. That criterion did not include the term or concept of preservation or long-term preservation.

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[67] Brazil's First Written Submission, para. 166.

[68] Brazil's First Written Submission, paras. 166 to 176.

[69] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 94 (emphasis added).

59. Are there any GATT Schedules of WTO Members other than the EC's in which headings identical or similar to the headings at issue in this case exist? If so, please provide details of such Schedules and information regarding the classification practices of such Members in respect of those headings. If possible, the parties are requested to indicate how such Members classify the products at issue in this case.

In Exhibit BRA-37 we are providing the tariff concessions for heading 0210 found in the Schedules of some WTO Members.[70] Specifically, the concessions submitted are for countries that are major import markets of chicken products from Brazil. To the best of our knowledge, there are no significant markets, other than the EC, that import frozen salted chicken cuts for further processing. Thus, we were not able to obtain classification practice of other Members on imports of frozen salted chicken meat.

Nonetheless, the Panel will note that there are some slight variances among descriptions of heading 0210 and its subheadings in some Schedules.[71] Nonetheless, based on the nature of the question posed by the Panel, we would like to reiterate that a Member's tariff concession is not interpreted merely by what is provided in the tariff line of its Schedule. The Appellate Body has shown that other factors, besides the words employed in the text, are also relevant in the interpretation of a tariff concession in a Member's Schedule, including a Member's classification legislation at the time of tariff negotiations.[72]

60. The parties are requested to provide details regarding the processes to which the products at issue are subjected upon importation to the EC and prior to final consumption. In particular, please provide details including supporting material regarding:

(a) the physical processes that are applied to the products at issue;
(b) the effects of these processes on the products at issue;
(c) the time taken to complete these processes; and
(d) the costs and benefits that such processes entail.

Brazil submits that the information requested is not information that belongs to the Brazilian Government or to the Brazilian producers/exporters of salted chicken meat and is, thus, not information to which Brazil has easy or complete access to. We further note that salted chicken cuts are used as raw material in the processing of a wide variety of value-added chicken products. This means that frozen salted chicken cuts are further processed in many different ways. Consequently, the information we provide in this response is a general overview of some of the processes to which frozen salted chicken cuts are submitted in the making of value-added chicken products.

In the processing of cooked / breaded chicken products, frozen salted chicken cuts are thawed, tumbled / blended with seasoning, left to rest (to mature), pre-dusted / battered / breaded, pre-fried, cooked, frozen and packed. Depending on the product, this process may present some variations. Frozen salted chicken cuts may be thawed, ground, tenderised with seasoning, mixed with other ingredients in a mixer, formed, pre-dusted / battered / breaded, pre-fried, cooked, frozen and packed. They may also be thawed, ground, mixed with other ingredients in a mixer, formed, pre-dusted / battered / breaded, pre-fried, pre-cooked, frozen and packed.

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[70] We note that Exhibit BRA-37 also provides the tariff applied by Russia and Saudi Arabia, which are not WTO Members, but are major importing markets of Brazilian chicken products.

[71] We note that the Republic of Korea provides for a "meat of poultry" subheading within heading 0210 of its Schedule. The US and Canada, although not listed in Exhibit BRA-37, also provide in their Schedule a "meat of poultry" subheading within heading 0210.

[72] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 94.

In the processing of marinated chicken, frozen salted chicken cuts are thawed, tumbled / blended with seasoning, left to rest (to mature), packed and frozen.

In the processing of sausages and chicken deli products, frozen salted chicken cuts are thawed, ground, mixed with other ingredients in a mixer, left to rest (to mature), pressed, tied, weighed, packed and frozen. Depending on the product, this process may present some variations. Frozen salted chicken cuts may be thawed, ground, mixed with other ingredients in a mixer, pressed, cooked / smoked / chilled and packed. They may also be thawed, ground, mixed with other ingredients in a mixer, emulsified, pressed, cooked, chilled, dyed, dried, packed, pasteurised and packed a second time. They may also be thawed, ground, cut in a cutter, pressed, cooked, chilled and packed.

In the processing of chicken burgers, the frozen salted chicken cuts are thawed, ground, mixed with other ingredients in a mixer, formed, frozen, enveloped and packed. In the processing of chicken meatballs and alike, the frozen salted chicken cuts are thawed, ground, mixed with other ingredients in a mixer, formed, frozen and packed.

Regarding the descriptions above, we observe that: 1) the first step in all processes is always the thawing of frozen salted chicken meat; 2) there is no de-salting stage in all processes described (salted cuts are not de-salted for further processing); and, 3) the reference to seasoning does not include salt.

The effect of these processes on the product at issue is that salted chicken cuts are transformed into elaborated chicken products (cooked / breaded / delicatessen / etc). By and large, value-added chicken products are more expensive than less elaborate chicken products. Because salted chicken cuts are used as raw material in the making of a wide range of products, the time to complete these processes varies greatly. That said, we believe that a period of 24 to 48 hours is the time usually taken to complete these processes.

61. If boneless chicken cuts have been deeply and homogeneously salted, can they be de-salted?

Brazilian salted chicken cuts, which are deeply and evenly impregnated with a salt content of over 1.2%, cannot be completely de-salted. For the Panel's benefit, Brazil is providing as Exhibit BRA-36 a brief explanation on salting methods and the effect of desalting salted chicken meat, written by Professor Dr. Nelcindo N. Terra,[73] pursuant to information gathered from international scientific literature.

In addition, we ask the Panel to think about the EC's suggestion that salted chicken meat exported from Brazil can be de-salted and that the salting process can be largely reversed before meat is consumed.[74] If this were true, then the Panel should ask itself: Why haven't Brazilian producers and exporters simply raised the salt content in meat so as to meet the EC's new definition of "salted meat" of heading 0210? After all, if it is possible to simply de-salt the product after it has been imported so that it goes back to being the same unsalted product, with the same properties, that existed prior to salting; then why haven't producers/exporters already done this? The answer is simple.

[73] Dr. Nelcindo Nascimento Terra is a Professor at the Federal University of Santa Maria (UFSM), in the State of Rio Grande do Sul (RS) – Brazil. Professor Terra belongs to the Department of Science and Technology of Food Products of UFSM and has taught classes on meat technology.

[74] EC's First Written Submission, paras. 25 and 43.

The salting process carried out by Brazilian producers irreversibly renders the product salted, different from the product without salt.[75] Some de-salting is possible. However, Brazilian chicken meat deeply impregnated with salt **cannot be completely** desalted to the point that it goes back to being unsalted chicken with the same basic characteristics and use that existed prior to salting. Once deeply and evenly impregnated with salt, chicken meat will always present itself as salted meat, even after desalting. Brazil has no knowledge of any European importer that de-salts the product. As far as our inquiries went, we found that processors may adapt the mixture of ingredients or the recipes in order to take into account the fact that the chicken cuts are already salted.

What's more, because desalting entails the addition of water to meat for a certain period, when part of the salt is removed by the water, certain important muscle proteins, vitamins and minerals are also removed. As a result, the desalting process depletes meat of fundamental characteristics and sometimes even leaves it inadequate to be used as raw material for the processing of meat products.

62. What is/would be the process used to salt boneless chicken cuts so as to ensure long-term preservation of the cuts?

Salting for "long-term preservation" is a concept created by the EC, which has actually not been defined. Brazil, therefore, is not able to respond what is / would be the salting process necessary to ensure long-term preservation.

What we can attest is that frozen salted chicken cuts exported from Brazil to the EC were deeply and homogeneously impregnated with salt in all parts with a total salt content of over 1.2% by weight and, therefore, met the criterion set out in the EC's Combined Nomenclature for "salted meat" of heading 0210.

63. What end-products other than chicken nuggets use the products at issue as an input?

Salted chicken cuts are used as raw material in the processing of several value-added chicken products, such as: cooked, breaded, battered, marinated chicken products (e.g., patties, fingers, nuggets, meatballs); chicken wieners, sausages and other deli products; prepared meals, entrees, pies; etc.

64. Have the products at issue been salted with common salt? Does the term "salted" in the EC Schedule relate to the addition of common salt or does it include the addition of other salts as well?

Brazilian salted chicken cuts exported to the EC are impregnated with common salt. Brazil would rather not volunteer comments on whether, in abstract, the term "salted" of heading 0210 in Schedule LXXX only relates to preparation by usage of common salt or whether it can also relate to salt preparation that includes the addition of other salts.

65. Does chilling/freezing subsequent to salting, brining, drying or smoking for long-term preservation mean that the product in question should be categorised under heading 0207?

No. Chilling or freezing are processes applied to meat that merely serve to preserve it in the same manner, or with the same basic characteristics, as prior to chilling or freezing. Meat will fundamentally possess the same basic characteristics and be used for the same purposes before and after freezing. For example, salted chicken meat after thawing will be the same salted chicken meat that existed prior to freezing. The possibility that freezing may cause irreversible changes of a

[75] Brazilian First Written Submission, paras. 83 and 141.

microscopical nature, normally imperceptible to consumers, does not mean that the essential or basic characteristics of the product have changed.

On the other hand, salting, brining, drying and/or smoking are processes that have such an impact on meat that they change the characteristics of the product. We have presented in Exhibit BRA-16 literature on the action and impact of salt on meat and the different properties it conveys. In Exhibit BRA-36, we are providing an explanation, based on scientific literature, regarding different salting methods and the effect of desalting on meat, specifically that the salting process cannot be completely reversed and that desalting depletes meat of inherent and important properties.

Heading 0210 is a specific heading for meats that have been prepared by certain processes: salting, brining, drying or smoking. These processes confer the characteristic of the product and, consequently, its classification. Thus, once meat is salted, it does not matter whether it remains fresh or is kept chilled or frozen, for all purposes that meat is and will remain salted meat.

66. In interpreting headings 0207 and 0210 of the EC Schedule, should the ordinary meaning of all the terms in those headings be assessed as a whole or, rather, should the terms other than "frozen" in heading 0207 (i.e. "fresh" and "chilled") and the terms other than "salted" in heading 0210 (i.e. "in brine", "dried" and "smoked") be treated as context for the interpretation of the terms that appear to be directly at issue – i.e. "frozen" and "salted". Will the result of the interpretative exercise differ depending upon which approach is adopted? If so, please explain making specific reference to the headings at issue in this case.

Brazil has provided the ordinary meanings of all the relevant terms in heading 0207 ("fresh", "chilled" and "frozen") and heading 0210 ("salted", "in brine", dried" and "smoked")[76] because it believes that what is under examination by the Panel is the scope and meaning of the tariff concession of heading 0210 in Schedule LXXX. Accordingly, heading 0210 is composed of terms other than salted that must be interpreted as well. Furthermore, the measures at issue, namely Regulation No. 1223/2002 and EC Commission Decision, relate to the inclusion of "salted meat" within heading 0207. Thus, the scope and meaning of (all terms of) that heading must also be examined.

Brazil does not consider that the result in the interpretative exercise will differ whether the other terms of headings 0207 and 0210 are assessed as ordinary meaning or as context.

67. Can products that fall within the scope of heading 0207 of the EC Schedule be considered as having undergone a "process"? If so, please explain what is meant by "process". Can the processes to which products falling within the scope of heading 0207 are subject, if any, be distinguished from those to which products falling within the scope of heading 0210 are subject? If so, how?

Dictionaries define the term "process" as "a continuous and regular action or succession of actions, taking place or carried on in a definite manner"[77] or "a series of operations performed in the making or treatment of a product".[78] The Panel will note that the definition of the term "process" is a wide-ranging one.

Within that very broad definition, and aside from fresh meat, products under heading 0207 may be considered as having undergone a process; that is, a series of actions taken to chill or freeze

[76] Brazil's First Written Submission, paras. 71 to 75.

[77] The Shorter Oxford English Dictionary on Historical Principles – Third Edition, Oxford at the Clarendon Press, 1944, p. 1590.

[78] The American Heritage College Dictionary – Third Edition, Houghton Mifflin Company, 1993, pages 1090 and 1091.

meat. Chilling and freezing are carried out to preserve meat. Brazil does not know of any other reason for chilling or freezing meat. Thus, freezing serves to preserve meat so that after thawing it remains basically the same, and used for the same purposes, as prior to freezing.

Products under heading 0210 are also considered to have undergone a process. In other words, a series of operations that turn *in natura* meat into salted, dried or smoked meat. Salting, drying or smoking of meat is done for several reasons, including: to confer organoleptic characteristics to meat; to give it special processing properties (extraction of proteins, reduced drip loss, increased yields); and, to preserve it. Different from thawing, after meat is de-salted it will not present the same basic characteristics, and will not serve the same purposes, as it did prior to salting.

68. If some or all products that fall within the scope of heading 0207 of the EC Schedule can be considered as having undergone a "process", what is the purpose of that process? What is the purpose of the processes to which products falling within the scope of heading 0210 are subject?

Please refer to the response to question no. 67 above.

69. To what extent, if at all, is the purpose of a process to which a product is subject relevant to the interpretation of: (a) heading 0207 of the EC Schedule; and (b) heading 0210 of the EC Schedule? Should the purpose take precedence over the process in either case? If so, please explain why and in what circumstances. In the case of both headings, if there are multiple purposes underlying the processes in question, which purpose should take precedence?

For Brazil, the purpose of the processes to which the products under headings 0207 and 0210 are subject to is not relevant in the interpretation of the meaning and scope of these headings.

For instance, the process of salting or smoking meat may serve more than one purpose. One may salt, dry or smoke meat because they want to preserve it. One may also salt, dry or smoke meat because they want a product with special organoleptic qualities (or with special processing properties). Heading 0210 of Schedule LXXX does not qualify the purpose of the process of salting/bring/drying/smoking. Likewise, Chapter 2 and heading 0210 of the Harmonized System also do not qualify the purpose of the processes in that heading. They simply qualify the processes of heading 0210 as preparation process. The "salted meat" definition in Regulation No. 535/94 (and in the EC's Combined Nomenclature) also **clearly** did not qualify the purpose of the salting process. That definition merely qualified the salting process as that which leaves meat deeply and homogeneously impregnated with over 1.2% of salt, and not as that which preserves meat for long-term. We understand the EC tried to introduce [a narrow] purpose for salting by means of Regulation No. 1223/2002 and Regulation No. 1871/2003.

Based on the above, Brazil considers that purpose should not and could not take precedence over process.

70. Does the order of steps/activity entailed in a process to which a product is subject play a role in the classification of that product? Please explain making reference to the products at issue in this case.

The order of steps/activity may be relevant only to the extent that it changes the basic characteristics of the end product. As described in the response to question no. 14 and in Exhibit BRA-33, Brazilian chicken cuts are first subject to a salting process and then frozen. Hence, when the product is frozen, chicken cuts have already been deeply and homogeneously impregnated with salt. After frozen salted cuts are thawed, they go back to being salted chicken cuts with the same

characteristics and use that existed prior to freezing. Therefore, the product is salted chicken that has been frozen.

From the scientific literature submitted in Exhibit BRA-16, we understand that temperature influences salt penetration. Specifically, "*very low temperatures (…) hinders salt penetration*"[79] and "*the higher the temperature, the quicker the penetration. However, higher temperatures are liable to a greater microbial growth*".[80] If freezing (*very low temperatures*) prevents or inhibits salt penetration, than we understand it is possible that salt will not deeply and homogeneously impregnate the meat if salting occurs after the product is frozen.

71. Are there different degrees to which meat can be dried, smoked or soaked in brine? If so, is it the case that meat products can only be classified under heading 0210 if the degree of drying, smoking or soaking in brine has exceeded a particular level? If so, what are those levels and how are they determined?

Yes, there are different degrees to which meat can be dried, smoked or soaked in brine. However, when a Member specifically defines a criterion (or degree) of salting, drying or smoking for meat to fall under heading 0210, at the time it commits to a tariff related to that product, that Member is providing predictability to other Members of what constitutes meat of heading 0210 and what tariff will be applied to it.

In that sense, Brazil understands that there is not just one universal value (degree) that is applied across the board to every Schedule of Commitment. In the case of the EC, the salting value (degree) that was applicable to Schedule LXXX was that existing at the time of its conclusion. That is, that meat be deeply and homogeneously impregnated with salt in all parts with a total salt content not less than 1.2% by weight.

72. Does the reference to "poultry" in heading 0207 of the EC Schedule make it more "specific" within the meaning of General Rule of Interpretation 3(a) of the Harmonized System than heading 0210, which refers more generally to meat"? Please explain.

The short answer is no. The reference to poultry in heading 0207 does not make it more specific than heading 0210.

However, before adequately addressing the question, we would first like to remind the Panel that based on the examination of the terms of headings 0207 and 0210 and their relative Section and Chapter notes, Brazil does not consider frozen salted chicken cuts to be a product that *prima facie* falls under two or more headings.[81] For us, frozen salted chicken cuts fall under heading 0210.

As stated in paragraph 70 of our First Written Submission, the EC in its measures – and apparently throughout this proceeding – does not dispute the fact that both subheadings 0207.41.10 and 0210.90.20 include chicken meat. Hence, there is no question that chicken meat is a product covered by both subheadings. The HS Explanatory Notes explain that heading 0210 applies to all kinds of meat, meaning that a variety of meats are classified under that heading. This includes meat of swine, bovine animals, horses, lambs, goats, geese, turkeys, chicken and others. In other words, because the term "meat" under heading 0210 includes all kinds of meat, it would be just the same to state that heading 0210 refers to meat of swine, bovine animals, horses, lambs, goats, geese, turkeys, chicken, etc.

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[79] Literature on the Action of Salt in Meat. João Andrade Silva at page 184. Exhibit BRA-16.
[80] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 724. Exhibit BRA-16.
[81] Brazil's First Written Submission, para. 147.

However, what is under dispute here is the interpretation and reach of the terms "salted" in heading 0210 and "frozen" in heading 0207 of Schedule LXXX. In this case, the term "salted" more specifically describes the product "frozen salted chicken cuts" than the term "frozen".

We have provided in paragraphs 150 to 156 of our First Written Submission, the reasons why salted meat is more specific than frozen meat. Salt confers special properties to meat. In particular, it changes the organoleptic characteristics (flavor and texture) of meat and provides special and important properties that favour processing (protein extraction, reduced drip loss and increased yield). These properties also have an impact on consumer perception of the product and the buyer of chicken meat must know and be able to identify whether the meat being bought has been salted or not.

73. Is the Harmonized System "context" under Article 31.2 of the *Vienna Convention*? If so, please explain by demonstrating how the various elements in Articles 31.2(a) or 31.2(b) are fulfilled.

In *EC – Computer Equipment*, the Appellate Body considered that the Panel in that case had failed to "*examine the context of Schedule LXXX (…) in accordance with the rules of treaty interpretation set out in the Vienna Convention*"[82] and was, thus, "*(…) puzzled by the fact that the Panel, in its efforts to interpret the terms of Schedule LXXX, did not consider the Harmonized System and its Explanatory Notes (…)*".[83] The Appellate Body believed, as does Brazil, that a proper interpretation of Schedule LXXX should include an examination of the Harmonized System and its Explanatory Notes.

Taking the above into consideration, Brazil considers that the Harmonized System and its Explanatory Notes are context under Article 31.2(b) of the Vienna Convention. Article 31.2(b) establishes that context, for purposes of treaty interpretation, is also comprised of "*any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty*". The Harmonized System and its Explanatory Notes fulfil the elements in that Article in the following manner:

1. "*Any instrument which was made by one or more parties (…)*" – the Harmonized System Convention, with the HS nomenclature, was an instrument made by various parties to the WTO Agreement.

2. "*(…) in connection with the conclusion of the treaty (…)*" – The Harmonized System was made "in connection with" the conclusion of the WTO Agreement, in the sense that it relates to the WTO Agreement – because tariff negotiation were held on its basis – and not in the sense that it was concluded at the same time as the WTO Agreement.

3. "*(…) accepted by the other parties as an instruments related to the treaty*" – Even though not all WTO Members are parties to the Harmonized System, all WTO Members accepted that the Harmonized System would be used as basis for the negotiations of schedules of commitments.

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[82] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 88 (emphasis added).

[83] *Id*, para. 89.

74. Assuming that the Harmonized System qualifies as "context" for the interpretation of the EC Schedule under Article 31.2 of the *Vienna Convention*, to what extent if at all can the General Rules for the interpretation of the Harmonized System be used to determine the meaning of the headings in question?

Relevant part of Article 1(a) of the Harmonized System Convention provides that: "(…) the "Harmonized System", means the Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading notes and the General Rules for the interpretation of the Harmonized System (…)".[84] Therefore, the General Rules for the interpretation of the Harmonized System are part of the Harmonized System and, consequently, also qualify as context for the interpretation of headings under Schedule LXXX.

We call the Panel's attention to the fact that Article 1(a) of the HS Convention does not include the Explanatory Notes as part of the Harmonized System. We point this out to show that the Appellate Body, in *EC Lan- Equipment*, knowing that Explanatory Notes were not part of the HS, intentionally gave them the same interpretative weight and status as that given to the Harmonized System.[85] We know the Appellate Body fully understood the legal nature of HS Explanatory Notes, for this was discussed during the proceedings of that case.[86] Nonetheless, the Appellate Body understood that an examination of the Explanatory Notes was also relevant in the interpretation of Schedule LXXX.

75. How are the following to be categorised, if at all, within the framework of Articles 31 and 32 of the *Vienna Convention*: (a) 1981 Explanatory Note to heading 02.06 of the EC's Common Customs Tariff; (b) the 1983 Explanatory Note for subheadings 0210.11-31 and 0210.11-39 of the EC's Common Customs Tariff; (c) the 1983 *Dinter* judgement of the ECJ; (d) the 1993 *Gausepohl* judgement of the ECJ; and (e) the December 1994 Explanatory Note to subheadings 0210.11.11 and 0210.11.19 to the EC's Combined Nomenclature?

None of the items mentioned in question no. 75 above are to be categorized within the framework of Articles 31 and 32 of the Vienna Convention.

We understand that the Appellate Body in *EC – Computer Equipment* acknowledged that EC customs classification legislation – in other words, the Combined Nomenclature – at the time of the Uruguay Round negotiations was relevant in the interpretation of tariff concessions in Schedule LXXX.[87] The Appellate Body, however, did **not** say that the Explanatory Notes to the Combined Nomenclature, specially those dating 10 years prior to the conclusion of the Uruguay Round, could be considered as part of the "circumstances of [the] conclusion" of the WTO Agreement.[88] We further highlight the fact that CN Explanatory Notes are instruments that are not legally binding and that the European Court of Justice itself has at times considered their content not to be in accordance with actual provisions of the Combined Nomenclature.[89]

Likewise, Brazil fails to see how ECJ Court cases prior to the conclusion of the Uruguay Round could qualify as "circumstances of [the] conclusion" of the WTO Agreement. In fact, Brazil, a

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[84] Exhibit BRA-20 (emphasis added).

[85] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 89.

[86] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 38.

[87] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 94.

[88] Id.

[89] Exhibit THA-18, page 1284.

country based on the civil law system, understands that a Member is not required to know another Member's entire case-law and non-binding instruments, such as CN Explanatory Notes, at the time of tariff negotiations. For that purpose, it would suffice to know that Member's customs classification legislation. This is exactly what the Appellate Body in *EC – Computer Equipment* understood.

76. Can the Harmonized System be considered as comprising "relevant rules of international law" within the meaning of Article 31.3(c) of the *Vienna Convention*? If so, please explain by demonstrating how the various elements in Article 31.3(c) have been fulfilled.

No. Please refer to Brazil's response to question no. 73, where we provide that the Harmonized System and its Explanatory Notes are context within the meaning of Article 31.2(b) of the Vienna Convention.

77. Apart from the issue of timing, what is the difference, if any, in the nature of evidence of classification practice that must be adduced to prove the existence of "subsequent practice" within the meaning of Article 31.3(b) of the *Vienna Convention* as compared to the nature of evidence that is needed regarding classification practice for the purposes of Article 32 of the *Vienna Convention*?

In the case at hand, Brazil understands that there are two moments with respect to classification practice. One, prior to the conclusion of the Uruguay Round negotiations. Another, subsequent to it.

We know that prior to the conclusion of tariff negotiations, the EC did not import salted chicken meat under heading 0210. We also know that there was some debate regarding whether frozen and salted meat should be classified under heading 0210 or not, and that there was no specific classification legislation in the EC that defined or established a criterion for "salted meat" of heading 0210.

It was **prior** to the conclusion of tariff negotiations, more precisely during the verification of tariff schedules, that the EC issued Regulation No. 535/94 with a very specific definition for the product "salted meat" of heading 0210 in its Combined Nomenclature. This definition was the EC's understanding of what constitutes "salted meat" of heading 0210 and negotiating partners – exporting Members – accepted and understood that the tariffs being negotiated for heading 0210 in Schedule LXXX (and not for every Member's Schedule) applied to the products that fit the definition of "salted meat" as set forth in the EC's Combined Nomenclature.

This was a landmark, intended to clarify, once and for all, when salted frozen meat – of any type – was to be classified under heading 0210.

Subsequent to it, after the conclusion of the Uruguay Round, exporting Members began exporting salted chicken meat under heading 0210 in accordance with the definition introduced in the EC's Combined Nomenclature by means of Regulation No. 535/94. Customs authorities in the EC accepted and classified the product frozen salted chicken cuts, which met the criterion set out in Regulation No. 535/94, as "salted meat" of heading 0210. Authorities classified in this manner for a period of over 6 years (4 years for the Brazilian product and 6 for the Thai). EC legislation classification for "salted meat" of heading 0210 remained as provided in the end of the Uruguay Round until the measures at issue – Regulation No. 1223/2002 and EC Commission Decision – became effective. In other words, from 1995 until 2002, the EC maintained its classification legislation with respect to "salted meat" of heading 0210 as it was when it negotiated its tariff concessions under Schedule LXXX. Consequently, from 1996 to 2002, the EC classified imports of frozen salted chicken cuts under heading 0210.

As stated in the response to question no. 16 above, what is under examination is the meaning and scope of the tariff concession for heading 0210 under Schedule LXXX. Schedule LXXX is the EC's, and not some other Member's, Schedule of Commitment. Consequently, subsequent classification practice must be that of the EC based on its Schedule of Commitment. It may be the case that for some tariff concessions Members' Schedules are similar or identical and, in that sense, classification practice of some or all Members is relevant to establish the meaning and scope of a tariff concession. However, this is not the case for "salted meat" of heading 0210 in Schedule LXXX. For heading 0210, the EC inserted a specific definition that differs from that found in most if not all Member's Schedule. Therefore, relevant classification practice must be that of the EC's for purposes of interpretation of the tariff concession for heading 0210 of Schedule LXXX.

78. Do the parties consider that the WTO Modalities for the Establishment of Specific Binding Commitments under the Reform Programme issued on 20 December 1993 amounts to "preparatory work" within the meaning of Article 32 of the *Vienna Convention*? If so, please explain why and indicate the significance parties attach to this document?

The last paragraph of page 1 of the December 1993 WTO Modalities Paper explicitly provides that: "The revised text is being re-issued on the understanding of participants in the Uruguay Round that these negotiating modalities **shall not** be used as basis **for dispute settlement proceedings** under the MTO Agreement (sic)."[90] Members, therefore, unequivocally expressed their intention **not** to use the referred Paper as basis for dispute settlement proceedings under the WTO Agreement.

We recall that the WTO dispute settlement system also serves "(…) to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".[91] In other words, the mechanism is used to clarify WTO law according to public international rules of interpretation. Since the rules that may be applied in interpreting the meaning of a concession are the rules of interpretation in the Vienna Convention (Articles 31 and 32), Members determined that the Modalities Paper may **not** be used as "preparatory work" within the meaning of Article 32 for purposes of this dispute settlement proceeding.

In addition, we point out that "preparatory work" is to be used in the interpretation of a treaty – in this case Schedule LXXX – and not in the interpretation of the EC's import practice at the conclusion of the Uruguay Round. We state this because it seems that this is precisely what the EC does when it associates the Modalities Paper to its import practice of frozen chicken and salted meat at the conclusion of the Uruguay Round.[92]

79. What common essential feature(s) do the parties consider characterise products that fall under:

(a) Chapter 2 of the Harmonized System?
(b) heading 0207 of the EC Schedule?
(c) heading 0210 of the EC Schedule?

For products falling under Chapter 2 of the Harmonized System, the common essential feature is that they are meat or edible meat offal. The common feature of products falling under heading 0207 of Schedule LXXX is that they relate to poultry meat or edible offal that have not been prepared. With respect to heading 0210 of Schedule LXXX, the common feature of products thereunder is that they refer to meat or edible meat offal that have been prepared by salting, brining, drying or smoking.

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[90] Exhibit EC-9 (emphasis added).
[91] Article 3.2 of the DSU.
[92] EC's First Written Submission, para. 53.

80. In paragraph 20 of its oral statement during the first substantive meeting, Brazil submits that "[i]mporting Members have ample margin to define their offers in such a way that their interests are fully protected". Does this mean that, in the process of making tariff commitments, Members must be taken to have anticipated, or at least, assumed responsibility for all possible changes in trade patterns?

Although Members can anticipate some changes in trade patterns, Brazil does not think it is possible for Members to fully anticipate and assume all possible changes in trade patterns when they are negotiating tariff concessions. After all, trade flow is something that has always been and always will be dynamic, with new patterns developing to fit fresh market demands and existing rules.

At the time tariffs are negotiated, Members define their offers and their obligations in terms that best suit their needs. There is no doubt about that. A Member, however, cannot possibly thoroughly foresee what its needs will be ten or more years from the date it negotiated its tariffs. It is precisely because trade flow is dynamic that it is possible, and even likely, that some new and unexpected trade pattern will develop in a way that is contrary to or that does not suit a Member's need. This is something all WTO Members are subject to.

In fact, the WTO Agreements recognise this possibility and provide ways for Members to address unexpected trade patterns. One avenue is the Agreement on Safeguards, when an unexpected surge of imports of a given product occurs. A Member may also resort to anti-dumping or countervailing measures when dumped or subsidised imports increase in volume and injury to the domestic industry ensues. A Member may even modify its Schedule of Concessions under the provisions of Article XXVIII. However, what a Member cannot do is unilaterally change its commitments simply because a new trade pattern has emerged and the corresponding concession in its Schedule no longer suits its needs.

ANNEX C-2

**RESPONSES BY BRAZIL TO QUESTIONS
POSED BY THE PANEL AND THE EUROPEAN COMMUNITIES
AFTER THE SECOND SUBSTANTIVE MEETING**

(2 December 2004)

QUESTIONS POSED BY THE PANEL

FOR BRAZIL:

81. In its reply to Panel question No. 77, Brazil submits that the definition of the term "salted" in Regulation 535/94 comprised the EC's understanding of what constitutes "salted meat" of heading 02.10 and negotiating partners – exporting Members – accepted and understood that the tariffs being negotiated for heading 02.10 in the EC Schedule (and not for every Member's Schedule) applied to the products that fit the definition of "salted meat" as set forth in the EC's Combined Nomenclature. Please provide evidence of such "acceptance" and "understanding".

In *EC – Computer Equipment,* the Appellate Body concluded that "*(…) the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members*".[1] Brazil reiterates that this "common agreement among all Members" was reached on 15 April 1994 when Members agreed to and signed the Marrakech Protocol. Regulation No. 535/94, with the EC's understanding/definition of "salted meat" of heading 0210, was published in the EC's Official Journal prior to 15 April 1994, more precisely on 11 March 1994. Thus, the Marrakech Protocol itself is the ultimate evidence that negotiating partners accepted the term "salted meat" in Regulation No. 535/94 as the definition of "salted meat" of heading 0210 in Schedule LXXX.

Brazil also understands that Members were given an opportunity, prior to 15 April 1994, to verify each others schedules so as to "check and control" the scope and definition of tariff concessions. This opportunity to verify schedules ended on 25 March 1994 and Members had until this date to raise, discuss and resolve issues with respect to the scope and definition of specific tariff concessions. Regulation No. 535/94 provided, on 11 March 1994, the EC's definition of "salted meat" of heading 0210 within the Combined Nomenclature and, consequently, within Schedule LXXX. Had Brazil, or any other WTO Member, an objection or issue regarding the EC's definition of "salted meat" they had until 25 March 1994 to bring it up and discuss it with the EC.

But, where no objections or issues were raised, there was no need or reason to expressly acknowledge acceptance of specific concessions negotiated. An implicit acknowledgement would naturally occur on 25 March 1994, at the end of the period for verification of schedules. This was the case for the tariff concession of heading 0210. Brazil did not, and did not have to, express a formal acceptance of the scope and meaning of each and every tariff line of special interest to Brazil. In this sense, what the Panel is asking is that Brazil provide the impossible proof of a negative: that Members did not object to the scope of heading 0210 in Schedule LXXX. We have searched and found no document expressing Brazil's "acceptance" of the scope and definition of heading 0210 of Schedule

[1] *EC – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 109 (emphasis added).

LXXX, nor of any other tariff line. This obviously does not mean that Brazil was oblivious to the definition and scope of headings of Schedule LXXX, some of them related to crucial Brazilian export items. This simply means that, during the verification period, Brazil found no reason to object to the definition and scope of those headings. The actual evidence of acceptance of the definition of "salted meat", as set forth in the EC's Combined Nomenclature, is the signature of the Marrakech Agreement by Brazil and by all WTO Members on 15 April 1994.

82. In its reply to Panel question No. 60, Brazil notes that, upon importation into the EC, the products at issue are "seasoned" and/or "mixed with other ingredients". Please provide proof that "seasoning" and "mixing with other ingredients" does not entail the addition of salt.

Brazil reiterates that it is the objective characteristic of the product at the time of importation that is of relevance for purposes of classification. In the case at hand, Brazil has already shown that frozen salted chicken cuts met the objective characteristics of meat of heading 0210 laid down in Additional Note 7 of Chapter 2, inserted in the Combined Nomenclature by means of Regulation No. 535/94.[2] In other words, frozen salted chicken cuts from Brazil and Thailand were, in actual fact, deeply and homogeneously impregnated in all parts with a minimum salt content of 1.2% by weight when they entered the EC. This is not disputed by the EC. Accordingly, how a product is further handled after importation is not relevant for purposes of classification.

That said, we turn to the Panel's request. As a preliminary observation, we note that salted chicken cuts are used by European processors as raw material for a wide variety of value-added chicken products. Consequently, specific information regarding the composition of formulations used in the many different processes is sensitive commercial information that belongs to the European processing industry and to which the Brazilian government and producers/exporters of salted chicken cuts do not have complete and ready access to.

The information Brazil was able to obtain is that, when salted cuts are used, salt is not added in the processing of value-added chicken products. To support this information, we refer to Exhibit BRA-30 with letters from European companies attesting that processors do not need to add salt to their formulations because the cuts are already salted.[3] Brazil is also submitting, as Exhibit BRA-41, further confirmation from European processors that no additional salt – other than that found in the salted cuts – was included in the processing of chicken meat. We note that all information contained in Exhibit BRA-41, particularly names of importers and processors, is considered confidential and should be treated as such during and after these proceedings.

***FOR THE COMPLAINANTS**:*

84. How do Brazil's and Thailand's exporters describe the products at issue on their exportation documentation when exported to the EC?

Brazil has submitted as Exhibit BRA-29 a number of correspondences, invoices, bills of lading and purchase orders of sales of salted chicken cuts from Brazil to the EC for the period 1998 through 2002. By means of these documents, the Panel is able to assess how Brazilian exporters described the product at issue when exported to the EC.

Specifically, in Exhibit BRA-29(a) the product was described in a 1998 invoice as "*chicken breast, halves, skinless, boneless, without innerfillet, without medallion, uncalibrated, exe kg packed, frozen, spiced with salt*". In Exhibit BRA-29(d), we provided a 2001 invoice and bill of lading for the same transaction with the following product description: "*pechuga de pollo sin hueso y sin piel*

[2] Exhibits THA-22 and THA-23.
[3] Exhibit BRA-30. Second and third letters in the Exhibit.

sazonada con sal congelada" (chicken breast boneless and skinless seasoned with salt frozen). In Exhibit BRA-29(e), the product was described in a 2000 invoice as "*frozen chicken half breast boneless skinless salted*". In Exhibit BRA-29(f), we submitted a 2001 invoice, bill of lading and purchase order for the same transaction describing the product as "*frozen boneless, skinless, innerfillet breast salt content 1,3% by weight*". In Exhibit BRA-29(g), we submitted another set of documents for a 2001 transaction (invoice, bill of lading, purchase order) with the same product description as that found in Exhibit BRA-29(f). In Exhibit BRA-29(h) we provided an invoice, bill of lading and purchase order for a 2002 transaction, describing the product as "*frozen chicken breast, boneless, skinless, single without innerfillet salted 1,2% to 1,5%*".

Brazil is also submitting in Exhibit BRA-42 additional export documentation with the description of the product at issue. Specifically, Exhibit BRA-42(a) contains a 1998 *pro-forma* invoice, where the product at issue is described as "*frozen chicken breast, boneless skinless, in halves, without inner fillet, without middle cartilage, without medallion, 80 GM UP, salted 1,2 / 1,5% tumbled, 7,5 kg block blue foil, mini container of 570 kg*". In Exhibit BRA-42(b), the product described in a 1999 *pro-forma* invoice is "*chicken breast, frozen, half breasts, skinless, boneless, without middle cartilage, without innerfillet, without medallion, salted, normal sizes 80G UP and small sizes, packed in 7,5 kg blocks / blue foil, in mini containers of 570 kg*". Still with respect to the invoice in Exhibit BRA-42(b), we call attention to the fact that the field titled "shipment" in that invoice describes the product as salted chicken breast. We are also providing, in Exhibit BRA-42(c), a 2001 bill of lading, describing the product as "*Brazilian fresh frozen chicken breast, butterfly, with innerfillet, boneless, skinless, without tendon, salted (1,2 pct – 1,6 pct)*". Regarding this bill of lading, we note that in it the reported customs classification code for the product was NCM 0210.90. Still regarding Exhibit BRA-42(c), we are also presenting the export registration (RE) of that transaction with the customs code NCM 0210.90 reported under field No. 10 and the export receipt for that transaction. Similarly, we are submitting in Exhibit BRA-42(d) another 2001 bill of lading that describes the product as "*frozen salted chicken breast, in halves, boneless, skinless, without innerfillet, min. 1,2% max. 1,6% salt, max. 2% water*", the export registration (RE) for that transaction with the customs code for the product declared as NCM 0210.90, and the corresponding export receipt for the transaction. In Exhibit BRA-42(e), we have provided the following documentation related to one 2001 sales transaction: invoice, bill of lading, packing list, certificate of origin, animal and public health certificate (in Portuguese and English), additional declaration, and purchase order confirmation. In all documents of Exhibit BRA-42(e) the product is described as "*chicken breast fillets, boneless, skinless, salted, matured, without innerfillet, tumbled, minimum 140 G UP per piece, salt 1,2 – 1,5%, layer packed, polyliner cartons of 15 kg*".

Brazil stresses that all documents contained in Exhibits BRA-29 and BRA-42 and all information therein (including names of importers and processors) are highly sensitive and confidential and should be treated as such during and after these proceedings.

85. Please explain the export classification process for the products at issue. In particular, is this undertaken by domestic customs authorities and/or by exporters?

Based on pertinent regulations and also on information obtained from Brazilian authorities as well as producers/exporters of salted chicken cuts, Brazil is providing the following general overview of the export classification process for all chicken products, including the one at issue.

First, the exporter negotiates and defines with the importer/processor the terms and conditions of a specific sales transaction. Such process entails the definition of market destination, product description, quantity, price, payment conditions, shipment conditions and term, and other negotiated variables. The exporter then sends a *pro-forma* invoice to the importer/processor with an account of the negotiated transaction, including a description of the product. In sequence, the exporter receives a

confirmation of the *pro-forma* invoice from the importer. The exporter then directs an order for production.

In sequence, the exporter arranges shipment details (date and carrier) and sends the product from the production unit to the loading port. At this point, the exporter generates the invoice with information such as: quantity, price, product description (sometimes with the corresponding customs classification code in the Mercosul Common Nomenclature – NCM), name and address of producer, name and address of customer, loading and discharge port, terms and conditions of payment and shipment, etc. In addition, the exporter also prepares other documents required for shipment, such as: packing list and certificates (quality, sanitary).

After the container has been sterilised, the exporter – or his customs broker – registers the export transaction by filling out a document titled *Registro de Operações de Exportação* (RE) in an on-line registration system called *Sistema Integrado de Comércio Exterior* (SISCOMEX). Through SISCOMEX, the Brazilian government is able to control all import and export transactions in Brazil. The government entities that manage and are responsible for SISCOMEX are: the Secretariat of Foreign Trade (*Secretaria de Comércio Exterior* – SECEX),[4] the Federal Revenue Services (*Secretaria da Receita Federal* – SRF),[5] and Brazil's Central Bank (*Banco Central do Brasil* – BACEN). The objective of the export registration in SISCOMEX is to monitor/control all merchandise being shipped, thus assuring that what has been invoiced for export is effectively what is being shipped abroad. The RE contains information about the specific export transaction, such as: name and taxpayer registration number of the exporter; exporter's production and dispatching units; name, address and country of importer; payment and shipment terms and conditions; value of transaction; customs classification code (NCM) of the product exported;[6] product description; quantity; etc. The SISCOMEX software checks whether all fields have been properly filled out. If this is the case, the RE is issued by the system. Article 8 of Portaria SECEX No. 15, of 17 November 2004, holds the exporter responsible for the information entered into the RE.

Next, the exporter – usually the customs broker – puts together an export declaration, called *Declaração de Despacho de Exportação* (DDE), comprised of the invoice, an extract of the RE, and a request for shipment from the Department of Animal Products Inspection (*Departamento de Inspeção de Produtos de Origem Animal* – DIPOA).[7] These documents are submitted to the Federal Revenue Services at the loading port. The Federal Revenue Services then may immediately release the merchandise for shipment or it may select it for inspection. Selection for inspection in case of exports is very rare and, when it does occur, it is usually because the declared value of the merchandise is well below market price, the product description is vague or inexact, or when documentation appears to have been tampered with.

At this stage, the merchandise is released and ready for shipment. The exporter, in turn, has already sent shipment instructions to the ship owner, who – upon shipment confirmation of the merchandise – issues the bill of lading. The ship owner's customs broker has approximately 48 hours after the issuance of the bill of lading to register shipment data in SISCOMEX. There is simultaneous cross checking of information within SISCOMEX between the information provided by the exporter in the DDE and the shipment data registered by the customs broker in SISCOMEX.

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[4] SECEX belongs to the Brazilian Ministry of Development, Industry and Foreign Trade (*Ministério do Desenvolvimento, Indústria e Comércio Exterior* – MDIC).

[5] SRF belongs to the Brazilian Ministry of Finance (*Ministério da Fazenda* – MF).

[6] In Exhibits BRA-42(c) and BRA-42(d), the customs classification code (NCM) for the product is reported as 0210.90 in field No. 10 of the RE.

[7] DIPOA belongs to the Brazilian Ministry of Agriculture (*Ministério da Agricultura, Pecuária e Abastecimento* – MAPA).

If DDE matches the bill of lading, a notation/registration is issued, an export receipt is generated and the merchandise is released by SISCOMEX for shipment.

86. In paragraphs 14 and 36 of its second written submission, the EC submits that low levels (0.5%) of salt are regarded in the industry as sufficient for the purposes of preventing "drip loss". According to the EC, there is no need for a salt content of 1.2% or above for such purposes. The EC argues that, therefore, even if drip loss were relevant, it does not require that the salt content be greater than 0.5%. Please comment.

In their second written submission, the Communities asserted that a level of 0.5% of salt is regarded by the industry as sufficient to prevent "drip loss" and, thus, according to the EC there is no need to impregnate meat with a salt content of 1.2% or more.[8] We stress that, once again in these proceedings, the EC makes an allegation that is unsubstantiated by evidence.

Brazil, on the other hand, has provided letters from European companies attesting that salted chicken meat exported from Brazil to the EC – that is, meat impregnated with a minimum 1.2% of salt – is favoured over unsalted chicken meat precisely because it reduces "drip loss".[9] Thus, what the Panel has before it is the industry's confirmation that a 1.2% salt content in chicken meat effectively reduces "drip loss".

In addition, Brazil has provided technical literature explaining that water-holding capacity is the ability of meat to retain water[10] and that "drip loss" is the flipside of water-holding capacity. In other words, it is the inability of the muscle tissue to retain water, and with it protein. In connection, the literature also provides that meat treated with increasing quantities of salt becomes initially voluminous, greatly increasing the amount of retained water.[11] In simple terms, the more salt you add to the meat the greater the water-holding capacity and the lower the "drip loss". But there is a limit to the correlation between the increase in quantities of salt and the reduction in "drip loss". When meat absorbs about 5% of salt, a state of maximum "drip loss" inhibition is reached and, with this, the amount of retained water also reaches its peak.[12] By continuing to add salt, the volume of meat and retained water decreases and when it reaches a salt concentration of 10 to 12%, the process is inverted; that is, the muscle bundles have their volume reduced and the meat starts losing its own water.[13]

Translated to the case at hand, the higher the salt content (up to 5%), the lower the "drip loss". Thus, according to the evidence before the Panel, if 0.5% of salt can reduce "drip loss", a 1.2% salt content can reduce "drip loss" even more. For the processing industry, the prevention or reduction of "drip loss" in salted meat is a good thing because it means that more water and protein is retained in the final processed product.

At any rate, the Panel should not lose track of the most important point here: that it was the EC that established the objective characteristics for "salted meat" of heading 0210 as meat deeply and homogeneously impregnated with a minimum 1.2% of salt by weight. It is undisputed that salted

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[8] EC's Second Written Submission, paras. 14 and 36.

[9] Exhibit BRA-30.

[10] Literature on the Action of Salt in Meat. Montana Meat Processors Convention, page 7. Exhibit BRA-16. Aguirre, S.E., Ingredientes que Aumentan la Capacidad de Retención de Agua em Productos Cárnicos, first paragraph. Exhibit BRA-38.

[11] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 724; João Andrade Silva at page 183. Exhibit BRA-16.

[12] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 724; João Andrade Silva at page 183. Exhibit BRA-16.

[13] Literature on the Action of Salt in Meat. Miguel Cione Pardi at page 724; João Andrade Silva at page 183. Exhibit BRA-16.

chicken cuts exported from Brazil and Thailand to the EC met this objective characteristic at the time of importation. That salted chicken meat impregnated with 1.2% of salt in effect reduces "drip loss" is one commercial reason why there is demand for the product in the EC. However, what determines classification under heading 0210 is that the product met the objective characteristics set out in the EC's nomenclature at the time of importation.

***FOR ALL PARTIES**:*

118. What is the distinction between "preservation" and "long-term preservation"?

Brazil has provided that the verb "preserve" means to "maintain (a thing) in its existing condition" or "to prevent (organic bodies) from decaying or spoiling".[14] Brazil understands that the concept of preservation is not absolute and unequivocal and that a product may undergo processes that allow preservation for entirely different time spans. With that in mind, we affirm that "long-term preservation" is a term not found or defined in the Harmonised System nomenclature, in Brazil's classification nomenclature and legislation, nor in the EC's Combined Nomenclature.

Furthermore, we remind the Panel that "long-term preservation" was a term created and introduced by the EC, which has never really been properly defined in this dispute. At one point, the EC seems to have qualified it as preservation for "many" or "several" months,[15] but Brazil is not certain since in the Annex to Regulation No. 1223/2002 the term appears to mean preservation for one year (12 months).[16] Still, recital (4) of Regulation No. 1871/2003 suggests that the term is preservation for a period other than transportation.[17] In *Gausepohl*, the discussed terminology for long-term preservation was "*preservation considerably exceeding the time required for transportation*".[18] In that case, we recall that the time required for transporting the meat in question was only one hour but it was preserved for up to two days, a period that was regarded by the Advocate General as considerably exceeding the time required for transportation.[19] Additional confusion as to the meaning of "long-term preservation" was introduced by the EC when it provided that salted/dried/smoked meats may be "*further preserved*" by other means – such as chilling or freezing – and still fall under heading 0210,[20] while arguing at the same time that what determines classification under heading 0210 is that salting/drying/smoking ensures long-term preservation.

Based on the absence of a legitimate definition for the term and taking into account the various meanings provided in the paragraph above, Brazil submits that it cannot establish a distinction between the terms "preservation" and "long-term preservation".

119. At the time the EC concluded its Schedule, was there evidence of the existence of trade in meats under heading 02.10 which, through salting, were preserved for less than a few months?

In all likelihood, when the EC concluded Schedule LXXX there was trade under heading 0210 of meats prepared with salt, which were also preserved by that salting for a period inferior to a few months. The trade of products such as chilled or frozen bacon and Parma ham under heading 0210 is not a recent practice. However, the questions that remain are: 1) whether a salt content of

[14] Brazil's First Written Submission, para. 76.
[15] EC's Second Written Submission, para. 41; Exhibit EC-5.
[16] Exhibit BRA-08.
[17] Exhibit BRA-10.
[18] Exhibit EC-14, page I-3056, para. 35.
[19] Exhibit EC-14, page I-3061, para. 6.
[20] EC's Replies to the Panel's Questions, paras. 54, 57 and 79; EC's Second Written Submission, para. 30.

1.2% alone preserved meats for a period of a few months, as suggested by the EC; 2) whether these salted meats were also frozen – for further preservation – when traded under heading 0210; and 3) whether the same salted meat was preserved for different time spans, depending on the distance between exporting and importing country.

Brazil searched the World Customs Organisation's (WCO) Harmonised System Commodity Database On-Line to find out what kinds of salted meat were traded under heading 0210 at the time the EC concluded its Schedule. We point out that the WCO On-line Database consists of a combination of databases obtained from Member administrations, private companies, international organisations, etc. It is designed to help users determine the classification of commodities in the Harmonised System and is part of the complementary publications and databases of the Harmonised System. Unfortunately, the On-line Database is only available for the 1996 and 2002 version of the Harmonised System. In any event, we are submitting in Exhibit BRA-43 part of the list found in the HS On-line Database of salted meat classified under subheading 0210.90 (1996 HS version). The Panel will note that "salted meat of chicken" and "salted meat of poultry" are included in this list as examples of products that fall under subheading 0210.90.

The list is also suggestive because it contains a number of products that fail to meet the absurd criterion proposed by the EC for classification under heading 0210: a "preparation that places meat in a recognisably different state, normally one which is identified by a name."[21] Products such as salted edible offal of reindeer, salted meat of beavers, salted frogs' legs, salted meat of pigeons, or salted meat of hares, to cite just a few, are hardly "instantly recognisable in the sense that bacon or charque are instantly recognisable."[22] Yet, as the list clearly shows, these are products that are normally traded under heading 0210.90.

120. With respect to Brazil's suggestion in its reply to Panel question No. 3 that the Panel should draw adverse inferences regarding the EC's failure to provide certain information requested of it by the Panel, is there any basis for the Panel drawing similar inferences regarding Brazil's and Thailand's refusal to provide export classification practice for the headings at issue?

Brazil has stated in its response to question No. 3 that Binding Tariff Information (BTI) is information that EC authorities and importers have easy access to and, consequently, it is not information that non-EC producers/exporters or the Brazilian Government can easily obtain. Consequently, only the Communities in these proceedings have full and immediate access to BTIs issued by its Member States and only the Communities can effectively provide this information to the Panel.

In question No. 53, the Panel requested that the EC provide copies of the relevant BTIs or other material to support the assertion that other customs offices – apart from those in Hamburg, Rotterdam and in the United Kingdom – did not classify the product at issue under subheading 0210.90. As a response, the EC provided an unrelated BTI for ham, not chicken, of subheading 0210.11.31 and, therefore, failed to provide the information requested by the Panel: relevant BTIs, or other supporting material, demonstrating that other EC customs offices did not classify the product at issue under subheading 0210.90. Apparently, even the Panel acknowledges that the EC failed to provide this information for it is once again requesting it in question No. 117.

In contrast, Brazil has not refused to provide export classification practice for the headings at issue. We recall that in question No. 16 the Panel asked that the Complainants provide details of their classification practice in relation to imports and exports of the product at issue. This is precisely what

[21] EC's Second Written Submission, para. 35.
[22] EC's Second Written Submission, para. 36.

Brazil did. First, we informed that there is no import classification practice for salted chicken cuts because we do not import this product. Then, we further provided that our export classification practice of frozen salted chicken was inconsistent. That is, while sometimes the Brazilian exporter or its customs agent correctly classified exports of salted chicken cuts under heading 0210,[23] Brazil concedes that other exports of the product at issue were incorrectly classified under heading 0207. In this regard, we also explained why such export practice was inconsistent. A point, however, that should not escape the Panel is that Brazil does not believe that its classification practice is relevant for the interpretation of Schedule LXXX. We have extensively provided the reasons why in our response to questions Nos. 16 and 77, in our second written submission, and in our second oral statement, and will not replicate our arguments here.[24]

In short, Brazil would like to make clear that it has not refused to provide information on its export classification practice of salted chicken cuts and, thus, believes there is no basis for the Panel to draw adverse inferences on any information and/or response it has provided.

121. What relative weight should the Panel accord to inferences that may be drawn for the headings at issue in this case from:

(a) the structure of Chapter 2 of the HS and its predecessors;

(b) the Explanatory Notes that are relevant to Chapter 2 of the HS and to its predecessors; and

(c) General Interpretative Rule 3 of the HS.

Given that the EC and Brazil have different views as to how Chapter 2 of the HS is structured, the inferences that can be drawn for the headings at issue, and the weight that should be accorded to such inferences, must be based on what is explicitly provided in the HS and in its predecessors. In this sense, the EC's view that Chapter 2 of the HS is structured according to methods of preservation finds no support in the language of the HS nor in former nomenclatures. It is simply a point of view of the EC that is not validated by the language in the HS.

In contrast, there is clear and unequivocal language in the HS Explanatory Notes to Chapter 2 and heading 0210 that clarify that the structure of Chapter 2 is based on methods of preservation and preparation, and that the processes of heading 0210 are preparation – and not preservation – processes. Clear language on the structure of Chapter 2 is also found in nomenclatures preceding the HS, which can be of assistance to the Panel in understanding how the HS was originally structured. For example, in the 1937 Draft Customs Nomenclature of the League of Nations, Chapter 2 was structured so as to place *in natura* meat at the beginning of the Chapter and "simply prepared" meat at the end.[25] The 1937 Draft also explained why the terms "fresh", "chilled" and "frozen" – terms related to preservation – were placed as tertiary items within a heading and not as separate headings. There was a real concern that fundamental distinctions not be made between "fresh", "chilled" and "frozen" because countries might be compelled to introduce in their classification nomenclature subdivisions that would lead to discrimination being made between the same meat – preserved by different methods – coming from different parts of the world.[26] This was not a concern for salted meat because salt preparation was not considered a method of preservation. That is why salted meat was placed in a separate heading within Chapter 2.

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[23] Exhibits BRA-42(c) and BRA-42(d) illustrate the point that some exports of the product at issue were classified under subheading 0210.90 when they left Brazil.

[24] Brazil's Second Written Submission, paras. 75 and 76; Brazil's Second Oral Statement, paras. 40-48.

[25] Brazil's Second Written Submission, paras. 36 and 37; Exhibit BRA-40.

[26] Brazil's Second Written Submission, paras. 38 – 41; Exhibit BRA-40.

As to the weight the Panel should accord to inferences drawn from HS Explanatory Notes to Chapter 2, we have provided that, in *EC – Computer Equipment*, the Appellate Body believed that a proper interpretation of Schedule LXXX should have included an examination of the Harmonised System and its Explanatory Notes.[27] In this dispute, all parties agree that both the HS and Explanatory Notes are relevant in the interpretation of the terms of Schedule LXXX. Specifically, Brazil and the EC consider that the HS and Explanatory Notes are context.[28] Specifically regarding Explanatory Notes, we note that the Appellate Body in *Computer Equipment* intentionally gave them the same interpretative weight and status as that given the HS.[29] We know this because in that case the US cautioned the Appellate Body of the interpretative value that should be given to these notes.[30] Although warned by the US, the Appellate Body considered the Explanatory Notes to be just as relevant as the HS itself in the interpretation of Schedule LXXX.[31]

Similarly, with respect to General Interpretative Rule 3 of the HS, Brazil has provided that it is part of the HS. We call to mind that the Harmonised System is made up of "*(…) the Nomenclature comprising the headings and subheading and their related numerical codes, the Sections, Chapter and Subheading notes and the General Rules for the interpretation of the Harmonized System (…)*".[32] Because it is part of the HS, General Rule 3 is also part of the context of Schedule LXXX. Even though Brazil does not consider that the product at issue may *prima facie* fall under two or more headings of the HS (to us it is unequivocally a product of heading 0210), if General Rule 3 is applied it should be used as part of context – alongside the other rules of treaty interpretation – in the interpretative exercise of the Panel.

122. Do the parties consider that actual knowledge during negotiations of a document or instrument is necessary on the part of some/all negotiators involved in the negotiation of a treaty in order for it to qualify for consideration as "preparatory work" and/or "circumstances of conclusion" of a treaty under Article 32 of the *Vienna Convention*? If so, please provide support for this view. If not, please provide support for this view.

To properly respond, Brazil finds it necessary to qualify the phrase "actual knowledge" found in the Panel's question.

If "actual knowledge" means that all negotiators must have been, in effect, aware of the existence and content of certain documents and instruments during negotiations, then the response is: "No". Actual knowledge of a document or instrument is not necessary on the part of some/all negotiators in order for these instruments to be considered as "preparatory work" and/or "circumstances of conclusion" within the meaning of Article 32 of the Vienna Convention. For example, instruments or documents may be drafted during the negotiations of a treaty without the participation of all States, contracting parties to that treaty. One cannot presume that such documents are not part of the historical background of the treaty negotiated simply because some States did or were not able to [fully and equally] participate in the discussion or drafting of such documents.

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[27] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 89.

[28] EC's First Written Submission, para. 107; EC's Replies to the Panel's Questions, paras. 95 and 102; EC's Second Oral Statement, para. 28; Brazil's Replies to the Panel's Questions, Question 73; Brazil's First Oral Statement, para. 31; Brazil's Second Written Submission, para. 27.

[29] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 89.

[30] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 38.

[31] *EC – Computer Equipment*, Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 89.

[32] Article 1(a) of the Harmonized System Convention. Exhibit BRA-20 (emphasis added).

On the other hand, if "actual knowledge" means that certain documents and instruments were publicly available and, thus, potentially accessible to all negotiators during negotiations, then the response is: "Yes". For a document or instrument to qualify for consideration as "preparatory work" and/or "circumstances of conclusion", that document or instrument must have been published. That is, States should have had the possibility of consulting these documents or instruments during negotiations if they wished to do so. Quite logically, one cannot possibly call upon documents or instruments that have not been published, or which are concealed, as historical documents associated with the negotiation of a treaty.

To better illustrate the distinction indicated in the above paragraphs, we quote Sir Ian Sinclair, regarding supplementary means of interpretation:[33]

> *"(…) the better view would still appear to be that recourse to travaux préparatoires* ***does not*** *depend on the participation in the drafting of the text of the State against whom the travaux are invoked. To hold otherwise would disrupt the unity of a multilateral treaty, since it would imply that two different methods of interpretation should be employed, the one for States who participated in the travaux préparatoires and the other for States who did not so participate. One qualification should, however, be made.* ***The travaux préparatoires should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them****. Travaux préparatoires which are kept secret by the negotiating States should not be capable of being invoked against subsequently acceding States."* (emphasis added)

In the case at hand, we note that Regulation No. 535/94 was available in the public domain as of 11 March 1994, and all EC negotiating partners had the possibility of consulting the Communities' understanding/definition of "salted meat" of heading 0210 prior to the conclusion of Schedule LXXX.

QUESTIONS POSED BY THE EUROPEAN COMMUNITIES

Brazil is asked to identify and cite the specific sentences of its Exhibits which it considers supports the following claims:

- **"Brazil has provided evidence that salt at such [1.2-3%] levels has some preservative effect on meat" (Para. 2 of Brazil's Second Oral Statement)**;

Brazil has already identified and cited in footnote 1 of its closing statement the specific pages in the technical literature, provided in Exhibit BRA-16, which support the fact that 1.2 to 3% of salt in meat has some preservative effect. In the spirit of cooperation, we reproduce below some of the cited passages in Exhibit BRA-16.

Meat Science Foundations
John C. Forrest at page 246

> *"(…) the reduction of water activity to a level sufficient for an effective preservation requires a salt concentration in the finished product of 9-11%, a quantity considerably higher than the* ***2-3%*** *usually found in commercially processed products.* ***Although some micro-organisms are inhibited by these [2-3%] salt concentrations****, the water activity is still sufficiently high so as to tolerate the growth*

[33] *The Vienna Convention on the Law of Treaties, Second edition,* Sir Ian Sinclair, Manchester University Press, 1984, page 144.

of molds, yeasts and halophilic bacteria (salt lovers). Thus, on todays commercially processed meat products, ***salt only exerts a limited preserving effect, whereas these products need other methods of preservation in order to have their shelf-life extended****."* (emphasis added)

Chemical Food Preservation – Characteristics, Uses, Effects
E. Lück at page 84

"In these cases [as a preservative], ***common salt exerts a good microbial effect at concentrations as low as 1-3%.*** *These relatively small additions reduce water activity to prevent the growth of important putrefaction bacteria, such as those in sausages, hams, and salted meats."* (emphasis added)

Meat Science, Technology and Hygiene
Miguel Cione Pardi at pages 722 and 723

"a) on sufficiently high concentrations, salt inhibits the microbial growth by increasing the osmotic pressure of the environment, with the consequential reduction of water activity (aa);

b) on concentrations between 1% and 3% of salt, a good antimicrobial action is exerted, in view of a reduction in the water activity (aa);

c) ***the growth of some bacteria is inhibited on low concentrations such as 2%****, while others, like yeasts and molds, are capable of growing in salt concentrations which may reach even the saturation point; whereas halophiles in general require concentrations higher than 10% NaCl;*

d) in order for the product to be properly preserved, it should contain between 50 and 55% of water, and between 9 and 11% of salt, that is, an aqueous phase almost saturated with salt;

e) the preserving effect of salt diminishes significantly when its concentration on the aqueous phase of cured meat is lower than 5.5%;

d) in current practice, ***where 2 to 3% of salt is added*** *so that the cured product presents a pleasing taste****, the salt lacks a significant preserving effect*** *in products with a humidity content of 60% or more; (…)"* (emphasis added)

Topics on Food Technology
João Andrade Silva at pages 182 and 183

"In sufficiently high concentrations, salt inhibits microbial growth by increasing the osmotic pressure of the environment, with the consequent reduction of the water activity; ***low concentrations of salt between 1.0 to 3.0%, already exert a significant antimicrobial action, due to the reduction in the water activity of the environment****. (…)"* (emphasis added)

"(…) On cured meats, ***the salt preserving effect is dramatically reduced, when its concentration is lower than 5.5%****, on the aqueous phase.* ***The preservation of products with salt concentrations lower than this value should be made by means of refrigeration (cooling).*** *(…)"* (emphasis added)

- **"Salt extracts proteins, increases water-holding capacity and yield, improves bind and texture and reduces 'drip loss' after thawing' (para. 17 of Brazil's Second Oral Statement)**

Throughout these proceedings, Brazil has identified and cited in its submissions, statements and responses, passages that validate the facts provided in paragraph 17 of Brazil's second oral statement. Specifically, we direct the Panel to paragraphs 85 - 87 and footnotes 75 - 79 of Brazil's first written submission; paragraph 26 and footnotes 15 - 19 of Brazil's first oral statement; and, paragraph 15 and footnotes 20 - 22 of Brazil's second written submission. These passages, as well as paragraph 17 of Brazil's second oral statement, are supported by: Exhibit BRA-16, scientific literature on the action of salt in meat; Exhibit BRA-30, letters from European companies declaring their preference of salted over unsalted chicken cuts because it leaves meat more tender and reduces drip loss (better yields); Exhibit BRA-36, a brief account provided by Professor Dr. Nelcindo Terra of the effect of salt on poultry meat, the different methods of salting poultry meat, and the consequence of desalting meat; and, Exhibit BRA-38, supporting information on the action of salt and different salting methods.

For ease of reference, Brazil has reproduced below extracts in the scientific literature provided in Exhibit BRA-16 that confirm the statement in paragraph 17.

Meat Science, Technology and Hygiene
Miguel Cione Pardi at page 721

> "***Salt (sodium chloride) is used on prepared meats due to its important binding attributes***, *aroma/flavour and preservation.* ***One of the purposes of NaCl is to extract the myofibril proteins. The extraction and solubilization of these muscle proteins contribute to the binding of meat particle in order to emulsify the fat and increase the WHC (water holding capacity)***. *Thus, it* ***reduces the losses occurred*** *when the product is cooked and* ***improves the quality and texture of the product***. *When the raw product is cooked, the fat, water, and other constituents are attracted inside the coagulated meat protein matrix to* ***form acceptable products with respect to yield, softness, humidity, texture, and overall quality*** *(SCHMIDT et al (13); ACTON et al (2)). (…)*" (emphasis added)

Science of Meat and Meat Products
James F. Price at pages 381–385

> "*The binding mechanism of meat systems is complex and not completely understood. Nonetheless,* ***the more relevant factors that determined the efficiency of the bind are: the protein extraction, the mechanical labour, the presence and concentration of added salts, the pH and the heating temperature*** *(Trout and Schmidt, 1984).*" (emphasis added)

> "*(…) The* ***mechanisms by which salt increases the binding capacity of the protein matrix are****: (a)* ***by increasing the number of protein extracted****; (b) by altering the ionic force and the pH of the environment so that the stable protein matrix by the final heat forms a coherent three dimensional structure.*

> *An explanation of how salts increase the gel force was proposed by Siegel and Schmidt (1979a, 1979b), who demonstrated, by electronic microscope sweepings, that when myosin and actomyosin are heated in saline solutions of high ionic force, proteins formed a three-dimensional framework of fibers. Without these added salts, the same proteins formed a spongy structure with little force (Siegel et al., 1979).*

Thus, ***they concluded that the addition of salts was necessary for meat proteins to form a stable three-dimensional net****."* (emphasis added)

Topics on Food Technology
João Andrade Silva at page 181

"***One of the most important roles of salt****, in the meat product industry,* ***is the extraction of myofibril proteins****. The extraction and solubilization of these muscle proteins contribute to the emulsification of fats and to the* ***increase in its water holding capacity****, thus* ***reducing weight losses*** *when the product is cooked,* ***contributing to the improvement of the quality and texture of the product.*** *(…)*" (emphasis added)

Ingredients in Processed Meat Products
Montana Meat Processors Convention at page 11

"(…) Salt is used in most instances as a flavour enhancer but ***it is also important to water binding ability of meat and extraction of meat proteins*** *necessary for the manufacture of boneless or chopped and formed hams. When salt is added to meat it causes swelling of the myofibrils (Hamm, 1960). With the addition of salt the isoelectric point (lowest water holding capacity) is shifted to a more acidic pH,* ***increasing the water binding ability of meat*** *at its normal ultimate pH of 5.5-5.6 (Hamm 1960).*

Salt improves water binding but also is necessary to extract proteins *in the manufacture of boneless hams.* ***Salt solubilizes actin and myosin to form the glue between muscle pieces so boneless products appear as once piece and aids in the sliceability of the finished product.*** ***Increasing levels of salt will extract more muscle proteins*** *but the amount that can be used is limited by the taste of the product. (…)*" (emphasis added)

Regarding the "drip loss" effect, we note that the EC itself asserted that the issue arises in respect of frozen food and that it concerns, more specifically, the loss of protein when thawing.[34] Accordingly, salted meat is more attractive to processors because further processed products, that use it as raw material, are able to retain more water and protein.

[34] EC's Second Written Submission, paras. 14 and 36.

ANNEX C-3

COMMENTS BY BRAZIL ON THE EUROPEAN COMMUNITIES' RESPONSES TO QUESTIONS AFTER THE SECOND SUBSTANTIVE MEETING

(9 December 2004)

QUESTIONS POSED TO THE EUROPEAN COMMUNITIES

Question 91

We begin by pointing out that the Communities failed to provide a response to the Panel's question as to how a product is dealt with by customs officials when it is not obvious that a product has been preserved by one of the means mentioned in heading 0210.

Furthermore, we recall that the EC has claimed throughout these proceedings that the product at issue does not qualify as salted meat of heading 0210 because the salting in question does not ensure long-term preservation. In responding this question, the EC states that it is "normally obvious" to customs officials what kind of salted/dried/smoked meat has been preserved, since the preservation techniques referred to in heading 0210 leave meat with specific characteristics that are readily detectable. Yet, for a period of over 6 years it was "normally obvious" to EC customs officials that the product at issue was classified under heading 0210. Apparently, the product at issue presented specific characteristics (saltiness), readily detected by EC customs officials, which put it under heading 0210.

In connection, the EC provided in response to question No. 89 that in assessing the objective characteristics of a product customs officials carry out certain steps in their inspection/analyses. Among these steps is "*the physical inspection of the product, in particular its temperature, smell, taste, colour*". There is no doubt that, upon inspection, the product at issue is readily detected as "salted meat", especially because of the salty taste of the product.

The EC also points out laboratory analysis of product samples as another possible means of inspection in the assessment of the objective characteristics of a product. Such analysis is undertaken to verify conformity with customs specifications. In the instant case, EC Member States effectively carried out analysis of frozen salted chicken cuts that confirmed that the product at issue met the objective characteristics criterion laid down in Additional Note 7 to Chapter 2 of the CN.[1] That is, customs officials actually verified that the product conformed to customs specifications.

Question 93

The EC has provided that "Regulation 535/94 sets a minimum salt content, a pragmatic rule, below which it cannot be considered that a product is salted for preservation". For the sake of argument, if we were to consider this a true statement, it seems logical that the EC would only set a 1.2% minimum salt content in heading 0210 if there was some kind of meat that, in effect, was preserved [for long-term] with this salt percentage. Otherwise, why would the EC set the minimum salt threshold at 1.2%? Yet, the EC has provided that it does **not** know of any type of meat that deeply and homogeneously impregnated with 1.2% of salt can be preserved for many or several months without chilling or freezing.[2] In another response, the EC also replied that "in order to be preserved with salt, meat should be deeply and homogeneously impregnated with a level of salt

[1] Exhibits THA-22 and THA-23.
[2] EC's Response to Brazil's Questions Following the Second Substantive Meeting, Question 2 para. 2.

sufficient to ensure long-term preservation, i.e., much higher than 3%".[3] From these responses, it is clear to us that - different from what has been argued by the EC - the 1.2% threshold in Regulation No. 535/94 was not a pragmatic minimum salt content rule below which a product is not salted for preservation (in order words, at or above which it could be salted for long-term preservation).

Besides, Regulation No. 535/94 does **not** mention "preservation" or "long-term preservation". The EC would like the Panel to believe that "*the requirement of preservation (…) flows directly from heading 0210 of the Combined Nomenclature*" and it is implicitly contained in Regulation No. 535/94. That is simply **not** true. Until the advent of Regulation No. 1871/2003, "long-term preservation" was not a concept/notion/requirement found **anywhere** in the Combined Nomenclature. One cannot, as the EC implies, interpret that it was an assumed concept within the CN because it was covered by the HS. This is also **not** true. "Long-term preservation" was **not**, and is **not**, covered or even referred to in the HS, especially with respect to salted meats of heading 0210. We have fully demonstrated this during these proceedings.

The truth of the matter is that Regulation No. 535/94 simply set out the objective characteristics criterion a product had to meet in order to qualify as salted meat of heading 0210. In this regard, the EC does not dispute that the product at issue met the objective characteristics criterion for salted meat of heading 0210: the product was deeply and homogeneously impregnated with salt in all parts with a minimum 1.2% of salt by weight.

Question 96

It is undisputed that the EC classifies Parma ham, prosciutto and jamón serrano under heading 0210,[4] even when chilled or frozen. The packages provided in Exhibit THA-25 are proof that these products need to be preserved by chilling. Brazil has also provided that Danish salted/smoked bacon is classified under heading 0210, even when frozen.[5] The EC itself has conceded that salted/dried/smoked meat that has been sliced – such as the case of Parma ham and prosciutto - is vulnerable to surface contamination unless measures [chilling/freezing] are taken to protect the meat.[6] With respect to salted/smoked bacon, the EC also admitted that it is frozen because it is sliced and put into consumer packs ready for retail sale. To the EC, the fact that it has been refrigerated to permit a longer shelf-life does not alter its classification under heading 0210.[7]

Now, the EC is altogether denying that it has ever said that these types of products require additional means of preservation. In doing so, it refers to an opinion provided by Professor Karl-Otto Honikel stating that Parma ham, prosciutto and jamón serrano are shelf-stable for many months at ambient temperatures and that, even when sliced, these products are shelf-stable,[8] although in this regard neither the EC nor Professor Honikel venture to state for how long. Perhaps, they could be shelf-stable without refrigeration for weeks, days or hours. Curiously, that information has not been provided. Still, Professor Honikel explains that moulds and yeasts may grow on unchilled sliced salted/dried/smoked meat and form unpleasant looking spots on the meat surface.[9] According to the Professor, this is the reason why sliced raw hams are chilled during storage or display. In other words, these products are chilled or frozen during storage or display to prevent the growth of moulds

[3] EC's Response to Panel's Questions Following the Second Substantive Meeting, Question 88 para, 4.

[4] We observe that the EC did not provide the classification of the products mentioned by the Panel when imported into the EC and that Exhibit EC-31 is the EC's Refund Nomenclature and not the EC's Combined Nomenclature.

[5] Exhibits BRA-32 and BRA-39.

[6] EC's Second Written Submission, para. 43.

[7] EC's Second Written Submission, para. 45.

[8] Exhibit EC-32.

[9] Exhibit EC-32.

and yeasts, microorganisms that deteriorate meat. In particular, we note that the formation of unpleasant looking spots in meat is part of the deterioration process. Thus, chilling and freezing are indeed applied to Parma ham, prosciutto, jamón serrano and bacon in order to ensure preservation.

Here, the Panel should keep in mind that if, as claimed by the EC, preservation is what really structures Chapter 2, and the processes of heading 0210 are those that ensure long-term preservation, then salted/dried/smoked meat – such as Parma ham or bacon – that are actually preserved or further preserved (for transportation, storage, display, etc) by chilling/freezing cannot be classified under heading 0210, as has been the EC's regular practice in respect to these products. In practice, not even the EC considers that [long-term] preservation is what bestows classification under heading 0210.

Brazil would also like to take this opportunity to make a few overall comments regarding Exhibit EC-32. First, the EC outright declares that Brazil has referred or cited to Professor Karl-Otto Honikel in the material it has presented in these proceedings. Brazil invites the Panel to check and verify whether any of the technical information it has provided to the Panel is authored by Professor Karl-Otto Honikel.[10] It is not. Second, the opinion provided by Professor Honikel in Exhibit EC-32 is not supported by any bibliography that can be verified by the Complainants or the Panel. Third, the bulk of the technical literature Brazil has provided in these proceedings was presented on 3 August 2004, in Exhibit BRA-16, together with Brazil's first written submission. The Communities had the opportunity, if they wanted, to present technical expert opinion on the action of salt in meat in its first written submission or at a subsequent stage – at the first substantive meeting, in response to the Panel's questions, or in their second written submission. Yet, the Communities chose to provide this information at the last opportunity possible, making it impossible for the Complainants - within the limited time frame to provide comments - to fully and technically address and rebut the information presented in Exhibit EC-32. For that reason, and based on item 14 of the Panel's Working Procedure, Brazil requests that the Panel disregard Exhibit EC-32.

Question 97

Regarding the above response, a few clarifications are in order.

More than once, the EC tries to pass off the idea that changes in red colouring is a meat characteristic brought about by salting when used for preservation.[11] Just to set the record straight, we remind the Panel that the product at issue is salted chicken meat. In other words, it is white - and not red - meat and, thus, irrespective of the amount of salt impregnated, will never present a "customary red colour". Likewise, salted frogs' legs, salted meat of ducks, salted meat of geese, salted meat of pigeons, salted meat of rabbits, and many other salted white meats listed in the WCO's HS Commodity DataBase as meats falling under subheading 0210.90 will not present a red colour after salting, as suggested by the EC. The EC seems to imply that only red meat can qualify as salted meat of heading 0210. This is **not** true.

The second clarification relates to the EC's proposition that Brazil has purposely claimed at a late stage in the proceedings that 1.2 to 3.0% of salt is enough to preserve meat. This is also **not** true. Brazil has, since its first written submission, been upfront about the action of salt in meat.[12] In fact, in

[10] Please note that in the article titled "Microstructure and Biochemistry of Avian Muscle and its Relevance to Meat Processing Industries", authored by Thayne R. Dutson and Ann Carter, found in Exhibit BRA-38, an article regarding bovine meat written by Professor Honikel, and others, is merely cited in the references section of that article.

[11] EC's Response to Panel's Questions Following Second Substantive Meeting, paras. 18 and 31. In these paragraphs the EC cites to paragraph 116 of its First Written Submission but Brazil fails to understand how that paragraph supports the EC's contention.

[12] Brazil's First Written Submission, paras. 83-87 and para. 102.

responding to EC question No. 1, following the second substantive meeting, Brazil not only indicated and cited to the passages in the technical literature that support the fact that 1.2 to 3.0% of salt has some preservative effect, but also reproduced parts of those passages for the EC.[13] But what is even more ludicrous is the allegation that we have made a new claim late in the proceedings. Brazil recalls that it was forced to clarify the issue precisely because the EC had misled the Panel into thinking that Brazil had claimed that cuts salted at such levels could not be preserved.[14] We were **not** making a new claim, as proposed by the Communities, but clarifying a misconception created by the EC.

We further clarify additional false impressions that the Panel may be under with respect to Exhibit EC-32. Professor Karl-Otto Honikel states in that Exhibit that "*in the raw and chilled state 3% salt is too low to prevent spoilage for more than a few days*".[15] We agree. In fact, we have pretty much said this already: at concentrations of 1 to 3% common salt exerts a good antimicrobial action but for the product to be properly/adequately preserved salt concentration of 9 to 11% is needed.[16] That concentrations of 1 to 3% of salt have some preservative effect on chicken meat is apparently not disputed, since even the EC's authority on the subject has acknowledged that it can preserve chicken meat for a few days.[17] Brazil is not of the view that salting of heading 0210 must ensure preservation. Nonetheless, even under the assumption that it must, we recall that in *Gausepohl* long-term preservation was a two-day period.[18] If long-term preservation was a two-day period in *Gausepohl* and Professor Honikel has asserted that salted chicken meat is preserved for a few days without refrigeration, then it seems that the product at issue qualifies as salted meat of heading 0210, according to the EC's criterion, and freezing takes place only as a means of further preservation of the product.

Still regarding Exhibit EC-32, Professor Honikel asserts that "there is no technological advantage of salting meat before freezing as frozen (salted or unsalted) chicken breast if used for meat products will be used in slight frozen state. So drip loss is of no concern."[19] In other words, what the Professor is saying is that drip loss has no effect if meat is not thawed. For the most part, we agree with this assessment. We do **not**, however, agree with the Professor's contention that frozen salted chicken cuts are not thawed prior to processing. In response to question No. 60 posed by the Panel, we have informed that the first step in all further processes is always the thawing of frozen salted chicken meat. Moreover, the processors themselves have declared that drip loss reduction of salted chicken meat is beneficial to them.[20] In actual fact, drip loss is a concern. The Communities, and Professor Honikel, have not even attempted to prove that it is not. We must point out that not only is Professor Honikel's assertion regarding drip loss of a commercial nature rather than a technical one ("chicken breast if used for meat products will be used in a slight frozen state"), but it is unsubstantiated by any evidence. This alone puts in question the impartiality and objectivity of Professor Honikel's "expert" opinion.

The last point of clarification deals with the EC's assertion that Brazil has interpreted that any amount of salting, drying or smoking would be sufficient for a product to qualify under heading 0210 of the HS. Brazil has **never** said this. For example, we understand that sprinkling meat with salt – which is not the case at hand – is not sufficient to qualify meat as salted under heading 0210. This is explicitly provided for in the HS. On the other hand, the HS does not provide a specific salt criterion or threshold for meat to fall under heading 0210. This is something that countries may insert in their

[13] Brazil's Response to EC's Questions Following the Second Substantive Meeting, Question No. 1.
[14] Brazil's Second Oral Statement, para. 2 and EC's Second Written Submission, para. 33.
[15] Exhibit EC-32.
[16] Brazil's Response to EC's Question Following Second Substantive Meeting, Question No. 1.
[17] Exhibit EC-32.
[18] Exhibit EC-14, page I-3061, para. 6.
[19] Exhibit EC-32.
[20] Exhibits BRA-30 and BRA-41.

own classification nomenclatures. The EC, for example, included in its Combined Nomenclature, and consequently in Schedule LXXX, a specific criterion and salt threshold for meat to qualify as salted under heading 0210. Obviously, the HS does not contain the definition of salted meat of heading 0210, as set out in Additional Note 7 to Chapter 2 of the CN. That is something the EC inserted in its CN, which does not exist in the HS and, as far as we know, in any other Member's national nomenclature.[21]

Question 98

In its reply, the EC provides that the reason meat, which has been preserved for long-term, should be further preserved is so that it may be preserved for an even longer term. We know that the EC considers the distinction between "preservation" and "long-term preservation" to be irrelevant to this case,[22] but we believe it is of the utmost relevance. If we do not know what "long-term preservation" means – or how long is long-term - how do we know where to draw the line between "long-term preservation" and "further preservation" for purposes of classification under heading 0210? The EC's response provides no clarity or predictability for importers and exporters.

According to the EC, slicing meat affects/diminishes the meat's shelf-life to the point that it needs to be [further] preserved by chilling or freezing.[23] Well, within the EC's reasoning that long-term preservation imparts classification under heading 0210, salted/dried/smoked sliced products should be classified under a heading other than 0210, for the salting/drying/smoking is no longer sufficient to ensure long-term preservation. If there were any logic to the EC's position with respect to long-term preservation, this would have to be the practice of the EC with respect to Parma ham and bacon. But the truth is that it is not.

In addition, the fact that HS Explanatory Notes to Chapter 2 explicitly envisage preservation techniques for meat falling under heading 0210 is perfectly aligned with our understanding that heading 0210 comprises meats that have been prepared, and not preserved, by salting/drying/smoking. Prepared meats will always be classified under heading 0210 despite of the preservation method applied to it.

Question 99

Brazil clarifies that it has simply stated that one letter of advice from the WCO Secretariat on a product that is different, and classified under a different heading (0305) and Chapter, from the product at issue cannot be seriously considered as relevant subsequent practice in the application of heading 0210 of Schedule LXXX.

Question 100

We begin by stressing our concern regarding Professor Honikel's opinion in Exhibit EC-32 and the Communities' understanding of it. Brazil has submitted in Exhibits BRA-16, BRA-30 and BRA-41 evidence that 1.2 to 3.0% has some preservative effect on meat, that drip loss does occur and that it is a real concern to the industry. The Communities' understanding, based on Professor Honikel's assessment, that the technical articles and letters are simply incorrect, once again puts in question the objectivity and impartiality of the opinion provided in Exhibit EC-32.

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[21] Brazil's Second Oral Statement, paras. 46-48.

[22] EC's Response to Brazil's Question Following the First Substantive Meeting, Question 2 para. 6; EC's Response to Panel's Questions Following the Second Substantive Meeting, Question No. 118 para. 75.

[23] EC's Second Written Submission, para. 43.

That said, Brazil agrees that meat that has been salted/dried/smoked is undeniably different from *in natura* meat, that is, from meat that has not been prepared by those processes. This is basically the difference between meat of heading 0207 and meat of heading 0210, one is unprepared meat of poultry and the other is meat prepared by salting, drying or smoking. We have claimed this from day one,[24] and maintained this position throughout these proceedings.[25] However, we do not believe that criterion such as "recognizably different", "instantly recognizable" or "readily identifiable" are valid in the classification of goods. For one, these standards are not provided for under the HS or the CN.[26]

In yet another attempt to exclude salted chicken cuts from heading 0210, the Communities put forward that meats of heading 0210 have names, either general (bacon) or specific (Parma ham). Apparently, to the EC, the fact that salted chicken cuts do not have a [general or specific] name is an indication that it does not belong to heading 0210. This contention is absurd. First, because there are no classification rules or standards applied anywhere in the world that support such an illogical criterion for classification. Second, because Brazil has provided in Exhibit BRA-41 examples of salted meats that fall under subheading 0210.90 of the HS, as provided in the WCO's On-line Database, and none of the listed salted meats have "names". In fact, we have observed that the salted meats in the WCO On-line Database also do not meet the EC's criterion of "recognizably different", "instantly recognizable" or "readily identifiable" products.

Question 102

First off, the EC has **not** shown that the notion of preservation, or long-term preservation, is at the heart of heading 0210 in the HS, in Schedule LXXX or in the CN. Nothing in these nomenclatures signal that preservation is what imparts classification under heading 0210. On the contrary, the explicit language of the HS and its Explanatory Notes unequivocally demonstrates that preparation is what determines classification under heading 0210. Since 1937, the structure of Chapter 2 instructs us that salted meats are **not** salted for purposes of preservation. If salting served to preserve meat, then it would have been inserted as a tertiary item/subheading, within a heading, alongside fresh, chilled and frozen meat. But salted/dried/smoked meat has always been a separate product, found under a separate heading.

Furthermore, the Communities appear to have ducked the Panel's question. Is a shelf-life of many months at ambient temperatures long-term preservation? It seems that this is the EC's position, but we are not quite sure, since it fails to expressly say so. Another point that would require clarification is whether meat preserved for a few days at ambient temperature is also considered long-term preservation for purposes of heading 0210. We call to mind that in *Gausepohl* two days was sufficient to meet the long-term preservation criterion. Thus, the criterion in that case was **not** preservation for many or several months. In connection, we asked the Communities to indicate where in *Gausepohl*, or under Community law, is the principle of long-term preservation defined/provided as preservation for many or several months. Instead of pointing out passages in *Gausepohl*, or under Community law, the EC vaguely responded that it had already given ample guidance as to how the criterion of long-term preservation is enshrined in Community law.[27] This [lack of] response in itself is indication that the notion of long-term preservation, especially in the sense of preservation for many or several months, is not enshrined in Community law, either by way of legislation or even by way of case-law (as alleged by the EC).

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[24] Brazil's First Written Submission, paras. 76-96.
[25] Brazil's Response to Panel's Questions Following the First Substantive Meeting, Question No. 79.
[26] Brazil's Second Oral Statement, para. 31.
[27] EC's Response to Brazil's Question Following the Second Substantive Meeting, Question 3 para. 3.

Question 105

The Communities acknowledge that its classification of goods is based on the product's objective characteristics, which are based on their composition and properties and verified by laboratory examination. They go on to assert that the state of frozen salted/dried Alaska Pollack and frozen salted/smoked salmon[28] can be established by laboratories by determining the moisture content and water activity. Brazil does not know whether the moisture content and water activity are objective characteristics criterion provided in the CN for these products (salted/dried Pollack and salted/smoked salmon). What Brazil knows is that the objective characteristics criterion for salted meat of heading 0210 – until the advent of the measures being challenged - was simply that it be deeply and homogeneously impregnated with salt in all parts with a minimum salt content of 1.2% by weight. That criterion was established in the CN. Laboratories verified that salted chicken cuts conformed to it.

Question 106

We agree in part with the response provided by the EC. We agree that many elements of Chapter 2 of the 1937 Geneva Draft were carried into the CCCN. We agree that item/heading division according to the type of animal was followed in the 1937 Geneva Draft and the CCCN. We also agree that the terms "chilled" and "frozen" – terms that indicate means of refrigeration – are linked to the term "preserved" in the 1937 Draft, the CCCN and the HS, whereas the terms "salted", "dried" and "smoked' are not. The EC failed to note, however, that products within Chapter 2, as well as within the entire structure of the three nomenclatures (HS, CCCN and 1937 Draft), are placed according to their degree of processing.

Item 18 indeed corresponds to CCCN heading 0206 and HS heading 0210. The phrase "cooked and simply prepared" in Item 18 is, in fact, no longer provided in heading 0210, but the term "prepared" deliberately remains in the Explanatory Notes to heading 0210 and Chapter 2 of the HS. The EC suggests that term "preparation" in the HS Explanatory Notes was inadvertently left behind in Chapter 2 and heading 0210 when the term "cooked" was moved into Chapter 16. This allegation is ludicrous. One cannot reasonably believe that a modification of such prominence (transfer of cooked meat into another heading and Chapter) was not fully discussed and known by the Contracting Parties to the HS Convention. Furthermore, if the term "prepared" was actually left behind in the Explanatory Notes to Chapter 2 and heading 0210, as proposed by the Communities, this could have been "corrected" in the various amendments made to the HS. Yet, no Contracting Party to the HS has ever requested such a correction or raised the issue in that forum.

Question 107

At this stage in the proceedings, the EC cannot seriously purport to have never submitted that Chapter 2 is structured according to methods of preservation. Just to cite a few places in which the EC has advanced this position, we ask the Panel to look at: recital (3) of Regulation No. 1871/2003;[29] paragraphs 76 and 138 of the EC's first written submission; paragraph 4 of the EC's second written submission; and also paragraphs 42 and 58 of the EC's response to the Panel's question following the second substantive meeting. Specifically, in paragraph 138 of its first submission, the EC declared that: *"(…) an examination of Chapter 2 as a whole shows that it is divided into different forms of preservation, and not into meat which has undergone no process and meat which has."*[30]

[28] Products described in the information on the existing BTIs provided in Exhibit BRA-34.
[29] Exhibit BRA-10.
[30] EC's First Written Submission, para 138 (emphasis added).

Interesting enough, the two particular characteristics of salted meats mentioned by the EC in response to question No. 107 are not related to preservation: 1) salted meats are markedly different from meat that have not been processed by salting; and 2) salted meats were so similar to each other that they could be treated under a common heading. The Communities' conclusion that these characteristics arise from the fact that meats are preserved is merely a contention put forward by them alone that finds no support on the structure and language of the successive nomenclatures.

The Panel should also note that the EC provides all sorts of explanations in response to the Panel's question except the one that is explicitly stated in the Explanatory Notes to the 1937 Draft. The terms "fresh", "chilled" and "frozen" were placed as tertiary items within a heading - and not as separate headings - because of a concern that if fundamental distinctions were made among these terms, discrimination would take place concerning the same kind of meat - preserved by different methods - coming from different parts of the world. No such concern existed for salted meat because salting was not considered a method of preservation.

Question 108

Succinctly put, the concept of preservation is **not** reflected in Regulation No. 535/94. No WTO Member looking at Regulation No. 535/94 could presume that, as suggested by the EC, it set a minimum salt content below which it could not be considered that a product was salted for preservation. Anyone that read Regulation No. 535/94, including the EC's own customs authorities, would arrive at the logical conclusion that the regulation simply set out the objective characteristics a product had to meet to qualify as salted meat of heading 0210.

Furthermore, the EC errs when it states that Regulation No. 535/94 did not need to explicitly restate that heading 0210 was based on the concept of preservation. For one, the verb "restate" gives off the idea that long-term preservation was already a concept inserted in or associated with heading 0210 of the CN, when we know that "preservation" or "long-term preservation" were never provided in or associated with heading 0210 of the CN, or the HS for that matter. If Regulation No. 535/94 wished to introduce the concept of "preservation"/"long-term preservation" in heading 0210 of the CN it had to explicitly do so, which it did not.

Finally, the European Court's conclusion in *Gausepohl* that, from the scheme of Chapter 2, the meat covered under that chapter is either fresh/chilled or that which has undergone one of the processes required to ensure long-term preservation, finds **no** support in the Combined Nomenclature or the Harmonized System. Again, the CN has never provided that "preservation"/"long-term preservation" is what determines the "scheme" of Chapter 2. On the contrary, the direct and express language found in the HS Explanatory Notes to Chapter 2 prove that classification is bestowed according to preservation **and** preparation. In turn, the HS Explanatory Notes to heading 0210 establish that for that heading preparation is what imparts classification.

Question 109

Exhibit EC-34 offers **no** support to the EC's opinion that the principle of "long-term preservation" was well-entrenched in the EC as of 1 September 1986. On the contrary, the response provided by the EC is again a classic example of tautology. Let's see. According to the EC, its 1986 Common Customs Tariff reproduces the headings of the CCCN – the nomenclature predecessor to the HS. Heading 0206 of the CCCN, says the EC, enshrines the principle of preservation. Thus, the notion of long-term preservation was already included in heading 0206 of the EC's 1986 Common Customs Tariff. The only problem with this "logical" response is that **nothing** in the structure or language of the 1937 Draft, the CCCN or the HS support or even suggest that the salting of salted meats (of heading 0206 of the CCN or 0210 of the HS) is that which ensures long-term preservation.

The principle of "long-term preservation" was **not** found under these classification nomenclatures, was **not** found in the EC's Common Customs Tariff, and was **not** found in Schedule LXXX.

Question 111

From the response given, we understand that the EC preferred **not** to comment on the fact that the Advocate General in *Dinter* did not consider smoking to be a preservation process. In paragraph 90 of our second submission, we cited to the Advocate General in *Dinter* precisely to make the point that the principle of "long-term preservation" is not a well-entrenched/enshrined principle related to the interpretation of heading 0210 of the Combined Nomenclature, as the EC would like the Panel to believe. Further support of our view is found in the 6-year classification practice by EC customs officials of frozen salted chicken cuts under heading 0210.

Question 112

In this dispute, the EC seems to have established that the principle of "long-term preservation", supposedly well-entrenched in Community law, means shelf-stable for many or several months at ambient temperature. When asked exactly where in *Gausepohl*, or in Community law, one could find this definition, the EC vaguely replied that it had already given ample guidance as to how the principle is enshrined in Community law.[31]

Now, the EC provides that the "long-term preservation" principle used by the Court in *Gausepohl* was that found in the CN Explanatory Notes to swine meat (subheadings 0210.11.11 and 0210.11.19). We have already explained why Explanatory Notes – non-binding instruments – of a specific subheading cannot be applied *mutatis mutandis* to another subheading without an explicit provision indicating so.[32] Nonetheless, we draw attention to part of that Explanatory Note that provides that *"(…) the period of such preservation must considerably exceed the time required for transportation."*[33] Nowhere is it stated that the period exceeding transportation is equal to many or several months. In *Gausepohl*, the period considerably exceeding the time required for transportation – in other words, the long-term preservation period - was only two days. Salted chicken, as attested by Professor Honikel,[34] can also be preserved for that same period and, accordingly, may be preserved for long-term if transported from Switzerland to Germany, for example. We recall that the EC has also provided that a salted/dried/smoked product can be further preserved by chilling/freezing and still fall under heading 0210. So, if the product at issue is considered preserved for long-term from Switzerland to Germany, it is only fair that from Brazil to Germany the same product also be considered preserved for long-term, even if further preserved by chilling or freezing.

Question 113

In *Gausepohl*, the *Bundesfinanzhof* considered that the case raised a problem as to the interpretation of the Community legislation in question – heading 0210 of the Combined Nomenclature – and, therefore, decided to refer the question to the Court of Justice under Article 177 of the EEC Treaty.[35]

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[31] EC's Response to Brazil's Questions Following the Second Substantive Meeting, Question No. 3 para. 3.

[32] Brazil's Second Written Submission, paras. 92-94.

[33] Exhibit EC-14, page I-3051, para. 9.

[34] Exhibit EC-32.

[35] Exhibit EC-14, page I-3051,para. 11.

Article 177 of the EC treaty provides that:

"*The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give a judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice." (emphasis added)

A Commentary on the EEC Treaty provides that "*Article 177 defines the Court's authority to decide questions of Community law arising in national tribunals*".[36] In explaining about the varying scope of the Court's authority, the Commentary states that "*the Court may have only the power to construe the law, but may not be authorized to apply the law to the established facts. This is what the Court has construed to be its task under Article 177.*"[37]

In *Gausepohl*, the law that the Court was asked to construe was Council Regulation (EEC) No. 2658/87, of 23 July 1987, establishing the EC's Combined Nomenclature.[38] The Combined Nomenclature, we recall, is made up of: 1) the HS nomenclature; 2) Community subdivisions (CN subheadings); and 3) preliminary provisions, additional section or chapter notes and footnotes relating to the CN subheadings.[39] Measures relating to the application of or the amendment to the Combined Nomenclature shall be adopted by the Commission.[40] The Commission, for example, can adopt a Regulation that inserts an additional note in a Chapter of the Combined Nomenclature. Regulation No. 535/94 is such an example.[41]

At this stage in these proceedings, the Panel has had the opportunity to verify that, until the arrival of Regulation No. 1871/2003, "long-term preservation" was **not** explicitly provided for in the Combined Nomenclature. Thus, when the Court in *Gausepohl* was asked to construe the CN, "long-term preservation" was not a part of the nomenclature. We must stress that, in responding to the Panel, the EC's entire reasoning is based upon an incorrect premise: that the concept of "long-term preservation" was included in the scope of heading 0210 of the Combined Nomenclature when the ECJ made its judgement in *Gausepohl.* We repeat, nowhere in the Combined Nomenclature, or in the HS, is the concept of "long-term preservation" provided for.

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[36] The *Law of the European Community, A Commentary on the EEC Treaty (Volume 5)*, Lexis Nexis, Mathew Bender (Original Authors: Hans Smit and Peter Herzog), page 5-313.

[37] The Law of the European Community, A Commentary on the EEC Treaty (Volume 5), Lexis Nexis, Mathew Bender (Original Authors: Hans Smit and Peter Herzog), page 5-314 (emphasis added).

[38] Exhibit BRA-23, Article 1.1 of Regulation No. 2658/87.

[39] Exhibit BRA-23. Article 1.2 of Regulation No. 2658/87.

[40] Exhibit BRA-23. Articles 9 and 10 of Regulation No. 2658/87.

[41] Exhibit BRA-6.

We warn the Panel that this is not an issue of hierarchy of norms, as the EC suggests.

The EC errs when it states that the Court confirmed the scope of heading 0210 in the CN. Confirmation implies validation of something that already existed, and the reality was that "preservation" or "long-term preservation" did not exist under heading 0210 of the CN. The fact that Additional Note 7 to Chapter 2 was inserted in the CN by means of a Commission Regulation, an inferior legal act to the Council Regulation that established the CN, has absolutely nothing to do with the issue. The EC tries to convince the Panel into thinking that it does.

The Communities push on. They provide that any Commission Act must necessarily be read together at all times with the superior norm, in this case the Council Act establishing the Combined Nomenclature. We agree. Commission Regulation No. 535/94 is in perfect harmony with what is provided under heading 0210 of the CN. In fact, we believe that "long-term preservation" was purposely left out of Regulation No. 535/94 so that it could be harmoniously read together with the Combined Nomenclature, part of which is based on the Harmonized System. The interpretation of the Court was simply incorrect. Brazil recalls that the ECJ has the authority to interpret an Act of the Council, such as the CN, but it does not have the authority to interpret the HS. An interpretation by the ECJ on the HS, or based on the HS, is still a unilateral interpretation and by no means an authoritative interpretation of that multilateral agreement.

Nonetheless, even if we were to consider that the Court's interpretation was correct – which it isn't - the standard applied in that case for preservation was a period in excess of the time required for transportation. In *Gausepohl*, the time required for transporting the meat in question was only one hour, but it was preserved for a time that considerably exceeding transportation: two days. However, this does not seem to be the EC's standard for "long-term preservation" in this case (many or several months).

Question 114

Based on the EC's response to question No. 115, Brazil is still of the position that a Regulation on the interpretation of a particular heading in the CN takes precedence over a Court judgement, delivered prior to said Regulation, on the interpretation of the same heading.

The EC asserts that a Commission Regulation must be compatible with Community law and the international obligations of the Community. Well, Regulation No. 535/94 was. Taking into account that the Combined Nomenclature did **not** provide that salting of heading 0210 was a preserving process and that, on the contrary, the HS actually provides that it is a preparation – and not a preservation - process, the objective criterion set out in Regulation No. 535/94 was compatible with Community law and the EC's international obligations under the HS Convention.

To make its point, the EC provides a hypothetical that is simply incoherent. It says that a change in the HS Convention to establish a salt threshold of 1.2% and above for heading 0210 could trigger a challenge of Regulation No. 1871/2003 (with long-term preservation requirement), based on the incompatibility with heading 0210 of the CN, which could in turn lead to a reversal of the "standing" case law on the interpretation of heading 0210. In the EC's example, it starts with the HS Convention (international obligation), goes on to Commission Regulation No. 1871/2003, providing the objective characteristics of salted meat of heading 0210 in the CN, and then to the Court's interpretation of heading 0210 in the CN. However, in the case before the Panel there were no measures (Regulations) that set out the objective characteristics of salted meat of heading 0210 in the CN when the Court in *Gausepohl* interpreted heading 0210 of the CN. The ECJ made an interpretation that was not based on explicit text provisions of: 1) Regulations interpreting heading 0210 of the CN; 2) the CN; or 3) the HS. The ECJ's interpretation was strictly a subjective assessment of the meaning of these texts.

The EC further affirms that there was no change in the superior norm looked at in *Gausepohl*, but that is simply **not** correct. First, the superior norm during *Gausepohl*, namely heading 0210 of the HS, did **not** provide that salting of heading 0210 was that which ensured long-term preservation. The concept didn't - and doesn't - even exist in the HS. The EC itself acknowledges that *"the word 'preservation' is not to be found in HS heading 0210*."[42] Second, the other superior norm looked at in *Gausepohl*, namely heading 0210 of the CN, was in fact changed, or clarified to say the least. The change was brought about by Regulation No. 535/94 and did not include the concept of "preservation" or "long-term preservation".

Question 115

Brazil notes that the EC has confirmed that Additional Note 6(a) takes precedence over the *Dinter* judgement. In connection, we cite a very important passage of the judgement in *Van de Kolk*, which upheld Additional Note 6(a): *"(…) it must be pointed out that that judgement [Dinter] was delivered in different circumstances from those in the present case; there was no provision in a regulation on the interpretation of the Common Customs Tariff (…)*".[43]

Applied to the case at hand, the *Gausepohl* judgement was also delivered in different circumstances. At that time, there were no provisions in a regulation on the interpretation of salted meats of heading 0210 of the Combined Nomenclature. Regulation No. 535/94 was precisely the regulation that gave the interpretation of salted meats of heading 0210 of the CN, and in doing so did not include "preservation" or "long-term-preservation". Additional Note 7 of Chapter 2 of the CN did not change the scope of the Chapters, Sections and headings of the CN. It merely specified the objective criteria to be taken into account for classifying salted meat under heading 0210.

Question 116

Brazil would like to clarify that the condition of "long-term preservation" did **not** exist in the Combined Nomenclature until it was **introduced** in the CN by Regulation No. 1871/2003. The EC throughout these proceedings has not been able to cite to any provision within the CN, past EC classification nomenclatures or anywhere in Community legislation where the condition is defined or even referred to.

Question 117

The EC has once again **failed** to provide BTIs, **or any supporting material**, to back-up the allegation that other customs offices within the EC did not classify the product at issue under subheading 0210.90. The ham-related BTI provided by the EC in Exhibit EC-26 is certainly not evidence that frozen salted chicken cuts were classified by certain EC customs offices under heading 0207 and not under heading 0210. On the other hand, Brazil and Thailand have provided copies of BTIs issued for frozen boneless salted chicken cuts with a salt content of more than 1.2% under subheading 0210.99.39.[44] Brazil has also shown that since 1998 it exported frozen salted chicken meat to the EC under heading 0210 to different ports of discharge of various EC Members States, including Germany, the Netherlands, Spain, Italy, and the United Kingdom.[45]

The Communities talk about the "*dangers of relying on BTIs as comprehensive indication of customs practice*" but have not presented even one BTI – or any other documentation – that would

[42] EC's Response to Panel's Question Following Second Substantive Meeting, para. 75.
[43] Exhibit THA-35. Judgement of the ECJ in case C-233/88, Van de Kolk, para. 15 (emphasis added).
[44] Exhibits BRA-31 and THA-24.
[45] Exhibits BRA-29 and BRA-42.

give the Panel some indication that certain customs offices classified the product under heading 0207 – and not under heading 0210 - from 1996 through 2002.

The EC tries to justify its failure to provide the requested information by explaining that it is possible under Community law to withdraw an application for a BTI where the outcome is considered unfavourable by the importer. Yet, Articles 6 and 8 of Commission Regulation No. 2454/93 sets forth that applications for binding information are made in writing and that a copy of the application for binding tariff information, a copy of the notification and the facts shall be transmitted to the Commission without delay by the customs authorities of the Member States concerned. It seems that even if an application was withdrawn by the importer, the Commission – or customs authorities of Member States - would at least have access to the written application and/or the forms mentioned in Articles 6 and 8.

QUESTIONS POSED TO ALL PARTIES

Question 118

We call the Panel's attention to the fact that the EC has conceded that the "*word 'preservation' is not to be found in HS heading 0210*." Unfortunately, the EC insists that its law on classification contains the term "long-term preservation". That is **not** true. "Long-term preservation" has never been associated with or included in heading 0210 of the Combined Nomenclature, or in Chapter 2 of the CN for that matter. We have asked the Communities to show us where we could find the definition of that concept in *Gausepohl* or under Community law and the EC was not able to do so.

It now appears that, to the EC, "preservation" and "long-term preservation" have the same meaning. Based on this response, it is still not clear whether the EC understands the term "preservation" to mean shelf-stability for many or several months at ambient temperature. We recall that the ordinary meaning of the verb "preserve" is to "maintain (a thing) in its existing condition" or "to prevent (organic bodies) from decaying or spoiling",[46] and no time frame is associated with the ordinary meaning of the term. In fact, such time frame could vary from a few minutes or hours to possibly years.

Question 120

The EC has, in effect, **failed** to provide the requested BTIs – or any other supporting material - in Response to question No. 53 (not question No. 34, as stated by the EC). Also, and as a point of clarification, Brazil has **not** conceded to the existence of export classification practice as alleged by the EC in its statistics and sample documents.[47] Brazil has simply confirmed that its export classification practice of frozen salted chicken was inconsistent: sometimes the product was correctly classified under heading 0210 and sometimes it was incorrectly classified under heading 0207. To that effect, we even submitted export documentation in Exhibits BRA-42(c) and BRA-42(d) that demonstrate that some exports of frozen salted chicken were classified under subheading 0210.90 when they left Brazil.

We have provided the evidence in Exhibits BRA-42(c) and BRA-42(d) even though the Panel did **not** make a specific request that such documentation be presented. On the other hand, a very specific request was made [twice] to the EC and it failed to comply with it.

[46] Brazil's First Written Submission, para. 76.

[47] Brazil is unaware of any sample documentation submitted by the EC regarding Brazil's export classification practice of the product at issue.

Question 121

Again, the EC misconstrues what Brazil has argued. To Brazil, the product at issue does not *prima facie* fall under two or more headings of the HS.[48] Undeniably, it is a product of heading 0210. The Panel, of course, may resort to General Rule 3 if it understands that the product falls under two or more headings of the HS. In the event that General Rule 3 is applied, we have explained that, as part of context, the Panel should use it in conjunction with the other rules of treaty interpretation.

A small but important correction that must also be made is that the WCO Secretary General did refer to the HS Explanatory Notes, and highlighted their importance, in the letter of advice dated 25 October 2004. According to the Secretary General, HS Explanatory Notes provide the official interpretation of the HS. Obviously, they shed light and supply valuable insight as to the meaning of heading 0210 in the HS. The EC itself has provided that the "*Harmonized System is relevant insofar as it sets forth headings and provides Chapter and Explanatory Notes that elucidate the meaning of a heading*".[49] Besides, the Appellate Body gave HS Explanatory Notes the same interpretative weight as that given to the HS itself.

Question 122

We begin by quoting a passage from the above response: "At the same time is clear that any documents relied upon in an interpretation of WTO obligations according to Article 32 of the Vienna Convention must have been in the public domain or accessible to WTO Members." Brazil, in its response, has advanced a similar position: for a document or instrument to qualify as "preparatory work" and/or "circumstances of conclusion" it must have been published so that States had the possibility of consulting them during negotiations if they wish to do so.

That said, we turn to the following considerations.

As of 11 March 1994, Brazil and all other negotiating Members had knowledge of Regulation No. 535/94 for this was the date the regulation was published in the Official Journal of the EC. This date preceded both 15 April 1994 and 25 March 1994, when the period for verification of schedules came to an end. Knowledge of Regulation No. 535/94 meant knowledge of what was effectively and expressly provided in that regulation, and "long-term preservation" was **not** therein included. The Communities claim that if Brazil had [actual or presumed] knowledge of Regulation No. 535/94 it must also have had knowledge of "*the preservation criterion at the heart of Community law*". Yet, the preservation criterion was **not** a part and had **never** been inserted in the Combined Nomenclature, and the Harmonized System for that matter. The criterion was **never** at the heart of Community law.

In a rather ironic fashion, the EC declares that if Brazil "pretends" knowledge of Regulation No. 535/94, because it suddenly took upon itself the burden to screen developments in the EC, it could not deny the existence of the "long-term preservation" requirement that was well-enshrined in the CN as interpreted by "several" judgements of the Court of Justice, since these judgements too were publicly available.

Well, as a point of clarification, Brazil does not "pretend" to have had knowledge of Regulation No. 535/94. As was the case during the Uruguay Round, the Brazilian Mission in Brussels is tasked with monitoring legislative developments in the EC through the publication of legislative

[48] Brazil's First Written Submission, para. 147. Brazil's Second Written Submission, para. 49. Brazil's Response to the Panel's Questions Following the Second Substantive Meeting, Question No. 121.

[49] EC's Response to the Panel's Question Following the First Substantive Meeting, Question No. 76 para. 102 (emphasis added).

acts in the EC's Official Journal. Monitoring and verification of Court judgements, however, have **never** been a part of that job, and it still is not.

Going back to the response, we repeat that the "long-term preservation" requirement was not, and could not have been, well-enshrined in the CN simply because that "requirement" had never been included in the CN. But, even if we assume – for the sake of argument – that Brazil and other negotiating Members had knowledge of the *Dinter* and *Gausepohl* judgements and of the Court's understanding of the alleged "long-term preservation" requirement in heading 0210, we point out that the Court's assessment in those cases was **not** supported by any provision found in the Combined Nomenclature or in the Harmonized System. As we have demonstrated in these proceedings, Chapter 2 is **not** structured according to methods of preservation and heading 0210 does **not** encompass meat that has been salted for long-term preservation. Therefore, the Court's assessment regarding the "scheme" of Chapter 2 and the qualification of heading 0210 in those cases was simply incorrect.

Furthermore, the *Dinter* and *Gausepohl* judgements did **not** establish or define "long-term preservation", especially not in the sense of shelf-life stability of many or several months. In particular, in the case of *Gausepohl*, the standard was a period considerably exceeding transportation, which in practice was two days. Well, two days are quite different from many or several months. If, even to this date, the EC cannot provide a consistent definition for "long-term preservation", how can it expect the Panel and the Complainants to believe that it was a "well-enshrined" concept/notion/requirement in Community law that did not need to be explicitly stated in Regulation No. 535/94.

ANNEX C-4

RESPONSES BY THAILAND TO QUESTIONS POSED BY THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

(14 October 2004)

FOR THAILAND:

7. Thailand is requested to provide proof of its assertion in paragraphs 7 and 53 of its first written submission that it commenced exporting salted chicken to the EC in 1996 in response to requests from European food processors.

See Exhibit THA–26.

8. Thailand argues in paragraphs 74-75 of its first written submission that a "frozen" product can be returned to its original state without any change in its physical or chemical characteristics. Thailand is requested to justify this argument in light of information contained in page 2 of Exhibit THA-14 to the effect that freezing causes the cell walls of food to rupture, thereby making poultry softer when it is thawed.

The article in Exhibit THA-14 discusses the "changes in food texture during freezing" and notes that the textural changes that result from freezing "are most noticeable in *fruits* and *vegetables* that have a high water content." Therefore, fruits and vegetables, such as lettuce and celery, which have a high water content, will be adversely affected by freezing as they would wilt and turn limp. In contrast, with respect to products that will be cooked before being eaten, the "textural changes due to freezing are not as apparent … because cooking also softens cell walls." Therefore, frozen boneless chicken cuts that will be thawed before being cooked will not be as changed or affected by the freezing.

FOR THE COMPLAINANTS:

12. Assuming that freezing has a permanent and irreversible impact upon meat, is there some way to distinguish that impact from the impact that salting, brining, drying and smoking have on meat?

If one were to assume that freezing may have such an impact on meat, the most appropriate way of distinguishing the effect of freezing from that of salting, brining, drying and smoking is to examine the effect on the taste. As meat is destined for human consumption, it is the effect on taste that is most relevant to the ultimate consumer. A frozen boneless chicken cut, once thawed and cooked, will taste the same as a fresh boneless chicken cut once cooked. However, a chicken cut that is salted, put in brine, dried or smoked would taste quite different having undergone such a process.

13. Brazil and Thailand suggest in their oral statements for the first substantive meeting (paragraph 16 in the case of Brazil and paragraphs 8 and 53 in the case of Thailand) that, for the purposes of the Panel's analysis under Article II of the GATT 1994, the decisive criterion for characterising the products at issue are the objective characteristics of the product at the time of importation. What role, if any, do Brazil and Thailand consider that production processes, end-uses and the perspective of end-users should play in the characterisation of the products at issue for the purposes of the Panel's analysis under Article II?

None. These are factors to determine the likeness of products under GATT Article III, a concept which is not at issue in this dispute. The information provided in these answers with respect to the production process, end-uses and the perspective of end-users are meant to give the panel a full picture of the facts of the case. However, Thailand's legal case does not rest on this information.

This dispute concerns the tariff treatment to be provided to the product at issue and, therefore, requires an examination of the EC's concession in heading 0210 and the assessment of whether the product at issue has the physical characteristics of the product described in the EC's Schedule of Concessions.

14. The complainants are requested to provide details regarding the processes to which the products at issue are subjected prior to being exported to the EC. In particular, please provide details including supporting material regarding:

(a) the physical processes that are applied to the products at issue;

Most salted chicken from Thailand is produced using the "tumbling" method. Under this process, chicken is cut into different sizes, following the customers' orders the chicken cuts are then mixed with salted water in the vacuum tumble machine. The tumbling takes around 20 minutes. Salted chicken can be tested for its level of salt. The test is carried out by using a special instrument which can determine the level of salt. Thailand will elaborate further on the processes in its second written submission.

(b) the effects of these processes on the products at issue;

The addition of salt reduces the level of water activity and prevents the growth of micro-organisms. Salt also breaks up the protein in the meat. Both protein and salt help reduce moisture loss when cooked and makes the meat juicier.

(c) the time taken to complete these processes; and

The tumbling process takes between 15 and 30 minutes.

(d) the costs that such processes entail.

The costs are as follows:

Thai workers' wages:	US$4.83/day or US$0.07-0.10/kg (200 baht/day or 3-4 baht/kg)
Cost of salt (common salt) - salt obtained from underground salt deposits located in the Northeast of Thailand	US$67-70/metric tonne
Total cost of production	**US$180-200/metric tonne**

15. Are the processes applied to the products at issue when they are exported to the EC from Brazil and Thailand the same as those processes applied to the products at issue when they are exported to other countries?

Thailand exports salted frozen chicken only to the EC as there are no orders for the product from countries other than the EC. Orders differ from country to country depending on consumer demand and importers' requirements. For example, in the case of orders from Japanese importers for

cooked chicken meat, the importers will provide a recipe and have the exporters cook the meat at the plant.

16. The complainants are requested to provide details of their classification practice in relation to imports and exports of the products at issue.

Thailand has never imported salted frozen chicken, and has therefore, never classified the product at issue for customs purposes. The classification of products for exportation is not relevant to determine the classification practice of a Member. What is relevant is the practice of Members in implementing their tariff concessions on salted meat.

17. Could the complainants comment on the fact that Explanatory Notes to Chapters 2 and 16 of the Harmonized System characterise both preservation and preparation as "processes".

It is not correct to state that the HS characterises "preservation and preparation as processes." Rather, they are the *purposes* for which a particular *process* is undertaken. For example, a product may be smoked by a particular process in order to achieve the purpose of preparation. This interpretation is based on the actual wording of the notes. In particular, the *Explanatory Note* to Chapter 2 makes a reference to "prepared or preserved by any process". The *Chapter Note* to Chapter 16 makes a reference to "prepared or preserved by the processes specified in Chapter 2 or 3 or heading 05.04." Thailand considers that this is an acknowledgement that the *purposes* of preservation and preparation may be achieved by the *processes* which are specified in Chapter 2, Chapter 3 and in heading 05.04. Please see answer to question 48(c) for further details.

FOR ALL PARTIES:

56. Do the parties agree that the relevant time at which the meaning of headings of the EC Schedule – LXXX - should be assessed is the time at which that Schedule was annexed to the Marrakech Protocol on 15 April 1994? If not, at what time/during what period should such an assessment be made?

Thailand agrees that the relevant time that the meanings of the headings of EC's Schedule LXXX should be assessed is 15 April 1994, namely the time the Schedule was annexed to the Marrakech Protocol. 15 April 1994 is the date on which the EC assumed its commitments under the Uruguay Round. In this regard, Thailand notes that in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body stated that the key date for the interpretation of the treaty at issue was 1994, which was the time at Members assumed their obligations under the WTO Agreement. In particular, the Appellate Body examined the term "exhaustible natural resources" in GATT Article XX(g) in the light of the wording of the Preamble of the WTO Agreement (Appellate Body Report, WT/DS58/AB/R, para. 129). The WTO Agreement was signed by Members in Marrakesh on 15 April 1994. Therefore, this is the relevant date on which to ascertain the meaning of the obligations and, in particular in this case, the concessions, entered into by the EC.

As noted in Thailand's First Written Submission, Regulation 535/94 – which provided the following clear definition of the products falling under heading 0210 – had been published and was in force prior to 15 April 1994.

> "For the purposes of heading 0210, the terms 'meat and edible meat offal, salted, in brine,' mean meat and edible meat offal deeply and homogenously impregnated with salt in all parts, having a total salt content of not less that 1,2% by weight."

59. Are there any GATT Schedules of WTO Members other than the EC's in which headings identical or similar to the headings at issue in this case exist? If so, please provide details of such Schedules and information regarding the classification practices of such Members in respect of those headings. If possible, the parties are requested to indicate how such Members classify the products at issue in this case.

Thailand is in the process of gathering this information and, with the indulgence of the Panel, will provide this information shortly.

60. The parties are requested to provide details regarding the processes to which the products at issue are subjected upon importation to the EC and prior to final consumption. In particular, please provide details including supporting material regarding:

The information received from EC importers on a general basis pertaining to the product at issue is the following:

(a) the physical processes that are applied to the products at issue;

The products at issue undergo several processes such as cutting, cooking, marinating, coating and any combination of these processes. There is no uniform process that the majority of processors use.

(b) the effects of these processes on the products at issue;

The effect that these processes have in general is to change the quality of the product to fulfil the wishes of the consumer.

(c) the time taken to complete these processes; and

The time taken to complete these processes varies from few hours to less than a day.

(d) the costs that such processes entail.

The cost for these processes varies widely.

61. If boneless chicken cuts have been deeply and homogeneously salted, can they be de-salted?

The product cannot be thoroughly de-salted. In para. 79 of Thailand's First Written Submission, Thailand stated "unlike the chilling or freezing of chicken which may easily be reversed, the salting of chicken homogenously in all parts cannot be thoroughly removed."

66. In interpreting headings 0207 and 0210 of the EC Schedule, should the ordinary meaning of all the terms in those headings be assessed as a whole or, rather, should the terms other than "frozen" in heading 0207 (i.e. "fresh" and "chilled") and the terms other than "salted" in heading 0210 (i.e. "in brine", "dried" and "smoked") be treated as context for the interpretation of the terms that appear to be directly at issue – i.e. "frozen" and "salted". Will the result of the interpretative exercise differ depending upon which approach is adopted? If so, please explain making specific reference to the headings at issue in this case.

In its First Written Submission, Thailand has adopted the approach of examining the ordinary meaning of *all* the terms in headings 0207 and 0210. Therefore, Thailand has adopted the first of the

two interpretive approaches put forward in this question. However, in our view, the result will not differ depending on which of the two approaches are adopted.

67. Can products that fall within the scope of heading 0207 of the EC Schedule be considered as having undergone a "process"? If so, please explain what is meant by "process". Can the processes to which products falling within the scope of heading 0207 are subject, if any, be distinguished from those to which products falling within the scope of heading 0210 are subject? If so, how?

A process is defined in the *New Shorter Oxford English Dictionary* as, *inter alia*, "[a] thing that goes on or is carried on; a continuous series of actions, events or changes; a course of action, a procedure; *esp*. a continuous and regular action or succession of actions occurring or performed in a definite manner; a systematic series of actions or operations directed to some end, as in manufacturing, printing, photography, etc." (page 2364.) Heading 0207 covers products that are "fresh, chilled, or frozen." If a product is fresh it cannot be said to have undergone a process. Chilling and freezing may be considered as processes. Of the three states (fresh, chilled or frozen) listed in this note to heading 0207, Thailand is of the view that chilling and freezing relate to a process to ensure the purpose of preservation.

The processes in heading 0207 can be clearly distinguished from processes in heading 0210. The processes in heading 0207 relate to the temperature of the product. The note to heading 0207 states:

> This heading covers only fresh, chilled or frozen meat and edible offal of domestic poultry which, when live are classified in heading 01.05.

In contrast, the processes in heading 0210 relate to the preparation of the product rather than its temperature. The note to heading 0210 states:

> This heading note applies to all kinds of meat and edible meat offal which have been *prepared as described in the heading*, other than pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted (heading 02.09). The heading includes streaky pork and similar meats interlarded with a high proportion of fat, and fat with an adhering layer of meat, *provided they have been prepared as describedin the heading*. (Emphasis added).

During the first substantive meeting of the Panel with the parties, after the delegate of Thailand read out the first sentence of the note, the EC commented that it was an Explanatory Note which was used to delineate the coverage between heading 02.09 and heading 02.10. The fact that the note makes reference to the delineation between two sub-headings does not detract from the intrinsic value of the description that is used in that note. Furthermore, the phrase "prepared as described in the heading" appears in both the first and the second sentence of the note. The note is clear in both its first and second sentence that the terms "… salted, in brine, dried or smoked …" are *descriptions* of the manner in which meat and meat offal *have been prepared.* In other words, the sub-heading covers *meat and meat offal which have been prepared as des cribed in the heading,* namely by the process of being salted, put in brine, dried or smoked. Preparation is not related to a temperature-based factor.

68. If some or all products that fall within the scope of heading 0207 of the EC Schedule can be considered as having undergone a "process", what is the purpose of that process? What is the purpose of the processes to which products falling within the scope of heading 0210 are subject?

Insofar as the purpose of the process is relevant to the scope of the EC's concession on 0210 in Schedule LXXX, the purpose of the processes in 0207 (chilling or freezing) would be that of preservation. The purpose of the processes to which products falling under heading 0210 are subject would be that of preparation.

This is confirmed by the EC's own Additional Note 6 which states that: "products falling within heading No. 0210 to which seasoning has been added during the *process of preparation* remain classified therein, provided that the addition of seasoning has not changed the character of the product"(emphasis added). This Additional Note 6, which clearly refers to products in heading 0210 as having undergone a process for the purpose of preparation, has been included in the EC's Combined Nomenclature since at least 1992 until 2003. Thailand is submitting the 1992 and 1993 Combined Nomenclature of the EC as Exhibits THA- 27 and 28 respectively. (Thailand notes that the 1994 Combined Nomenclature has already been submitted as Exhibit THA-8 and BRA-7.) Thailand notes that this definition is still in the 2003 version of the Combined Nomenclature.

69. To what extent, if at all, is the purpose of a process to which a product is subject relevant to the interpretation of: (a) heading 0207 of the EC Schedule; and (b) heading 0210 of the EC Schedule? Should the purpose take precedence over the process in either case? If so, please explain why and in what circumstances. In the case of both headings, if there are multiple purposes underlying the processes in question, which purpose should take precedence?

The purpose of the process to which a product is subject is not relevant to the interpretation of either heading 0207 or heading 0210 of the EC's Schedule. As the European Court of Justice has stated, "[t]he decisive criterion for the customs classification of goods must generally be looked for in their objective characteristics and properties … " (Case 55/75, Belgium State *v*. Vandertaelen, 1975 E.C.R. 1647. Cited in Exhibit THA-18 at p. 1278.) Therefore, in either heading, the purpose should not take precedence over the process or the objective characteristics of the product.

As the process takes precedence over the purpose, it is not relevant whether there may be multiple purposes underlying a particular process for the classification of a product.

71. Are there different degrees to which meat can be dried, smoked or soaked in brine? If so, is it the case that meat products can only be classified under heading 0210 if the degree of drying, smoking or soaking in brine has exceeded a particular level? If so, what are those levels and how are they determined?

Yes, there are different degrees to which a meat product can be dried, smoked, or put in brine.

As Thailand has noted in its First Written Submission, the EC had provided a definition of "salted" in Additional Note 7 in Chapter 2 of its Combined Nomenclature which set a minimum quantitative level that a product had to meet in order to be classified as salted under heading 0210. In a similar vein, the EC provided a definition of "dried or smoked" in Additional Note 2(E) in the same Chapter which provides that:

> For the purposes of subheadings 0210 11 31, 0210 11 39, 0210 12 19 and 0210 19 60 to 0210 19 89, products in which the water/protein ratio in the meat (nitrogen content x 6,25) is 2,8 or less shall be considered as 'dried or smoked.' The nitrogen content shall be determined according to ISO method 937-1978.

As with the definition for the coverage under for 0210, this definition only specifies the quantitative level that must be met for a product to be considered as "dried or smoked". Thailand notes that the structure of Additional Note 2(E) is the same as that of Additional Note 7, namely that the classification of a product as "dried or smoked" or "salted" is dependent on a neutral and objective criterion. For a product to be considered as "dried or smoked" it must have a specific water/protein ratio. Similarly, for a product to be considered as "salted" it had to have a minimum salt content of 1.2% homogenously and deeply impregnated in the meat product. These are criteria for determining whether a product would fall under heading 0210 that could be easily assessed by a Customs Officer at the border.

Thailand further notes that there is no requirement in Additional Note 2(E) that the product must be dried or smoked for the purposes of long-term preservation.

73. Is the Harmonized System "context" under Article 31.2 of the *Vienna Convention*? If so, please explain by demonstrating how the various elements in Articles 31.2(a) or 31.2(b) are fulfilled.

Articles 31(2) of the *Vienna Convention* reads as follows:

> The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and its annexes:
>
> a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Thailand does not consider that the Harmonized System is context within the meaning of Articles 31(2)(a) or 31(2)(b) as it does not fulfil the criteria set out in sub-paragraphs (a) or (b).

Thailand notes that in the *EC – Computer Equipment*, the Appellate Body did express the view that the Harmonized System should have been taken into consideration by the Panel "in its effort to interpret the terms of Schedule LXXX." (WT/DS/62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 89). However, the Appellate Body did not specify the provision in the Vienna Convention under which the Harmonized System should be taken into account. Thailand is of the view that it may not be necessary for the Panel to specify the provision in Article 31 under which it is considering the Harmonized System.

74. Assuming that the Harmonized System qualifies as "context" for the interpretation of the EC Schedule under Article 31.2 of the *Vienna Convention*, to what extent if at all can the General Rules for the interpretation of the Harmonized System be used to determine the meaning of the headings in question?

Under the assumption made by the Panel in this question, Thailand considers that the General Rules for the Interpretation of the Harmonized System must be used to determine the meaning of a particular heading. Article 1 of the Harmonized System Convention defines the Harmonized System as comprising, inter alia, the General Rules for the Interpretation of the Harmonized System. Article 3.1(a) obliges Contracting Parties to ensure that its "Customs tariff and statistical nomenclatures shall be in conformity with the Harmonized System." Furthermore, as stated in paragraph 104 of Thailand's First Written Submission, the EC and Thailand as Contracting Parties to

the Harmonized System Convention have agreed in Article 3 "to apply the General Rules for the Interpretation of the Harmonized System."

Even if the Panel were to consider the Harmonized System under a provision other than Article 31(2) of the *Vienna Convention*, it would still need to rely upon the General Rules for the Interpretation of the Harmonized System because they are an integral part of the Harmonized System for the foregoing reasons.

75. How are the following to be categorised, if at all, within the framework of Articles 31 and 32 of the *Vienna Convention*: (a) 1981 Explanatory Note to heading 02.06 of the EC's Common Customs Tariff; (b) the 1983 Explanatory Note for subheadings 0210.11-31 and 0210.11-39 of the EC's Common Customs Tariff; (c) the 1983 *Dinter* judgement of the ECJ; (d) the 1993 *Gausepohl* judgement of the ECJ; and (e) the December 1994 Explanatory Note to subheadings 0210.11.11 and 0210.11.19 to the EC's Combined Nomenclature?

Thailand considers that (a), (b) and (c) cannot be categorised within the framework of Articles 31 and 32 of the *Vienna Convention* because they existed prior to the launch of the Uruguay Round. Thailand considers that (d) cannot be categorised under Articles 31 and 32 as prior to the conclusion of the treaty, there was specific legislation passed in Regulation 535/94 which clarified the very issue addressed in the *Gausepohl* case and made clear that classification under heading 0210 should be based on the product meeting specific criteria. Thailand considers that (e) should not be considered under Articles 31 and 32 because it relates to a type of meat which is not at issue in this proceeding. As Thailand suggested in its questions to the EC, the normal practice in the EC is not to apply provisions of one Explanatory note to another, unless it is so stated that it shall apply *mutatis mutandis.*

In contrast, Thailand wishes to clarify that Regulation 535/94 should be considered in interpreting the terms of the EC's concession under heading 0210. First, Regulation 535/94 was published on 9 March 1994 and entered into force on 1 April 1994. Article 1 of this Regulation stated that "The following additional note shall be inserted in Chapter 2 of the Combined Nomenclature annexed to Regulation (EEC) No 2658/87":

> For the purposes of heading 0210, the term "salted" means meat or edible meat offal which has been deeply and homogenously impregnated with salt in all parts, having a total salt content not less than 1.2% by weight.

Article 2 states that:

> This Regulation shall enter into force on [1 April 1994] … and shall be binding in its entirety and *directly applicable* in all Member States.

Second, Thailand notes that the definition of "salted" set out in Regulation 535/94 was inserted in the Combined Nomenclature as an "Additional Note" and not an "Explanatory Note." As noted in Thailand's Oral Statement at the First Substantive Meeting of the Panel with the parties, the European Court of Justice has explained that "an Additional Note decided upon by the Council becomes part of the heading to which it refers and has the same binding effect whether it constitutes an authentic interpretation of the heading or supplements it." (Case 38-75, Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrchten en accijnzen, 19 November 1975, ECR 1975, page 01439, at para. 10.) Therefore, Additional Note 7 provided a clear definition of "salted" for purposes of heading 0210 and was a binding part of the heading 0210 in the EC's Combined Nomenclature as of the conclusion of the WTO Agreement.

The interpretation set out in the Additional Note was binding and constituted the EC's understanding, under its own laws, of its commitments in heading 0210 of Schedule LXXX.

76. Can the Harmonized System be considered as comprising "relevant rules of international law" within the meaning of Article 31.3(c) of the *Vienna Convention*? If so, please explain by demonstrating how the various elements in Article 31.3(c) have been fulfilled.

The Harmonized System could theoretically be considered as comprising a relevant rule of international law applicable in the relations between the parties within the meaning of Article 31(3)(c). As Thailand noted in response to this question orally during the First Substantive Meeting of the Panel with the parties, in *EC – Computer Equipment*, in responding to the Appellate Body's question, the EC stated that: "on the basis of Article 31(3)(c) of the *Vienna Convention*, the *International Convention on the Harmonized Commodity Description and Coding System* (footnote omitted) … and its *Explanatory Notes* (footnote omitted) would be relevant in interpreting the obligations of the European Communities under Schedule LXXX *vis-à-vis* WTO Members which are also Members of the World Customs Organisation (the 'WCO')" (Appellate Body Report, *EC – Computer Equipment*, para. 13).

Thailand notes however that in this case, in paragraph 107 of its First Written Submission, the EC has suggested the Harmonized System as "context" within the meaning of the *Vienna Convention* which would suggest that it should be considered under Article 31(1) or Article 31(2) since these are the only two provisions in the *Vienna Convention* referring to context.

Thailand stated in its first written submission that the Harmonized System must be considered in an Article 31 analysis, but did not specify under which provision it should fall.

78. Do the parties consider that the WTO Modalities for the Establishment of Specific Binding Commitments under the Reform Programme issued on 20 December 1993 amounts to "preparatory work" within the meaning of Article 32 of the *Vienna Convention*? If so, please explain why and indicate the significance parties attach to this document?

The WTO Modalities for the Establishment of Specific Binding Commitments under the Reform Programme issued on 20 December 1993 may theoretically be considered as "preparatory work" within the meaning of Article 32 of the *Vienna Convention.* From the reference to this document in paragraph 63 of the EC's First Submission, it would appear that the EC is citing the Modalities paper in order to demonstrate that the Harmonized System was an important tool in the agricultural negotiations. However, it is unclear to Thailand what is the probative value of this document as a supplementary means of interpretation. Thailand notes that the Agreement of Agriculture, which is part of the treaty of the WTO Agreement, makes clear in its Annexes that the product coverage is listed by HS Codes. Thailand does not consider this document to be of significance in these proceedings.

Thailand considers it is important to emphasise that it is the concession made by the EC in its Schedule LXXX, and not the heading in the HS, that must be interpreted by the Panel.

79. What common essential feature(s) do the parties consider characterise products that fall under:

(a) Chapter 2 of the Harmonized System?

The title of Chapter 2 indicates that it covers "meat and edible meat offal." The Chapter does not cover products falling under 02.01 to 02.08 and 02.10, which are unfit or unsuitable for human

consumption. Therefore, the common essential feature within this Chapter is that the product must be meat or meat offal which is fit or suitable for human consumption.

The General Chapter Note which provides the distinction between meat and meat offal of Chapter 2 and that of Chapter 16 states the following:

This Chapter covers meat and meat offal in the following states only:

1) fresh

2) chilled

3) frozen

4) salted, in brine, dried or smoked.

Therefore, the total coverage of Chapter 2 is for meat and meat offal in any of these *four* states.

(b) heading 0207 of the EC Schedule?

Heading 0207 covers meat and edible offal, of the poultry of heading 0105, fresh, chilled or frozen.

The note to 0207 provides that: "[t]his heading covers only fresh, chilled or frozen meat and edible offal of domestic poultry which, when live, are classified in heading 0105."

Therefore, it is textually clear that heading 0207 covers meat and edible offal in *three* of the *four* states that are covered by Chapter 2 (as per the General Chapter Note).

The common essential feature of "chilled and frozen" in this heading is that of preservation.

(c) heading 0210 of the EC Schedule?

Heading 0210 covers meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal.

The note to 0210 states that: "[t]his heading note applies to all kinds of meat and edible meat offal which have prepared as described in the heading, other than pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted (heading 0209). The heading includes streaky pork and similar meats interlarded with a high proportion of fat, and fat with an adhering layer of meat, provided they have been prepared as described in the heading. "

Therefore, it is textually clear that heading 0210 covers meat and edible meat offal that is in the *fourth* state i.e., salted, in brine, dried or smoked, that are covered by Chapter 2 (as per the General Chapter Note).

Furthermore, Thailand notes that the Chapter Note to Chapter 16 excludes products that are "*prepared or preserved* by the processes specified in Chapter 2 or 3 or heading 0504." As noted above, Chapter 2 covers products in four states: (i) fresh, (ii) chilled, (iii) frozen or (iv) salted, in brine, dried or smoked. Chapter 3 covers fish and crustaceans, molluscs and other aquatic invertebrates which are fresh, chilled, or frozen, salted, in brine, dried or smoked. Heading 0504 covers guts, bladders, and stomachs of animals (other than fish) whole and pieces thereof. (Thailand

notes that this is the complete heading in the EC's Schedule whereas the HS heading in full is as follows: guts, bladders, and stomachs of animals (other than fish) whole and pieces thereof, fresh, chilled, frozen, salted, in brine, dried or smoked.) These are the only processes specified in Chapter 2 and 3 and heading 0504. Out of these processes, it is undisputed that fresh does not refer to meat that is subject to preservation, and that chilled and frozen do refer to preservation. The question is whether "salted, in brine, dried or smoked" are for the purpose of preservation or preparation. To refer to these as being carried out for the purpose of preservation would have the effect of rendering the terms "or prepared" in the Chapter Note to Chapter 16 inutile. because that would in effect mean that there was no process for the purpose of *preparation* specified in Chapter 2, Chapter 3 or heading 0504. The correct interpretation would be to refer to "salted, in brine, dried or smoked" as processes for the purposes of *preparation*. This reading would give meaning to all the terms in the General Note to Chapter 16.

Thailand submits that this latter reading is in conformity with the EC's own understanding that the type of processes covered in Chapter 2 include processes carried out for the purposes of preparation and preservation.

In the EC's Combined Nomenclature of December 1994 (Commission Regulation (EC) No. 3115/94 of 20 December 1994, Exhibits THA-8 and BRA-7), Additional Note 6 stated that: "Products falling within heading No. 0210 to which seasoning has been added during the *process of preparation* remain classified therein provided that the addition of seasoning has not changed the character of the product."

The EC has been consistent in its understanding that products in heading no. 0210 undergo a *process of preparation.* This consistent understanding has been reflected in every annual issuance of the EC's Combined Nomenclature from at least 1992 to 2003.

ANNEX C-5

**RESPONSES BY THAILAND TO QUESTIONS
POSED BY THE PANEL AND THE EUROPEAN COMMUNITIES
AFTER THE SECOND SUBSTANTIVE MEETING**

(2 December 2004)

QUESTIONS POSED BY THE PANEL

FOR THAILAND:

83. Please reconcile the statement in paragraph 44 of Thailand's oral statement at the first substantive meeting and in its reply to Panel question No. 16 that only the classification practice of Members in implementing their tariff concessions is relevant with its statement in paragraph 68 of its second written submission that the unilateral classification practices of Members cannot be considered as subsequent practice establishing "the agreement of the parties" regarding the interpretation of the tariff heading at issue.

Paragraph 44 states that the classification practice of Members in implementing their tariff concessions is relevant [for the purpose of elucidating their understanding of the scope of that tariff concession.] This statement was made to highlight the importance of classification practice on importation with respect to a tariff concession *as compared to* the classification of exports for statistical purposes.

However, Thailand never considered the unilateral classification of a Member in implementing its tariff concessions to be "subsequent practice" within the meaning of Article 31(2)(b) of the Vienna Convention regarding the interpretation of the tariff heading at issue. "Subsequent practice" within the meaning of Article 31(2)(b) must establish the agreement of the parties.

The two statements made by Thailand can, therefore, be reconciled as they address different points.

FOR THE COMPLAINANTS:

84. How do Brazil's and Thailand's exporters describe the products at issue on their exportation documentation when exported to the EC?

The product is described as "Fresh Frozen Boneless Chicken Meat (Boneless Skinless Breast)" and is specified by the shipping company as 0207 on their exportation documentation.

85. Please explain the export classification process for the products at issue. In particular, is this undertaken by domestic customs authorities and/or by exporters?

(1) Exporters must obtain a permit (R-9 form) from the Department of Live Stocks to export animal carcass. The R-9 form is used to obtain an export declaration form from the Customs Department.

(2) A shipping company is hired by the exporters to handle the customs export procedures and paperwork. The shipping company will also fill out the description of the product and its customs classification heading in the export declaration form. Salted chicken exported from Thailand to the EC is classified by the shipping company as 0207. The export declaration

form as filled out by the shipping company will be submitted to Customs officials for further appropriate export procedures.

(3) The export declaration form is in turn used to obtain a health certificate from the Department of Live Stocks. The health certificate is required by the EC for Thai salted chicken exports to the EC. The certificate indicates whether the product is fresh chicken or meat preparation or cooked chicken.

86. In paragraphs 14 and 36 of its second written submission, the EC submits that low levels (0.5%) of salt are regarded in the industry as sufficient for the purposes of preventing "drip loss". According to the EC, there is no need for a salt content of 1.2% or above for such purposes. The EC argues that, therefore, even if drip loss were relevant, it does not require that the salt content be greater than 0.5%. Please comment.

The salt content of 1.2% that was specified in Regulation 535/94 in 1994 was not based on a requirement to prevent "drip loss." The "drip loss" factor is a concept that was first introduced during the course of these proceedings. The "drip loss" factor is an important technical reason why importers prefer salted chicken. However, the amount of salt that may or may not be required for "drip loss" to be prevented is an *ex post facto* consideration and is not relevant to the issue before the Panel, namely, the scope of the EC's tariff concession of heading 0210 at the time of the conclusion of the WTO Agreement.

***FOR THE EUROPEAN COMMUNITIES**:*

93. Do the products at issue in this case meet the criteria set out in EC Regulation 535/94?

Yes.

Even EC Commissioner Fischler has acknowledged that the products at issue meet the criteria set out in Regulation 535/94. He stated in response to the question posed by the European Member of Parliament, Mr. Albert Maat, "[t]he Honourable Member assumes that the meat in question is lightly salted and the salt may be shaken off. This fact would not be in conformity with the definition in the Combined Nomenclature which reads: 'For the purposes of heading 0210, the terms 'meat and edible meat offal, salted, in brine' mean meat and edible meat offal deeply and homogeneously impregnated with salt in all parts, having a total salt content not less than 1.2% by weight'. The Commission is however not aware that imported salted poultry meat does not comply with this definition." (Exhibit THA-4).

108. In paragraph 119 of its second written submission, the EC submits that throughout the Uruguay Round negotiations, EC law on classification under heading 02.10, including Regulation 535/94, was based on the concept of preservation. Please explain where the concept of preservation is reflected in Regulation 535/94.

The concept of preservation is not reflected in Regulation 535/94. The EC has explicitly acknowledged this omission in paragraph 87 of its First Written Submission, where it stated: "… Regulation 535/94 did not need to refer to the concept of preservation nor to the judgment of the EC."

114. Please comment on Brazil's and Thailand's submission in paragraphs 56 and 8 respectively of their oral statements at the second substantive meeting that the legal effects of an ECJ judgement may be reversed or altered by a change in the law, including the enactment of a new Regulation.

In response to a question posed by Thailand with respect to the difference between the European Court of Justice's judgement in *Dinter* and the subsequent Regulation which enacted Additional Note 6(a), the EC stated that "the EC exercises its legislative powers carefully, with a view to ensuring that there is no conflict. Should any such conflict occur, there can be no doubt that the judgements of the Court of Justice would prevail." The EC then cited the *French Republic v. Commission* case to the effect that the Commission is not authorized to "alter the subject-matter of the tariff headings which have been defined on the basis of the Harmonized System … whose scope the Community has undertaken not to modify."[1] Thailand agrees that the EC cannot alter the subject matter of the tariff headings. For example, if the EC enacted a Regulation which altered the definition of "salted meat" in heading 0210 to include widgets, then the European Court of Justice could strike down that Regulation as *ultra vires* as the EC would have exceeded its legislative competence in passing such a Regulation. In such a situation, the judgement of the Court of Justice would prevail.

However, this is not the situation in the case before the Panel.

Regulation 535/94 (enacted as Additional Note 7) did not alter the subject matter of the tariff headings which have been defined on the basis of the Harmonized System. Rather, Regulation 535/94 merely specified the criteria to be taken into account for classifying certain goods under a particular heading, in this case, heading 0210.

In *Gijs van de Kolk-Douane Expéditeur BV*, the European Court of Justice reviewed an Additional Note that did not change the scope of the chapters, sections and headings of the nomenclature, but merely specified the criteria to be taken into account for classifying certain goods under a particular heading of the Common Custom Tariff …[2] In that case, the European Court of Justice held that the validity of the Additional Note was not affected.

In a similar manner, Thailand submits that the previous Additional Note 7 does not change the scope of the tariff headings in the Combined Nomenclature – it merely specified the criteria to be taken into account for classifying certain goods. Therefore, the validity of the Additional Note 7 is not affected.

Thailand submits that the legal effects of the European Court of Justice's judgment in the *Gausepohl* case were modified by the provisions of Additional Note 7, which specified the criteria to be taken into account for classifying products under heading 0210.

FOR ALL PARTIES:

118. What is the distinction between "preservation" and "long-term preservation"?

Following the First Substantive Meeting with the Parties, Brazil posed the following question to the EC: "Is there a difference between 'preservation' and 'long-term preservation'? If so, what is it?" The EC's response was that "[t]he question is not relevant to this dispute since no one maintains that the product at issue qualifies under either criterion."

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[1] Replies of the European Communities to questions posed by the Complainants at the First Substantive Meeting of the Parties. EC Reply to Thailand's Question 1, 14 October 2004.

[2] C-233/88, *Gijs van de Kolk-Douane Expéditeur BV v Inspecteur der Invoerrecten en Accijnzen*, 8 February 1990, ECR [1990] page I-00265, para. 18. Exhibit THA-35.

The EC has repeatedly stated that "preservation lies at the heart of Chapter 2". (Thailand has never agreed that preservation is the key factor for determining classification under Chapter 2) However, the EC has never stated that "*long-term* preservation" lies at the heart of Chapter 2. Nevertheless, in Regulation 1223/ 2002 and in Regulation 1871/2003, the EC introduced the concept of *long-term preservation* as being the decisive criterion for determining the classification of a product.

However, as the EC has indicated throughout the course of these proceedings, it does not have a clear understanding itself of the standard to be used to assess "long-term preservation." Indeed, the EC has acknowledged that this determination would have to be resolved by individual EC customs officials within strict time-frames on a case-by-case basis, on a shipment-by-shipment basis, without any specific guidelines on the percentage of salting which would suffice to achieve the purpose of "long-term preservation." From the EC's own statements at the First Substantive Meeting with the Parties, a customs officer would have to determine that the product would need to be preserved for a period of between "a few" and "several months."

Thailand notes that in its oral reply to a question posed by the Panel during the Second Substantive Meeting, the EC stated that the analysis of what is meant by long-term preservation for the purpose of classifying the product under heading 0210, would have to be carried out on "a product-by-product basis and on a case-by-case basis." Such an approach fails to provide security and predictability to traders with respect to the trade concessions negotiated by the EC under Schedule LXXX.

119. At the time the EC concluded its Schedule, was there evidence of the existence of trade in meats under heading 02.10 which, through salting, were preserved for less than a few months?

In its First Written Submission, the EC provided information in Table 2 (page 22) which indicated that there was trade in meat under heading 02.10.90.20 in 1994 in the amount of 21 metric tonnes. However, there is no indication of the length of time for which the salted meat products were preserved, *e.g.*, a few days, a few months etc.

Thailand notes that the Panel has previously requested the EC "to provide details of the salt content of the products classified as 'other salted meats' with respect to the statistics provided in Table 1 (page 21)." The EC did not provide such details and instead replied:

> Table 1 of the EC's First Written Submission refers to imports during the period 1986 to 1993. The import declarations in respect of imports are not held centrally, but rather with the Member State customs authorities. It is unlikely that declarations from this period are still available, and it is moreover, unlikely that such declarations would mention the salt content of the goods in question. The EC has not been able to find documents attesting to the salt content of these products.[3]

It is not clear to Thailand why the EC has not requested this information directly from the Member State customs authorities.

In any event, Thailand notes that the meat in question in the *Gausepohl* case contained salt at the level of 0.71% (internal salt content 0.48%).[4] We further note that the *Oberfinanzdirektion* had

[3] EC's Replies to Panel's Questions Following the First Substantive Meting with the Parties, 14 October 2004. Question 35.

[4] Paragraph 2 of the Report of the Hearing in Case 33/92. Exhibit EC-14.

issued a Binding Customs Tariff Notice on 9 May 1989 classifying meat of bovine animals with a total salt content of 0.71% (internal salt content 0.48%) under subheading 0210 20 90 of the Combined Nomenclature. This fact by itself is an indication that there was trade in salted meat that was preserved for less than a few months. In that case, it was submitted that such a level of salt would not preserve the meat for an extended period of time.

120. With respect to Brazil's suggestion in its reply to Panel question No. 3 that the Panel should draw adverse inferences regarding the EC's failure to provide certain information requested of it by the Panel, is there any basis for the Panel drawing similar inferences regarding Brazil's and Thailand's refusal to provide export classification practice for the headings at issue?

No. Thailand never refused to provide the information. Thailand has maintained a legal argument throughout these proceedings that the classification practices of Thailand for statistical purposes is not relevant for determining the scope of the EC's concession on heading 0210 at the conclusion of the WTO Agreement.

However, in response to the Panel's request, Thailand has now provided the information in its response to question 84 and, therefore, there is no need for the Panel to draw adverse inferences.

121. What relative weight should the Panel accord to inferences that may be drawn for the headings at issue in this case from:

(a) the structure of Chapter 2 of the HS and its predecessors;

(b) the Explanatory Notes that are relevant to Chapter 2 of the HS and to its predecessors; and

(c) General Interpretative Rule 3 of the HS.

(a) The structure of the headings in the EC's Schedule of Concessions (which is the same as the structure of Chapter 2 of the Harmonised System and the same as the structure of Chapter 2 of the EC's Combined Nomenclature) should be taken into account by the Panel in its application of Article 31(1) of the Vienna Convention as part of the "context" following an examination of the "ordinary meaning" of the terms of the treaty at issue. The structure of Chapter 2 in the predecessor nomenclatures serves as useful background to the interpretation of the current Chapter 2 in the various agreements.

(b) The Note to Chapter 16 (which is not an Explanatory Note) is relevant to Chapter 2 of the HS. As explained in greater detail in Section B.3 of Thailand's Second Written Submission, the Note to Chapter 16 (which is legally binding) excludes products that are prepared or preserved by the processes specified in Chapter 2 or 3 or heading 0504. This means that the products in Chapter 2 undergo processes for the purpose of preservation *or* of preparation. Thailand has submitted that products in heading 0210 undergo processes for the purpose of preparation.

The Explanatory Notes to Chapter 2 should also be given weight by the Panel. The Appellate Body has specifically stated in *EC – Computer Equipment* that: "[w]e believe, however, a proper interpretation of Schedule LXXX should have included an examination of the Harmonized System and *its Explanatory Notes*." (Emphasis added. Para. 89). In interpreting Schedule LXXX, the Appellate Body could have chosen to not accord the Explanatory Notes of the Harmonized System the same weight as the HS itself. However, the Appellate Body made clear that the Harmonized System and its Explanatory Notes must be used in an

interpretation of the EC's Schedule LXXX. Therefore, the Panel should not give the HS Explanatory Notes less weight than the Appellate Body has recommended.

(c) The General Rule of Interpretation 3 of the HS may be taken into account as part of the Harmonized System. Article 1(a) of the Harmonized System Convention provides that the Harmonized System "means the Nomenclature comprising the headings and subheadings and their related numerical codes, the Section, Chapter and Subheading Notes and the *General Rules for the interpretation of the Harmonized System*, set out in the Annex to this Convention." (Emphasis added.)

122. Do the parties consider that actual knowledge during negotiations of a document or instrument is necessary on the part of some/all negotiators involved in the negotiation of a treaty in order for it to qualify for consideration as "preparatory work" and/or "circumstances of conclusion" of a treaty under Article 32 of the Vienna Convention? If so, please provide support for this view. If not, please provide support for this view.

No. Thailand does not consider that *actual* knowledge during negotiations of a document or instrument is necessary on the part of some or all negotiators in order for that document or instrument to qualify as "circumstances of the conclusion." From a practical perspective, it would be extremely difficult to prove "actual knowledge" among all negotiators. However, negotiators are expected to have *deemed* knowledge of the legislation in another Member's jurisdiction at the time of the conclusion of the treaty.

QUESTION POSED BY THE EUROPEAN COMMUNITIES

In para. 5 of its closing statement of 18 November 2004, Thailand opines that Additional Note 6(b) means "that products in heading 0210 undergo a process of preparation". How does Thailand explain that none of the parties in the *Gausepohl* case relied on this note to argue that the beef had been "prepared" and should therefore qualify under heading 0210, and that the Court did not consider it in its interpretation of heading 0210?

Reply

Thailand is not aware of the reasons why neither the parties nor the Court in the *Gausepohl* case relied on Additional Note 6(b) which stated that "that products in heading 0210 undergo a process of preparation".

Thailand is aware, however, that Additional Note 6(b) was introduced by Regulation No 3678/83 of 23 December 1983 (Commission Regulation (EEC) No 3678/83 of 23 December 1983 on the tariff classification of certain types of seasoned meat and amended Regulation (EEC) No 950/68 on the Common Customs Tariff, O.J. L 366/53). The note was at that time numbered as Additional Note 6(c) and provided:

> "However, products falling within subheadings 02.06 B I, 02.06 C I a) and 02.06 C II a) to which seasoning has been added during the process of preparation continues to fall within the said subheadings provided that the addition of seasoning has not changed their character of product falling within heading No 02.06."

In Thailand's view, as the Additional Note 6(b) was duly published and was in force at the time of the *Gausepohl* case, the parties and the Court could have relied on the provisions of this Note to the effect that "that products in heading 0210 undergo a process of preparation".

ANNEX C-6

COMMENTS BY THAILAND ON THE EUROPEAN COMMUNITIES' RESPONSES TO QUESTIONS AFTER THE SECOND SUBSTANTIVE MEETING

(9 December 2004)

QUESTIONS POSED TO THE EUROPEAN COMMUNITIES

Question 87

In Thailand's view, the meaning of the headings in the EC Schedule must be assessed as of the time of the conclusion of the WTO Agreement. The meaning of "salted" in heading 0210 in the EC's Schedule at that time was defined by Regulation 535/94 which had been published on 11 March 1994 and entered into force in the EC's Combined Nomenclature on 1 April 1994. As the Appellate Body stated in *EC - Computer Equipment*, "… the fact that Member's Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members." (para. 109) A treaty interpreter must assess the scope of the tariff commitment the EC made on heading 0210 when it concluded the WTO Agreement on 15 April 1994 in order to ascertain the EC's WTO obligations. The determination of whether there is a violation of the EC's obligations must be made on the basis of the situation existing at the date of the establishment of the Panel.

Furthermore, in this particular case, negotiators at the conclusion of the WTO Agreement could have been expected to have deemed knowledge of the *legislation* in the EC, such as Regulation 535/94, which was published and in force at the time of the conclusion of the treaty. Negotiators could not have been expected to be aware of every Court judgement in the EC because each judgement related to the specific fact situation before the Court. For example, the operative part of the ruling in the *Gausepohl* case on which the EC seeks to rely in this case only pertains to the interpretation of heading 0210 with respect to bovine meat. Therefore, the Court's interpretation of heading 0210 in *Gausepohl* is of little use to traders exporting salted chicken or other types of meat to the EC. Amendments made by legislation, on the other hand, are more generally applicable in a variety of situations. Regulation 535/94, which applies to all types of meat falling under heading 0210 is more general and therefore more informative to traders who export different types of meat.

Members did agree in the Modalities Agreement to use the *level* of duties applied as of 1 September 1986. It is very common to agree at the beginning of multilateral trade negotiations on a date in the past that would be used to determine the tariff levels to which any agreements on tariff reductions would be applied. This ensures that no participant in the negotiations can increase its "bargaining chips" in the course of a Round. This agreement to use the level of duties can not be taken to mean that the scope of the EC's Schedule should be determined as of the beginning of the Round. However, the content of the agreement finally reached must be determined by the circumstances prevailing at the conclusion of the agreement.

Indeed, the Vienna Convention makes clear in Article 31 that it is the terms of the treaty (as they have *been* negotiated) that must be interpreted and in Article 32 that it is the circumstances of the *conclusion* of the treaty to which recourse may be sought. The *Vienna Convention* does not have any reference to the circumstances at the *launch* of the negotiations of the treaty.

Question 97

The EC states that it "knows of no meat that is preserved by the use of common salt alone." It then notes that it had previously referred to bacon as the only meat product that is preserved by salting alone, but now states that it is more accurate to refer to bacon as "cured" rather than "salted" because a combination of common salt NaCL, sodium nitrate and nitrate are used in the process (para. 19). However, the terms of the heading 0210 do not contain the term "cured" but only refer to "salted, in brine, dried or smoked." So, the EC's answer oddly implies that meat which has been treated with common salt cannot be considered under the term 'salted' and that bacon which is regularly classified as "salted meat" under heading 0210 should not be considered as "salted" but "cured" even though the term "cured" does not appear in heading 0210. The EC's interpretation does not make sense.

In addition, the EC has obtained an expert's opinion which states that a minimum of 7% salt in meat is necessary to preserve the meat (Exhibit EC-32). (Thailand notes that there is a seeming inconsistency between this expert opinion and that provided in the *Gausepohl* case by the Federal Office for Meat Research which stated that 4-5% salt was necessary to preserve the meat). In any event, during the course of the First Substantive Meeting with the Parties, the EC stated that meat salted at the level of 3% or more would have no commercial market in the EC. Therefore, the EC is requiring that meat be salted for the purposes of preservation at such high levels that the meat would be inedible and unsuitable for human consumption. Thailand notes that the Note to Chapter 2 states that "[t]his chapter does not cover … products of the kinds described in headings 0201 to 0208 or 0210, unfit or unsuitable for human consumption." Thailand submits that meat salted at the level of 7% would be "unfit or unsuitable for human consumption." Therefore, the EC is seeking to establish criteria for "salted meat" (i.e., 7% salt content) that, if applied, would render the product ineligible for coverage under Chapter 2.

Question 100

There is no legal or evidentiary basis for the EC's alternative argument that preparation must "place the meat in a recognisably different state." The EC cites its Exhibit-5 as support to state that all the meats that "all the meats that we are aware of as being classified under heading 02.10 share this characteristic." However, Thailand notes that this Exhibit is entitled a "*Non-Exhaustive* List of Traditional *European* salted and dried/smoked meat products." This would imply that there are other products which are not on this list which could nevertheless fall under heading 0210. Further, Thailand notes the evidence that Brazil has submitted in BRA-43 which contains a partial list of the products listed in the HS on-line Database of salted meat classifiable under subheading 0210.90 (1996 HS version). This list includes products such as 'salted meat of chicken' which are not presented in a 'recognisably different state' and do not have a 'general' or 'specific' name such as bacon or Parma ham. Yet, the Harmonized System Database confirms the fact that 'salted meat of chicken' is a product falling under heading 02.10.

Question 102

In Thailand's view, the EC has not shown that the notion of preservation is "at the heart" of heading 02.10 in the Harmonised System, the EC's Schedule and the EC's Combined Nomenclature. If, indeed, that were the case with the Harmonised System, then the WCO would have presumably mentioned that point in its replies to the Panel's first set of questions. The EC would also have not introduced in 1983 Additional Note 6(a) in its Combined Nomenclature which stated that: "… products falling within subheading 02.06 [the predecessor to heading 02.10] … to which seasoning has been added during the process of preparation continues to fall within the said subheadings…"

Question 109

Thailand notes that the EC is unable to provide the Panel with any additional evidence to buttress its general and oft-repeated assertion that 'EC law and practice support the principle of long-term preservation'. Indeed, the EC submits only the EC's Common Customs Tariff for 1986 which reproduces the headings of the CCCN. The EC's sole argument is that the heading 02.06 of the CCCN contains effectively the same wording of heading 02.10, which according to the EC "enshrine" the principle of preservation. It remains unclear to Thailand how the mere wording of heading 0210 "enshrines" the principle of preservation. Indeed, Thailand has demonstrated throughout these proceedings how the term 'salted' in heading 0210 refers to a process undertaken for the purpose of preparation.

Moreover, the EC has only cited *one* only European Court of Justice case prior to 1 September 1986 which referred to the principle of preservation governing classification under Chapter 2, namely the *Dinter* case. *Gausepohl* which is the only other European Court of Justice case which refers to preservation (albeit in the context of the classification of bovine meat) refers only to *Dinter*.

Question 113

Thailand notes that the Court in *Gausepohl* provided its interpretation of heading 0210 with respect to bovine meat only, and therefore cannot be viewed as the Court's interpretation for all meat falling under heading 0210.

Furthermore, Thailand submits that the content of Regulation 535/94 has been enacted many times as a Council Regulation through the annual issuance of the EC's Combined Nomenclature. Thailand also submits that Additional Note 7 does not change the scope of the sections or headings in Chapter 2.

The Commission has the power to enact a Regulation such as Regulation 535/94 specifying criteria to be taken into consideration for classifying goods under heading 0210.

Question 114

The EC's explanation of the relationship between the *Dinter* case, Additional Note 6(a) and the effect of the judgement in the *Van de Kolk* case is misleading.

In the *Dinter* case (judgment issued on 17 March 1983), the Court held that "a criterion as subjective as taste may not be used to assess the seasoning of meat." On 23 December 1983, the Commission introduced Regulation 3678/83 on the classification of certain types of seasoned meat which provided in Additional Note 6(a) that " '[s]easoned meat' shall be uncooked meat that has been seasoned either in depth or over the whole surface of the product with seasoning either visible to the naked eye or clearly distinguishable by taste." Additional Note 6(a) was then incorporated in the EC's Common Customs Tariff through Council Regulation 3400/84. The original customs issue in the *van der Kolk* case was that classification under heading 16.02 was disallowed because the chicken product has not been seasoned over the whole surface and was not distinguishable by taste. The product was therefore classified under heading 02.02 and the importer then became liable for tariff duties under this heading.

The importer then appealed to the Tariefcommissie which then questioned whether the Additional Note 6(a) was in conformity with the criteria for the Brussels Convention on Nomenclature (a previous method of classifying goods prior to the introduction of the Harmonized System). The issue before the European Court of Justice was:

> First, whether the Council had exceeded its discretionary powers to interpret the Common Customs Tariff when it adopted Additional Note 6(a) and,
>
> Second, whether Additional Note 6(a) modified the scope of the chapters, sections and headings of the Brussels Nomenclature.

To both these questions the Court answered in the negative. For the purposes of this present dispute it is worth examining in detail the reasons for the Court's ruling in *van der Kolk*. First, the Court noted that in *Dinter* it held that a criterion as subjective as taste could not be used for classification purposes. However, the Court then went on to point out that that judgement was delivered under two different circumstances: first, there was no regulation interpreting the Common Customs Tariff *and* second, there was no ISO standard to confirm the objectivity of sensory testing. (Contrary to what the EC states, there is not indication in the Court's judgment that the ISO standard was the "key change in circumstance.") The Court held that the Council did not infringe its discretionary authority in establishing that "taste" could be used for classification purposes. Second, the Court held the Additional Note 6(b) did not change the scope of the chapters, sections and headings of the Brussels Nomenclature. Therefore, the Court in *van der Kolk* upheld the validity of Additional Note 6(a) which the EC has confirmed currently applies. In other words, the Court upheld the validity of Additional Note 6(a) because it was not *ultra vires* the authority of the Commission or the Council.

Regulation 535/94 (Additional Note 7) may be analysed using the same approach as the Court used in its review of the validity of Additional Note 6(b). First, Thailand submits that the Commission was within its discretionary powers to enact Regulation 535/94. Second, Thailand submits that Regulation 535/94 does not change the scope of the chapters, sections and headings of the Harmonized System or of the EC's Combined Nomenclature or the EC's Schedule. It merely specified the objective criteria to be taken into account for classifying goods under heading 0210.

Thailand disagrees that the definition of "salted meat" as a meat product containing 1.2% salt deeply and homogenously impregnated in all parts could be considered as altering the scope of the heading 0210. The EC refers only to its argument that salting at this level does not ensure preservation. Yet the EC has failed to prove that salting in heading 0210 means "preservation." It has still not been able to point to any EC case-law other than *Dinter* and *Gausepohl* in support of its assertion. It has only cited the headings of the CCCN and the HS without clearly demonstrating how salting means "preservation."

Question 121

With respect to the first paragraph in the EC's response, Thailand does not agree that "all parties to this dispute are agreed General Interpretative Rule 3 is not applicable in this case." Thailand refers the Panel to its discussion of GRI 3 in its First Written Submission (pages 33-35), its Second Written Submission (pages 12-14) and its Opening Statement at the Second Substantive Meeting with the Parties (paras. 24-25).

ANNEX C-7

RESPONSES BY THE EUROPEAN COMMUNITIES TO QUESTIONS POSED BY THE PANEL, THAILAND AND BRAZIL AFTER THE FIRST SUBSTANTIVE MEETING

(14 October 2004)

QUESTIONS POSED BY THE PANEL

FOR THE EUROPEAN COMMUNITIES

19. What is the legal effect of EC Commission Decision of 31 January 2003? In particular

(a) Is the legal effect confined to the revocation of certain BTI notices issued by Germany or is the legal effect broader? If the latter, please explain.

Article 1 of Commission Decision 2003/97/EC of 31 January 2003 limits its effect to the revocation of the BTIs listed in the Annex thereto.

(b) Is the legal effect restricted to Germany or do some or all aspects of the Decision apply more generally to all EC member states? If the latter, please explain.

Article 249 of the EC Treaty (which regulates the competences of the EC and its institutions) states "A decision shall be binding in its entirety upon those to whom it is addressed". Article 2 of Commission Decision 2003/97/EC states that the "Decision is addressed to the Federal Republic of Germany". Consequently, the legal effect of Commission Decision 2003/97/EC is restricted to Germany.

(c) Can recitals in EC Commission Decisions have legal effect? If so, please explain what the legal effect is, if any, of recitals 7 and 8 of the EC Commission Decision of 31 January 2003 as regards the interpretation and application of EC Commission Regulation 1223/2002?

Article 253 of the EC Treaty requires that Community legislative acts "state the reasons on which they are based". The recitals to Commission Decision 2003/97/EC therefore provide the reasons for which the decision was adopted. However, the legal effect of the decision flows from its operative part.

20. With respect to EC Commission Regulations 1871/2003 and 2344/2003: a) How does the EC characterise their legal effect(s) as regards frozen chicken cuts that have been deeply and homogeneously impregnated with salt with a salt content of 1.2% or more in comparison with the legal effect(s) associated with EC Commission Regulation 1223/2002 and EC Commission Decision of 31 January 2003?

The EC would first note that neither of these Regulations are in the Panel's terms of reference. Commission Regulation (EC) No. 1871/2003 inserts into Additional Note 7 to Chapter 2 of the EC's Combined Nomenclature the phrase "provided it is the salting which ensures long-term preservation", in order to clarify and confirm, that in order for a meat to qualify as "salted" under 02.10 the salting must be sufficient to ensure preservation. This Regulation amended the text of the *Combined Nomenclature* in force in 2003. Commission Regulation (EC) No. 2344/2003 makes a series of

amendments to the text of the Combined Nomenclature for 2004, including those insertions included in Regulation 1871/2003.

Additional Note 7 applies to heading 02.10 of the *Combined Nomenclature* in general. That is, it applies to all meats which are presented for import under 02.10. By contrast, Commission Regulation 1223/2002 concerns the classification of the specific goods described in column 1 of the annex to that Regulation i.e. "boneless chicken cuts, frozen and impregnated with salt in all parts. They have a salt content by weight of 1.2 to 1.9%. The product is deep-frozen and has to be stored at a temperature of lower than -18°C to ensure a shelf-life of at least one year". Similarly, Decision 2003/97/EC concerns the specific products identified in the BTIs listed in the Annex to that Decision.

(b) Could frozen chicken cuts that have been deeply and homogeneously impregnated with salt with a salt content of 1.2% or more be classified under heading 0210.90.20 of the EC Combined Nomenclature as a result of the application of Commission Regulations 1871/2003 and 2344/2003? If so, please explain under what circumstances or subject to what conditions. If not, please explain under what heading of the Combined Nomenclature such products would be classified

Classification under 02.10 would only be possible if the goods in question were salted for preservation.

21. In paragraph 1 of the EC's first written submission and in paragraph 4 of its oral statement during the first substantive meeting, the EC submits that the product at issue is no more than "salty chicken". Could the EC further elaborate on what it means by this characterisation of the products at issue.

The expression "salty chicken" means that salt is added in the product at issue as an ingredient with the result that such chicken tastes of salt, as opposed to chicken that is preserved by salting. However, it is never consumed by the end-user as "salty chicken" because it is, as the Complainants explain, always transformed into further processed products, where salt is merely one ingredient.

22. Could the EC comment on arguments made by Brazil and Thailand in their oral statements during the first substantive meeting (paragraph 20 in the case of Brazil and paragraphs 47 and 49 in the case of Thailand) that exporters are within their rights to "seek the path of least resistance" and to develop products to minimize their costs, including tariffs.

The EC does not question the right of exporters to design products in a way that they come under a particular tariff heading. Sometimes this is successful, sometimes this fails. In any event, the decisive question is whether or not the product falls under the scope of the specific tariff line. The product exported by Thailand in 1996 and Brazil in 1998, i.e., frozen boneless chicken cuts with added salt between 1.2%-2.9% salt does not bring the product within the scope of heading 02.10. Therefore, Brazil's and Thailand's attempt to "seek the path of least resistance" was not successful.

23. Are there any guidelines for EC customs officers to assist them in determining whether or not salting achieves long-term preservation or do customs officers make this assessment on a case-by-case basis?

There are no specific guidelines as to when salting achieves long-term preservation. Such guidelines as are necessary would be specified in the Additional Notes or Explanatory Notes to the Combined Nomenclature. However, in practice such guidelines have never been necessary, because there has never been a problem in applying 02.10 (with the exception of the facts at issue in the *Gausepohl* case and in the present dispute) since there has been little dispute as to the type of product

which falls under 02.10.

24. The EC is requested to explain what is meant by the reference to "character" in the Annex to EC Regulation 1223/2003 and recital 7 of EC Commission Decision of 31 January2003.

These two references refer to the fact that the product at issue does not fall under the scope of tariff heading 02.10. In other words, it does not have the necessary characteristics (preservation by salting) to fall under 02.10.

25. Is there any mechanism in place in the EC that would prevent the duty levied on imports of the products covered by EC Commission Regulation 1223/2002 and EC Commission Decision of 31 January 2003 from exceeding 15.4% ad valorem?

Such products fall under heading 0207 and are subject to the duties applicable to these tariff lines under the EC's Common Customs Tariff. The EC currently has no mechanism in place which would subject the products covered by Regulation 1223/2002 and Decision 2003/97/EC but which fall under heading 0207 to a duty not exceeding 15.4% ad valorem. However, in the EC's view, it is not necessary to have such a mechanism in place because the product at issue is not entitled to benefit from the EC's concession of a 15.4% *ad valorem* rate under 02.10.

26. With respect to paragraph 45 of its first written submission, if there is no literature on the percentage of salt required to preserve chicken, how can the EC be sure that the impregnation with salt of boneless chicken cuts so that they have a salt content of between 1.2 – 3% does not result in long-term preservation?

The EC understands that there is no dispute between the parties that a salt content of between 1.2 and 3% is insufficient to ensure preservation. Neither Brazil nor Thailand have pretended that the specific product at issue has been salted for preservation purposes. In addition, , Brazil considers that "salted chickens cuts [..] are adequately preserved by salt contents ranging from 9-11% and above".[1] The EC considers from the general literature which it has examined that the salt content necessary to ensure preservation will vary with the type of meat, the cut of that meat and other environmental factors which may have an effect on spoilage mechanisms.

27. In paragraph 45 of its first written submission, the EC says that there is a "lack of practice of salting poultry for preservation." Despite the absence of such practice, the EC has suggested throughout its first written submission that products will only be classified as salted under heading 0210 if the salt has been used as a preservative. Further, the measures that have been challenged by the complainants suggest that a salt content of more than 3% is needed in order to preserve boneless chicken cuts. Is the EC effectively submitting that there is no trade in boneless chicken cuts with a salt content of more than 3%? Is there any trade into the EC of salted chicken cuts under heading 0210.90.20? If so, please provide details of such trade.

The EC is not aware of any trade in boneless chicken cuts with a salt content of more than 3%. The EC is not aware that any such product has been traded under heading 0210.90.20 (as it appears in the EC's Schedule). As far as the EC is aware, there is no commercial practice of salting chicken for preservation.

[1] Brazil, First Written Submission, para. 85.

28. Could the EC respond to the suggestion made by Brazil and Thailand in paragraphs 55 and 44 respectively of their oral statements during the first substantive meeting that export classification practice is less relevant than import classification practice given the fact that exported goods are not subject to levying.

Brazil and Thailand claim that "customs classification of products for exportation is not relevant to determine the customs classification practice of a Member."[2] The Complainants' distinction between classification for products for export and import finds no basis in law, and is simply intended to divert attention from their own classification practices. Classification of imports and exports should follow the same principles. This is recognised in Article 3.1(a) of the *HS Convention* which requires that the customs tariff and statistical nomenclatures shall be in conformity with the HS. The Preamble of the *HS Convention* envisages the promotion of "as close a correlation as possible between import statistics and export trade statistics and production statistics". A market access negotiator needs to rely on accurate export/import data in negotiating tariff concessions. GATT contracting parties recognised this in their decision of 1983 on the Harmonized System in which they noted:

> In addition to the benefits for trade facilitation and analysis of trade statistics, from a GATT point of view adoption of the Harmonized System would help ensure greater uniformity among countries in customs classification and thus a greater ability for countries to monitor and protect the value of tariff concessions.[3]

As the Appellate Body held, tariff negotiations are a process of "give and take" between exporting and importing Members.[4] A common basis of understanding for the classification of the goods is therefore necessary. The Complainants are wrong, therefore, to suggest that classification on export is any less relevant than classification on import.

29. In paragraph 25 of its first written submission, the EC questions why the tumbling procedure for adding between 1.2 and 3% salt takes place in Thailand. In paragraph 48 of its oral statement during the first substantive meeting, Thailand explains that the relevant costs are lower in the EC. Could the EC comment on Thailand's explanation.

The EC understands the Panel's reference is to costs being lower in Thailand and not the EC.

The EC's question remains pertinent and valid because the tumbling process carried out in Thailand is by necessity replicated in the EC. The European processing industry will tumble or inject the same chicken, in order to adjust the salt content (if necessary), add spices, other ingredients and ultimately redundant additional working process, designed, as far as the EC is aware, only for exports to the EC and only to avoid the tariff which frozen chicken attracts in the EC (as compared to salted meats). Thus, even if Thai labour costs are lower, the tumbling in Thailand does not serve to cut the costs of processing of chicken.

As further elaborated in response to Panel question 60, the processing industry in general prefers not to have the product tumbled or injected in the exporting country because this gives the exporter the chance to increase the weight of the chicken through the addition of water, hence inflating the price.

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[2] Oral Statement by Thailand, para. 44.

[3] Decision of the Contracting Parties of 12 July 1983 (L/5470/Rev.1) *GATT Concessions under the Harmonized Commodity Description and Coding System* GATT, BISD, Thirtieth Supplement, pp. 17-21 at para. 1.2. Quoted in the EC's First Written Submission at para. 61.

[4] Appellate Body Report, *EC – Computer Equipment*, para. 109.

30. In paragraph 33 of its oral statement during the first substantive meeting, the EC refers to a US customs ruling of November 1993, noting that the ruling found that the product a tissue fell under heading 0201 or 0202 (depending upon whether it was fresh or frozen) rather than under heading 0210. Could the EC refer to the specific aspects of that ruling that support the view that frozen meat that has been deeply and homogeneously impregnated with salt should be classified under heading 0207 rather than under heading 0210 of the EC Schedule.

The 1993 US ruling concerns the "tariff classification of fresh or frozen boneless beef, with 3 per cent added salt, from New Zealand". The salting process is described in the ruling as follows: "This meat is being tumbled, to get the myosin out of the meat and thus enhance its absorption ability. While the meat is being tumbled, some three percent by weight of salt will be added, and tumbling continued until all the salt has been absorbed".

The EC understands that this treatment results in the beef being "deeply and homogenously impregnated with salt", but that it does not preserve the meat. In other words, the meat in question was in the same state as the product at issue. This meat was classified by the US customs under 0201 or 0202 which are the headings for beef that correspond to heading 0207 for chicken. Thus the logic of the decision entirely supports the EC's conclusions.

31. What is meant by the expression " impregnated with salt" in the challenged measures? Please explain the process(es) that chicken would have to be subjected to and/or the qualities possessed by such chicken in order to qualify as having been impregnated with salt.

The expression "impregnated with salt" only appears in the product description in column 1 of the Annex to Regulation 1223/2002 and in recital 1 to Decision 2003/97/EC. In Regulation 1223/2002 the phrase is used to describe the product at issue, and this description is carried into recital 1 to Decision 2003/97/EC.

The phrase "impregnated with salt" appears as a legislative requirement in Regulation 535/94 (and in the ECJ's judgment in the *Gausepohl* case) where it is intended to distinguish products which have been salted for the purposes of preservation from those which have been simply sprinkled with salt. The types of process envisaged by this phrase are those leading to the preservation of the product by salting.

32. What is the difference, if any, between meat that has been "impregnated" with salt and meat that has been "deeply and homogeneously impregnated" with salt. Is the process associated with the latter different from the former? If so, please explain.

The word "homogeneously" is intended to signify that the salt has been spread evenly through the meat. The EC understands that it is not sufficient for the preservation of a product by salting to simply impregnate it with salt (even deeply) in one part – the whole piece of meat must be salted, otherwise spoilage will spread from the unsalted to the salted part. It may thus be the case that meat merely impregnated with salt will not be salted for preservation.

33. Does the EC characterise EC Commission Regulations 1789/2003 and 2344/2003 as annual revisions to the EC Combined Nomenclature within the meaning of Article 12 of Regulation 2658/87? If so, why were two annual revisions published in 2003? If not, please explain how these Regulations should be characterised.

Commission Regulation (EC) No. 1789/2003 reproduces the complete version of the *Combined Nomenclature* (see recital 6 thereto) for the year 2004. It replaces the entirety of Annex I to Council Regulation (EC) No. 2658/97, and was adopted on 11 September 2003, with entry into force on 1 January 2004. Commission Regulation (EC) No. 2344/2003 of 30 December 2003 makes certain

changes to the complete version of the *Combined Nomenclature* for 2004 annexed to Regulation 1789/2003 in order to take account of changes to the *Combined Nomenclature* in force in 2003 which were made after 11 September 2003.

Regulation 1871/2003 of 23 October 2003 was one such change. This explains the reference to Additional Note 7 to Chapter 2 in the Annex to Regulation 2344/2003.

34. In paragraph 94 of its first written submission, the EC states that the product description contained in EC Regulation 1223/2002 corresponded to product descriptions contained in BTIs. The EC is requested to provide copies of the BTIs upon which EC Regulation 1223/2002 was based.

Recital 4 and Article 2 refer to the existence of BTIs which were inconsistent with the classification ruling set out in the Annex to Regulation 1223/2002. Regulation 1223/2002 was not explicitly based on specific BTIs, but rather was intended to correct erroneous interpretations which had formed the basis for BTIs. The EC has provided, as Exhibit EC-24, a number of relevant BTIs, which show that the salt content in such BTIs ranged from 1.2 to 1.9%.

35. With respect to the statistics referred to in Table 1 (page 21) of the EC's first written submission, the EC is requested to provide details of the salt content of the products classified as "other salted meats".

Table 1 of the EC's first written submission refers to imports during the period 1986 to 1993. The import declarations in respect of imports are not held centrally, but rather with the Member State customs authorities. It is unlikely that declarations from this period are still available, and it is, moreover, unlikely that such declarations would mention the salt content of the goods in question. The EC has not been able to find documents attesting to the salt content of these products.

36. The EC suggests in paragraph 43 of its first written submission that the process of salting can be reversed. Can the same be said of meat that has been in brine, dried or smoked? Please explain providing supporting evidence.

It is the EC's understanding that the process of preservation caused by drying or smoking products cannot be reversed. This is because the processes bring about irreversible chemical and physical changes in the meat.

37. The EC is requested to explain what it means in paragraphs 43 and 135 of its first written submission that salting can be "largely" reversed. In particular, providing sufficient support, the EC is requested to indicate the extent to which salting can be reversed.

The EC understands that, as a matter of theory, common salt (sodium chloride, NaCl) that has been added to meat can be entirely removed, through a process of osmosis. Such removal, however, would require sophisticated techniques and would be expensive. It is not, therefore, commercially used. On the other hand, there has been a practice of reducing the salt level in imported salted chicken cuts by tumbling them with unsalted chicken while adding other ingredients, as mentioned in regard to Panel Question 60 and 61.

The EC refers the Panel, for an example of desalting, to the description provided of the desalting of salted cod provided in the EC's First Written Submission (see para. 39 and footnote 27).

As far as the EC is aware, the preservation of meat by "salting" often involves the use not only of sodium chloride, but also of sodium nitrate and nitrite. The latter combine with the muscle

pigment, myoglobin, to form the red-coloured nitrosomyoglobin. This process cannot be reversed. Residual sodium chloride could be reduced by osmosis.

38. Could the EC provide support for the view expressed in recital 4 of EC Regulation 1871/2003 that all processes listed in heading 0210 are for the purpose of ensuring longterm preservation.

Regulation 1871/2003 was not one of the measures identified by the Complainants in their requests for establishment of the Panel. That said, the interpretative exercise the EC was undertaking in the recitals of Regulation 1871/2003 is similar to that before the Panel. Moreover, the view expressed in recital 4 corresponds to the arguments the EC has made before the Panel – in line with its consistent position – on the conclusions for the interpretation of the term "salted" which must be drawn from the context of the term "salted"; i.e. the terms "in brine", "dried" and "smoked". As the EC has set out in its First Written Submission (paras. 127- 139) and its Oral Statement (paras. 10-16), the ordinary meaning of all of these terms refers to methods to preserve meats, as opposed to methods designed to add ingredients. In the current case, Brazilian and Thai exporters are simply adding ingredients – such a process does not bring the product at issue under 02.10.

39. The EC is requested to comment on the observation made by Thailand in paragraph 13 et seq of its oral statement at the first substantive meeting that, in cases where the EC wanted to make preservation a relevant criterion in its Schedule, it did so expressly.

The EC is not convinced by Thailand's argument that because in other instances the HS explicitly uses the term preservation, a reference to "frozen" in 0207, and all the processes mentioned in 02.10 cannot be a reference to preservation processes. The terms "frozen" and "dried", "salted", smoked, "in brine" necessarily imply that the meat is preserved. There is consequently, no need to explicitly mention it as it would be redundant. The *a contrario* reading suggested by Thailand is baseless. Indeed, Thailand contradicts itself. In its First Written Submission, it stated that the term "frozen" in the EC's schedule refers to "products preserved by [...] refrigeration", yet the term "preservation" is not mentioned with respect to the term "frozen" in the EC's Schedule.[5]

Moreover, a closer examination of chapter 8 which Thailand refers to, supports the EC's view that the processes described in 02.10 are meant for long-term preservation. The wording of 08.14 is vital in this respect. It states:

> Peel of citrus fruit or melons (including watermelons), fresh, frozen, dried or provisionally preserved in brine, in sulphur water or in other preservative solutions.

Heading 08.14 juxtaposes peel of citrus fruit or melons that are "frozen" or "dried" to those that are "provisionally preserved" in brine. As noted a moment ago, the expressions "frozen" and "dried" imply that the fruits are preserved through the processes of freezing and drying. Where the preservation is only provisional, this has to be expressly indicated.

[5] Thailand, First Written Submission, para. 72.

40. In paragraph 80 et seq of its first written submission, the EC refers to the *Gausepohl* judgement of the ECJ, which it argues stands for the proposition that the figure of 1.2% salt content was conceived of as a minimum salt content above which it was possible that a meat product could be preserved by salting alone. On what basis was the figure of 1.2% conceived? Presumably, the ECJ had meat products in mind for which a 1.2% salt content would suffice for their preservation. If so, what is the meat to which the ECJ was referring?

In order to respond to the question, it is useful to recall the procedural background to the *Gausepohl* case. That case arose from two classification decisions issued by the Hamburg Customs authorities that classified "beef with a salt content of 0.71 and 1,2 %" under 0202. The importer *Gausepohl* brought legal proceedings against the Hamburg authorities arguing that the meat ought to be classified as "salted" under 02.10. The the German Bundesfinanzhof was obliged to stay the proceeding and to seek a preliminary ruling from the European Court of Justice (ECJ) as the decision required an interpretation of the *Combined Nomenclature*, a Community law instrument. In doing so, the Bundesfinanzhof referred two specific questions to the ECJ (and it is for the referring courts to formulate them). The first question concerns the proper classification of the consignment at issue. However, the Bundesfinanzhof, also considered it useful to obtain more clarity generally about the interpretation of heading 02.10, because the second question enquires about the necessary salt content and other conditions that "must be fulfilled for meat of bovine animals to be classifiable as salted under heading 02.10".[6]

Neither *Gausepohl*, nor the responding German customs authority, nor Belgium and the European Commission (as interveners), nor the Bundesfinanzhof itself had any doubt that the process of salting mentioned under 02.10 must lead to preservation.[6] However, significant doubts were expressed as to the possibility of fixing positively a salt content at which all meat can be considered preserved. It was submitted that this decision is to be taken on a case to case basis.[7] Advocate General Tesauro considered that the minimum salt content can only be determined by "a process of elimination" (para.5) and he emphasised that a minimum salt content of 1.2% ought not to be regarded as decisive. The Commission accepted during the proceeding the need for some reference point for customs authorities in form of a minimum percentage of salt below which it can be excluded that beef is salted to ensure long term preservation.[8]

The ECJ therefore, in para. 13 of its Judgement undertook to determine the minimum percentage for meat to be classified under 02.10. The Court considered the different minimum salt contents suggested by the participants; 4-5% by the European Commission based on advice from the Kulmbach Federal Office for Meat Research, 2% by Germany and 1.2% by Belgium. The 1.2% threshold was simply the lowest (para. 14) indicated by any interested party and significantly below the one suggested by the scientific expertise as necessary to ensure preservation. The Court states in paragraphs 14 and 15 that:

> The documents before the Court show that various different figures have been adopted by the authorities of the Member States. They do, however, suggest that the minimum total salt content required for the long-term preservation of meat may be set at 1.2%. That percentage should, therefore, as proposed by the Belgian Government in its written observations and by the Commission at the heading, be

[6] Report for the hearing case C-33/92 (Exhibit EC-14), paras. 12 (BFH); 14 (German customs authorities), para. 20 (*Gausepohl* the plaintiff); 22 (Belgian Government) and 27 (Commission).

[7] Report for the hearing case C-33/92, paras. 22 and 25 (Belgian Government), paras. 31 and 37 and 39 (Commission).

[8] Opinion of Mr Tesauro, Case C-33/92, para. 7.

adopted as the minimum total salt content required for meat to be classified under heading 0210.[9]

By consequence the Court considered that it can be in all cases excluded that salting below 1.2% can lead to long-term preservation.

41. Could the EC explain what significance should be attached to the *Dinter* and *Gausepohl* judgements, if any, following enactment of EC Regulation 1223/2002 and EC Commission Decision of 31 January 2003.

The EC has explained in its First Written Submission (paras. 64 et seq.) the principles of EC law regarding customs classification issues, in particular the EC addressed the status of the various instruments. Furthermore, in its Oral Statement (para. 36) the EC emphasized that the Commission does not have the power to "alter the subject-matter of the tariff headings which have been defined on the basis of the *Harmonized System* established by the Convention".[10] Within the EC the authoritative source of interpretations of the Harmonized System is the European courts, and in particular the European Court of Justice. In the EC's First Written Submission it explained the legal significance of the *Dinter* and *Gausepoh* judgements. As regards the scope of tariff headings (which is the issue that confronts us) that significance cannot have been changed by the measures in question. In other words, Regulation 1223/2002 and Decision 2003/97/EC (like Regulation 535/94) should be read in conjunction with this case-law of the Court. All three acts confirm and/or apply the meaning of the terms in 02.10 as interpreted by the Court.

42. If, as is submitted by the EC in para. 72 et seq of its first written submission, the principle that products falling within heading 0210 must be salted for the purposes of long-term preservation is so well-entrenched in the EC, why was it felt necessary to enact EC Commission Regulation 1871/2003? What events/circumstances triggered the decision to enact this Regulation?

Commission Regulation 1871/2003 was designed to "clarify and confirm" (see recital 5) the appropriate meaning of the term "salted" in heading 02.10. The events which triggered the decision were the erroneous classification decisions of certain Member States customs offices with respect to the product at issue. It was considered that, in addition to dealing with the specific product in Regulation 1223/2002 and Decision 2003/97/EC, it was also appropriate to clarify, in general terms, the correct interpretation of heading 02.10, in line with the EC's consistent position on this matter.

43. In his reply to a question that was posed by a member of the European Parliament in November 2001 regarding imports of salted poultry into the EC, EC Agriculture Commissioner Fischler replied that "For the purposes of heading 0210 [of the EC's Combined Nomenclature], the terms 'meat and edible meat offal, salted, in brine mean meat and edible meat offal, deeply and homogeneously impregnated in all parts having a salt content of not less than 1.2% by weight'." (See Exhibit BRA—2). Please explain in this regard why "preservation" was not mentioned when clarifying products falling within the scope of heading 0210?

The EC notes that the Commissioner was simply answering a question concerning lightly and superficially salted chicken. The answer – a quote from the Additional Note – was sufficient to deal with this issue. A complete explanation of EC law on the matter was not necessary in that context.

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[9] Exhibit EC-14.
[10] Case C-267/94 *French Republic v Commission* ECR [1995] I-4845, para. 20 (Exhibit EC-22).

44. With respect to paragraph 3 of the EC's closing statement during the first substantive meeting, what is the specific principle to which the EC is referring? Further, how is this principle applied? Is the answer different depending upon where the products originate from? Does the EC provide any advance rulings in this regard?

The principle the EC is referring to is that of preservation. As the EC has noted elsewhere, the application of the principle has rarely been problematic because it is normally obvious whether a product has been preserved by one of the means mentioned in 02.10. The EC applies this principle irrespective of the origin of imports.

45. The EC is requested to comment on the excerpt of the Minutes of the EC's Customs Code Committee of 25 January 2002 contained in paragraph 27 of Thailand's oral statement at the first substantive meeting indicating that the definition of "salting" for the purposes of EC Regulation 535/94 deliberately excluded certain elements of the ECJ's judgement in *Gausepohl*, including the requirement that salting be for the purpose of long-term preservation.

The EC strongly disagrees with the implication behind the comment in Thailand's oral statement. It implies that the reason that Regulation 535/94 did not refer to the concept of preservation was because the EC had made a policy decision no longer to interpret 02.10 in such a way. However, Thailand provides no grounds for considering that such an abrupt U-turn in position had taken place (it should be noted that Regulation 535/94 was adopted only a few months after the Court has rendered its judgment in *Gausepohl* where all parties had unequivocally considered that heading 02.10 referred to salting for preservation). It can only attempt to "spin" the minutes of a Customs Code Committee meeting 8 years after the event. The reality is that had the EC decided that the criterion of preservation was no longer relevant, it would have had to go to the WCO and either have the HS Nomenclature amended or, at a minimum, a classification decision adopted. Failing such a development, the Court of Justice has made it clear that the Commission cannot, of its own volition, change the headings of the Combined Nomenclature. As already noted, in Case 267/94 the Court of Justice held that the Commission's authority to adopt additional notes:

> does not authorize it to alter the subject-matter of the tariff headings which have been defined on the basis of the harmonized system established by the Convention whose scope the Community has undertaken, under Article 3 thereof, not to modify.[11]

Second, the EC does not agree with the implied interpretation of Thailand. Thailand appears to suggest that the phrase "the criterion of salting for the purpose of long-term preservation has not been introduced" in the minutes of the Meeting suggests that the notion of preservation had been entirely excluded from the EC's customs classification legislation. This phrase, seen in context, simply states that the notion does not appear in Additional note 7 (which is undisputed).

The EC would like to clarify the situation by addressing the reasons why the Commission adopted Commission Regulation 535/94. As noted the rulings of the Court of Justice are binding on the Commission and constitute the authoritative interpretation of the Combined Nomenclature. The Commission considered it necessary at that time to insert specific additional notes in respect of aspects of Court rulings that were not yet spelled out in the CN in the form of a Note, and were not readily apparent from an interpretation of the headings.

In *Gausepohl* the Court interpreted heading 02.10 as requiring salting for preservation. That was uncontested between the parties and already reflected in several Explanatory Notes, which the Court considered in its interpretation. Given that the requirement of preservation was already reflected in the Combined Nomenclature in various ways (the ordinary meaning of the heading 02.10,

[11] Case C-267/94 *French Republic v Commission* ECR [1995] I-4845, para. 20 (Exhibit EC-22).

its context and the Explanatory Notes) and given that this was entirely undisputed between all interested parties, there was simply no need to restate the obvious. It should be borne in mind that Explanatory Notes are in the first place directed to the customs authorities of the Member States who are responsible for the actual application of the Combined Nomenclature. Such notes only address problems that have arisen in implementation or are somewhat unclear. The criterion of preservation was neither disputed nor unclear.

Finally, the EC would note that the minutes reflect preparatory discussion for Regulation 1871/2003, not for any of the measures at issue, nor of Regulation 535/94. They are not legislative acts of the Community, nor do they represent the reasons justifying legislative action by the Community, nor are they authoritative interpretations of Community acts.

46. The EC is requested to comment on the excerpt of the Minutes of the Meeting of the EC Customs Code Committee of 18–19 February 2002 set out in paragraph 30 of Thailand's first written submission.

The EC understands that the reference is to paragraph 39 of Thailand's Submission. The meeting in question was part of the discussions leading up to the adoption of Regulation 1223/2002. Some Member States reported that they had classified the product at issue under heading 02.10. (as described in the EC's First Written Submission, paras. 91 and 92). The statement in question merely recalls this factual situation.

47. Could the EC specifically point to the aspects of the ECJ cases to which it refers, namely *Dinter* and *Gausepohl*, that support the view that the minimum salt content needed to qualify a meat under heading 0210 may vary from meat to meat.

The EC has explained in its First Written Submission (para. 84) and in its response to Panel Question 40 how the *Gausepohl* judgement supports the conclusion that the 1.2 percent salt rule was intended as a minimum to be taken into account alongside the criterion of long-term preservation. It is implicit in such a principle that the amount of salt required for such preservation will vary from meat to meat. If there were no such variation then the necessary percentage could be calculated and published.

48. In paragraph 41 of its first written submission, the EC indicates that products preserved by salting (or a combination of salting, drying and smoking) are popular primarily by virtue of their taste and other characteristics. Which characteristic(s) of the products at issue are the most important for the consumer/end-user?

In making this statement, the EC had in mind meats (such as Parma ham) which are preserved by salting, etc., and which are popular with consumers, who appreciate their characteristics of taste, texture and such like, as well as their long life.

With respect to the product at issue, the Complainants admit that frozen boneless chicken cuts with a salt content of between 1.2 and 3% is intended exclusively for further processing and is not consumed as such by household consumers. In contrast to meats traditionally traded under heading 02.10, it is used to produce further processed chicken products. The main physical characteristic of the meat sought by the industrial consumers is its suitability for further processing. Generally speaking, such processors prefer meat to which no ingredients have been added. They may, however, be ready to accept meats to which ingredients have been added, provided that the later addition of ingredients during further processing is not impaired. The sole characteristic which interested the European processing industry about the product at issue was that it was provided at a cheap price, due to it being imported under 02.10.

49. The EC is requested to comment on Brazil's argument in paragraph 95 of its first written submission that the two 1999 US classification rulings to which it refers show that frozen smoked salmon is to be classified under heading 0305 concerning, inter alia, fish that has been salted, in brine, dried or smoked rather than heading 0303 concerning frozen fish. Similarly, the EC is requested to comment on Brazil's argument in paragraph 96 of its first written submission that, in the US, bacon that has been salted/smoked but also frozen will be treated as salted/smoked bacon rather than frozen bacon. In particular, could the EC comment on any inferences that may be drawn from these rulings in relation the headings of the EC Schedule at issue in this case?

The EC considers that the evidence Brazil cites to equally support its position.[12] In both cases the meat has been smoked or cured which are processes used for preserving meats. These processes were not undertaken simply to add ingredients as with the product at issue.

The EC has shown that the shelf life of preserved meats is many months (Exhibit EC-5) at ambient temperatures. Operators may choose to attempt to extend that shelf-life (e.g. so that they can warehouse the product for longer) by cooling or even freezing the product. There is no suggestion that these products needed to be preserved by freezing.

In any event, this evidence can only be relevant to the interpretation of the EC's Schedule to the extent that it can be qualified as relevant subsequent practice.

50. Under which heading – 0303 or 0305 – does the EC classify frozen smoked salmon? Please provide relevant supporting material.

The EC has not had to consider this issue at central level. However, in researching this question, the EC found only one BTI in which frozen smoked salmon was classified under 03.05. This BTI was issued by the German authorities, and is exhibited as Exhibit EC-25. The operative part of it reads:

> Salmon Salmo Salar frozen[.] Vacuum-sealed in plastic foil with various labels (e.g., "Grande Luxe R"/"genuine smoked salmon" ('echter Räucherlachs')/"Ambach telijk-gerookte Zalm- nit Noorwegen"). According to the claimant, the merchandise is salted - with salt added ready for consumption -, smoked, frozen and sliced salmon filet in a customary packaging with content varying in weight. The appearance, smell and taste have not given rise to any indication that this information would not be correct.[13]

In the case of this BTI, the customs authorities checked that the product had gone through a process of preservation (i.e. smoking) by checking the products appearance, smell and taste. Apparently, the German customs authorities could immediately see that the product was one that had undergone one of the processes in 03.05 to ensure preservation. That it had been frozen to keep longer was irrelevant. As the EC has noted in its response to the previous question, operators may attempt to extend the shelf-life of the product they produce by e.g. cooling, freezing or vacuum-packing the product. Because the fish at issue in that BTI is sliced, thereby, creating a larger surface area exposed to the air (and hence to microbes) the operator may also have decided to vacuum pack it and freeze it to ensure that it kept longer.

[12] The EC objects to Brazil's purported reliance on a bill of lading as proving classification. A bill of lading is not a document produced by a governmental authority and is not probative of classification.

[13] Exhibit EC-25. Unofficial translation into English.

51. In paragraph 29 of the EC's first written submission, the EC submits that there is no EC industry producing chicken with an added salt content. Could the EC further explain these comments in light of the question that was posed by Albert Maat to the EC Commission in November 2001 (Exhibit BRA-2) and the information note from the Italian delegation to the Agriculture and Fisheries Council in January 2003 (Exhibit BRA-3).

The question posed by Albert Maat and the information note from the Italian delegation suggest that there is an influx of chicken on the EC market due to a misapplication of heading 02.10. Specifically, both consider that the chicken which entered under 02.10 was lightly salted and therefore would have to be excluded from the scope of 02.10 according to the Explanatory Note inserted in 1994. They also noted that this product serves the same purpose as the unsalted frozen chicken, imports of which had declined proportionately.

In para. 29 of its First Written Submission, the EC notes that the Community industry neither produces chicken meat that is lightly salted nor the product at issue in this dispute (deeply and homogenously impregnated with 1.2-2.9% salt). The above comments reinforce the conclusion that there is no demand from the EC processing industry for frozen boneless chicken cuts with added salt as a "new product".

52. With respect to the data submitted in Tables 2 and 3 (pages 22-23) of its first written submission, the EC is requested to provide the same statistics at the 8 digit level

Table 2 does cover 8 digit level. The EC respectfully refers the Panel to footnotes 47 and 48 to the EC's First Written Submission. The reference in Table 2 to 02.07 and 02.10 was intended to avoid having to repeat the changes in the 8 digit nomenclature which took place during the period represented on the table.

The date in Table 3 is derived from GTAN database, which is a private database, to which the European Commission has a subscription. GTAN does not, however, provide the data at 6 digit level. The EC provided EC import data at four digit level to ensure comparability.

As the EC pointed out during the question and answer session with the Panel, the Complainants will be in a position to provide 8 digit statistics of their exports under the two relevant tariff lines in the period covered by Table 3 (1990-2003). The data at 8 digit level of imports into the EC can be found in Table 2.

53. In paragraphs 91–92 of its first written submission, the EC observes that, apart from EC member state customs authorities in Hamburg, Rotterdam and various offices, other customs offices did not classify the product at issue under heading 0210.90. The EC is requested to provide copies of the relevant BTIs or other material to support the assertion regarding those other customs offices.

In paragraph 92 of its First Written Submission, the EC stated that the interpretation of heading 02.10 as applying to products which were salted, but not for preservation, was only followed in a few Member States. A significant volume of trade of products classified under 02.10 which were salted, dried or smoked for preservation continued. For the large part, the classification of such products under heading 02.10 was uncontroversial, and so did not lead to requests for BTIs. However, there are some examples of BTIs showing that the interpretation given to 02.10 was only in respect of products which were salted, dried or smoked for preservation. The EC has exhibited as Exhibit EC-26 a BTI issued by the Spanish authorities, clearly referring to the necessity that in order for a product (in that case salted and dried) to be classified under 02.10 it must be preserved. The operative part of that BTI states:

Ham from the domestic pork species, conserved throughout a combination of a previous salting treatment followed by a drying one, partially without bone (without the "shin-bone"). It is presented in individual packs sealed in vacuum.[14]

54. In paragraphs 12 and 91 of its first written submission, the EC acknowledges that the product at issue had been classified under heading 0210 by some customs offices. Could the EC provide further details as to: (i) the period during which this classification practice existed; and (ii) what volume of total imports of the products at issue were affected by this "mistaken classification" of the products at issue. If the product at issue had been classified under heading 0210 by some customs offices for some time (i.e. possibly as early as 1996), why did the EC wait until 2002 to address the problem of "mistaken classification" through the enactment of EC Regulation 1223/2002?

The EC notes, first of all, that it does not accept that the erroneous classifications by certain customs offices could have altered the EC's international obligations, nor that it could constitute practice which might be relevant in the sense of Articles 31 or 32 of the *Vienna Convention*.

As Brazil and Thailand have explained, these imports started in 1996, and continued until the entry into force of the measures at issue. Statistics as to the volume of imports under the tariff line at issue have been presented in Table 2 of the EC's First Written Submission.

The EC did not wait until 2002 to address the problem. In fact, it only became evident to Commission officials that there was an issue of mistaken classification during 2001. This was because, first of all, the tariff line under which the imports were classified was "salted meats, other". The Commission could not tell what products were entering under this heading, and it was not until 2000 that there was a substantial leap in the statistics (imports tripled) (the statistics only being available from late 2000 into 2001). Even then, it was still not known that such products were not salted for preservation – this only became apparent after further investigation. Against this background, the EC would also note that roughly 30,000 BTIs are issued each year, (there are currently approximately 167,000 valid BTIs), that there were substantial problems communicating BTIs (as a result of a lack of interoperability of computer systems) and that the Commission only has one official, and two administrative assistants monitoring all issues with respect to the first 40 chapters of the Combined Nomenclature.

55. Why was an opinion of the EC Customs Code Committee not provided in relation to EC Regulation 1223/2002? What legal significance, if any, would have been attached to such an opinion had it been provided? What is the legal significance, if any, of the fact that an opinion was not provided in time in relation to EC Regulation 1223/2002?

The Customs Code Committee is a committee of Member States representatives responsible for monitoring the adoption of detailed secondary (delegated) legislation by the European Commission (the system is known as the "comitology" system). The Committee is asked to vote for or against a particular proposal. A qualified majority vote is required in order for the Committee to issue either a positive or negative opinion (for the necessary majority, see Article 205 of the EC Treaty). The adoption of a positive opinion, or the failure to arrive at an opinion, means that the proposal will be adopted. Only in the event of a negative opinion will the matter be examined by the Council of the European Union. The legal effects of the absence of such an opinion are therefore purely institutional and not of relevance for the adjudication of this dispute.

[14] Exhibit EC-26. Unofficial translation.

FOR ALL PARTIES:

56. Do the parties agree that the relevant time at which the meaning of headings of the EC Schedule – LXXX – should be assessed is the time at which that Schedule was annexed to the Marrakech Protocol on 15 April 1994? If not, at what time/during what period should such an assessment be made?

It is our view that the Panel is tasked to assess the meaning of the concession as of the date of Panel establishment according to Articles 3.2 and 11 of the DSU so as to take account of all relevant interpretative means under Article 31 of the Vienna Convention such as, e.g., subsequent practice.

Clearly, events after 15 April 1994 cannot possibly be circumstances of the conclusion within the meaning of Article 32 of the Vienna Convention.

57. Was the EC Schedule in question negotiated on the basis of series of offers and requests or, rather, was it based on a unilateral offer that was made by the EC?

Agricultural tariffs were established on the basis of the "Modalities Agreement" (Exhibit EC-9). The modalities established therein set out a specific formula for converting the level of protection provided by non-tariff barriers into "ordinary customs duties". Entering into the Uruguay Round, the EC did not have bindings for any of the tariff lines at issue. Pursuant to paragraph 3 of the Modalities Agreement, the EC bound its tariffs on "other salted meat" at 15.4 %, on the basis of the applied rate of duty on 1 September 1986. In respect of frozen poultry, the EC converted previous non-tariff barriers, through the process of "tariffication" into the tariffs which were eventually bound. The base period for the tariffication process was 1986-1988 (see Annex 3 of the Modalities Agreement). The levels of tariffs thus bound reflected the level of protection which had previously existed. Departures from this procedure could be negotiated, but none are relevant for the present case. The offer was not unilateral, but rather was one part of the framework for offers by all participants in the Uruguay Round.

58. Was EC Regulation 535/94 enacted in response in whole or in part to requests made of the EC by other Members during the conclusion of the Uruguay Round for clarification regarding the headings in the EC Schedule at issue in this case?

No. It was enacted in response to the ECJ's judgment in *Gausepohl.* That it was enacted during the spring of 1994 is purely coincidental. As noted in the EC's response to question 57, the relevant date for the EC's tariff concessions on salted meat was 1 September 1986, a full 8 years earlier. It is not plausible, therefore, to pretend that the common intention of the negotiating parties could be affected by this Regulation, or by any other such unilateral acts[15], absent some evidence from the Complainants (such as a footnote in the EC's Schedule) to the contrary.

59. Are there any GATT Schedules of WTO Members other than the EC's in which headings identical or similar to the headings at issue in this case exist? If so, please provide details of such Schedules and information regarding the classification practices of such Members in respect of those headings. If possible, the parties are requested to indicate how such Members classify the products at issue in this case.

Because the headings in question are derived from the Harmonized System, which was very widely adopted among the parties to the Uruguay Round negotiations, the EC assumes that the Schedules of most, if not all, other WTO Members are identical in so far as the headings in Chapter 2

[15] As explained in the hypothetical set out in the EC's Oral Statement to the First Substantive Meeting of the Panel.

are concerned. The EC has checked a number of Schedules (including those of the Brazil, Thailand and the US) and found this to be true.

The EC has already reported the practice of other Members on this issue in so far as it can be discovered. In particular, the only countries which have any practice of classifying the product at issue are Brazil, Thailand and the EC. Brazil and Thailand classify it for export in the same manner as the EC considers it should be classified. Moreover, the EC has already provided the Panel with evidence that the US classifies a materially identical product in the same way as the EC does.

60. The parties are requested to provide details regarding the processes to which the products at issue are subjected upon importation to the EC and prior to final consumption. In particular, please provide details including supporting material regarding:

(a) the physical processes that are applied to the products at issue;
(b) the effects of these processes on the products at issue;
(c) the time taken to complete these processes; and
d) the costs and benefits that such processes entail.

The EC has provided a series of photographs with commentary in Annex 1 to this document. These illustrate that the addition of salt between 1.2% and 1,9% by the exporter is economically nonsensical. As acknowledged by the Complainants, the product at issue is only sold to the processing industry. The processing industry will necessarily apply a tumbling process whereby the salt, spices and water are massaged into the meat. The cost of salt is negligible. The processor can therefore add the salt according to its own recipe when tumbling it. This does not entail any significant extra cost. To the contrary, in order to cover its production costs, the processing industry needs to add water when tumbling the meat. The processing industry has therefore an economic interest in keeping as much control of the chicken meat as possible in terms of ingredients and water content.

61. If boneless chicken cuts have been deeply and homogeneously salted, can they be desalted?

If salted chicken is tumbled with unsalted chicken the percentage of salt will tend to an average. The processing industry has used this system to arrive at a desired salt content while at the same time introducing other ingredients. Because most of the processed products at issue are marinated products, the industry will add 8, 10 or 15% water and other spices. This automatically reduces the salt content of the meat. However, the EC does not know whether these processes are effective for chicken with more than 3% salt. Moreover, the EC understands that where the salt used is not common salt it may be more difficult, if not impossible, to desalt the product.

62. What is/would be the process used to salt boneless chicken cuts so as to ensure long-term preservation of the cuts?

There are a number of possible techniques for salting of meat. The EC gave examples of such a technique being used for *charque* in the FAO document exhibited in Exhibit EC-8. The other article in Exhibit EC-8 also mentions that the salt may be absorbed through a process of tumbling or injection (noting that these techniques are commonplace in the meat industry) before being stacked with salt for a number of days. The stacking technique is similar to the technique mentioned in respect of Parma Ham in Exhibit EC – 6.

63. What end-products other than chicken nuggets use the products at issue as an input?

The Complainants will be better placed to respond to this question, because their exporters should be aware what the product at issue is processed into. As far as the EC is aware, the product at issue could be used for the preparation of any processed chicken product.

64. Have the products at issue been salted with common salt? Does the term "salted" in the EC Schedule relate to the addition of common salt or does it include the addition of other salts as well?

The Complainants will be better placed to answer this question. However, the EC understands that the product at issue has been salted with common salt. The term "salted" in the EC's Schedule would cover salting by other salts. Indeed, the EC understands that it is relatively uncommon for only common salt to be used for the preservation of products which are commercially traded.

65. Does chilling/freezing subsequent to salting, brining, drying or smoking for long-term preservation mean that the product in question should be categorised under heading 0207?

No. The processes listed in heading 02.10 put the meat in a particular state; that is they are preserved by one of the processes mentioned in 02.10. It retains that state whether or not it is subsequently chilled or frozen, or if the shelf-life is extended by any other means. (The EC notes the practical difficulties that would arise if mere chilling or unchilling could alter classification. All it would require would be to alter the temperature of a container by a few degrees. It is significant that changing the temperature of meat between normal and chilled does not change its classification under headings 02.01 to 02.09.).

66. In interpreting headings 0207 and 0210 of the EC Schedule, should the ordinary meaning of all the terms in those headings be assessed as a whole or, rather, should the terms other than "frozen" in heading 0207 (i.e. "fresh" and "chilled") and the terms other than "salted" in heading 0210 (i.e. "in brine", "dried" and "smoked") be treated as context for the interpretation of the terms that appear to be directly at issue – i.e. "frozen" and "salted". Will the result of the interpretative exercise differ depending upon which approach is adopted? If so, please explain making specific reference to the headings at issue in this case.

In the present case the EC has classified the product in question under heading 02.07 because it was poultry meat. The Complainants have objected to this decision on the sole ground that, they say, it should be classified under heading 02.10 as "salted". In order to succeed they must prove that it falls under this heading. The EC does not need to prove that the product at issue falls under 02.07.

In the present context, therefore, the term "salted" is to be examined in its context. The immediate context is the heading of 02.10. In its Submission and Oral Statement the EC has shown how Article 31 of the Vienna Convention, and in particular the principles of 'ordinary meaning' and 'context' lead to the conclusion that these terms have in common the notion of preservation. Whatever precise interpretation is given to that notion, not even the Complainants argue that it is met by chicken with 3 percent added salt.

67. Can products that fall within the scope of heading 0207 of the EC Schedule be considered as having undergone a "process"? If so, please explain what is meant by "process". Can the processes to which products falling within the scope of heading 0207 are subject, if any, be distinguished from those to which products falling within the scope of heading 0210 are subject? If so, how?

The EC does not believe that an analysis of the term 'process' that is separate from the particular operations mentioned or implied in headings 02.07 and 02.10 provides assistance in solving the present dispute. The EC notes that the word "process" has a very broad meaning. In particular, the EC submits that the meaning of the term "salted" is not greatly illuminated by the fact that it is described as a "process". Likewise, to the extent relevant, neither "chilling" nor "freezing" would be any better understood by having this term applied to them.

68. If some or all products that fall within the scope of heading 0207 of the EC Schedule can be considered as having undergone a "process", what is the purpose of that process? What is the purpose of the processes to which products falling within the scope of heading 0210 are subject?

The processes of chilling and freezing meat that are mentioned in heading 0207 are intended, by reducing the temperature and thereby slowing or stopping chemical and biological processes in the meat, to prevent changes, notably deterioration, occurring in it.

The processes of salting, etc., mentioned in heading 02.10 are equally intended to slow or stop the deterioration and decay of the meat. While the purpose of this process is to preserve the meat, these processes may also have incidental effects which makes them of interest to individual producers and consumers in varying degrees.

69. To what extent, if at all, is the purpose of a process to which a product is subject relevant to the interpretation of: (a) heading 0207 of the EC Schedule; and (b) heading 0210 of the EC Schedule? Should the purpose take precedence over the process in either case? If so, please explain why and in what circumstances. In the case of both headings, if there are multiple purposes underlying the processes in question, which purpose should take precedence?

(a) As regards heading 0207, clearly the processes referred to there – chilling and freezing – have a purpose, but the EC does not see that this has any implications for the interpretation of heading 02.10. The three states are instantly detectable, and there is no need to address the issue of purpose in order to decide whether meat is chilled or frozen.

(b) As regards heading 02.10, the EC's view is that the approach to its interpretation should be governed by the rules stated in the *Vienna Convention*. The EC has already demonstrated the results of applying these rules, and one way of describing the results would be to say that the purpose of the processes of salting, etc., is significant, since the conclusion of the analysis is that these processes are ones intended to preserve the meat. The EC does not see how it could be said in this context that the purpose takes precedence over the process. The purpose helps define the process, which might otherwise be presented as simply the addition of some salt, or some exposure to smoke or drying. As a practical matter for customs authorities what is important is that preserved meats have particular physical characteristics which h are readily identifiable.

By speaking of multiple purposes the EC understands the Panel to be referring to the fact that preserved meats are popular not merely because of their resistance to deterioration but also because of their taste, texture, appearance, etc. The EC does not think that these qualities can be meaningfully separated, or priorities established between them. The EC does not know any way of giving to meat

the latter group of qualities other than by subjecting it to the process of preservation. Similarly, if they are preserved by salting, etc., they will acquire those qualities.

The point that the EC is trying to make is that there is little to be gained in resolving the present dispute by trying to contrast the purpose of 'chilling' and 'freezing' in heading 02.07 (or in any of headings 02.01 to 02.08) with that of 'salting' etc., in heading 02.10.

70. Does the order of steps/activity entailed in a process to which a product is subject play a role in the classification of that product. Please explain making reference to the products at issue in this case.

The EC does not believe it can have been the intention of the drafters of Chapter 2 to make the interpretation of the headings depend on the order in which the relevant processes had been applied. What is relevant, in the EC's view, is the state the product is in at the time of importation.

As a matter of fact, in the present case, the product is immediately frozen after the addition of salt. Indeed, as pointed out in response to Panel Questions 29 and 60, to respect the ingredient list of the final processed product an additional tumbling process has to be applied after defrosting.

71. Are there different degrees to which meat can be dried, smoked or soaked in brine? If so, is it the case that meat products can only be classified under heading 0210 if the degree of drying, smoking or soaking in brine has exceeded a particular level. If so, what are those levels and how are they determined?

The degree of drying, etc., that is necessary to preserve meat varies from one kind to another. As explained in our First Written Submission (para. 37) the level of 'water activity' (Aw) is an important indicator of the degree of preservation achieved, and this can be measured with some precision. However, the use of sodium nitrite also has direct preservative effect, as does smoke, and neither of these lend themselves to precise measurement. As the EC explained in its Closing Statement at the First Substantive meeting with the Panel, in practice problems have rarely arisen in the case of preserved meats. The products are well-established and well-known; the basic products have existed for many centuries if not millenia. As the table in Exhibit EC-5 shows, their shelf life is many months. That they qualify under heading 02.10 has never been in doubt. Indeed it is obvious that it was precisely for such products that heading 02.10 was created. It is on the basis of extensive experience with these products that the EC developed its criterion of long-term preservation.

72. Does the reference to "poultry" in heading 0207 of the EC Schedule make it more "specific" within the meaning of General Rule of Interpretation 3(a) of the Harmonized System than heading 0210, which refers more generally to meat"? Please explain.

The EC is unconvinced that the application of General Rule of Interpretation 3(a) of the Harmonized System is of possible assistance in the interpretative process to determine the meaning of the term "salted" under the heading 02.10 (which is the interpretative task at stake). General Rule of Interpretation 3(a) concerns the classification of a product that falls *prima facie* under two different headings, and therefore gives as an initial interpretative task the question of the scope of the two different, potentially applicable, headings.[16]

That said, the factual answer to the Panel's question is straightforward. All poultry is meat, but not all meat is poultry. If the scope of the two were to be represented by circles, the circle

[16] Contrary to what Thailand asserts in para. 29 of its Oral Statement, the EC nowhere acknowledged that the product corresponds at the same time to the wording of the heading 0207 (frozen) and to the wording of the heading 0210(salted).

representing for poultry would be entirely within that for meat. Consequently the reference to 'poultry' is more specific.

The EC also refers to its response to Panel Question 74.

73. Is the Harmonized System "context" under Article 31.2 of the Vienna Convention? If so, please explain by demonstrating how the various elements in Articles 31.2(a) or 31.2(b) are fulfilled

The EC believes that there may be several bases in Article 31 of the Convention for using the Harmonized System to interpret the EC's Schedule and that decision has to be taken on a case-by-case basis. For the reasons provided in response to Panel Question 76 the EC considers the Harmonized System and its Chapter and Explanatory notes to be context within the meaning of Article 31(3)(c) of the *Vienna Convention*.

74. Assuming that the Harmonized System qualifies as "context" for the interpretation of the EC Schedule under Article 31.2 of the Vienna Convention, to what extent if at all can the General Rules for the interpretation of the Harmonized System be used to determine the meaning of the headings in question?

The meaning of the heading 02.10 and specifically the term "salted" therein has to be interpreted in accordance with Article 3.2 of the DSU by applying the customary rules of treaty interpretation set forth in Articles 31, 32 of the *Vienna Convention*, in particular ordinary meaning, context, purpose and subsequent practice.

The EC notes that Thailand relies on General Rule for Interpretation 3(c) of the Harmonized System to argue that if goods cannot be classified by reference to Rule 3(a) or Rule 3(b) then they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.[17]

The EC fails to understand how Thailand can rely on such a mechanistic rule for classification in order to determine the meaning of the heading in question. Both Brazil and Thailand continuously argue that this is not a classification dispute and indeed both Complainants refused the EC's suggestion, made at the consultation stage, to bring this dispute to the WCO to the extent that it relates to classification.

In any event, Article 3.2 of the DSU does not allow for the application of a mechanistic *non liquet* rule that ensures a result in day-to-day classification practice as spelled out in General Rule for Interpretation 3(c) to determine the meaning of one heading. Article 3.2 of the DSU read in conjunction with Articles 31 and 32 of the *Vienna Convention* require consideration of all interpretative materials, in particular supplementary means to determine the meaning of the schedule. In a *non liquet* situation, the general rules on burden of proof in WTO law would require the Panel to err on the side of the defendant.

[17] Oral Statement by Thailand, para. 29.

75. How are the following to be categorised, if at all, within the framework of Articles 31 and 32 of the Vienna Convention: (a) 1981 Explanatory Note to heading 02.06 of the EC's Common Customs Tariff; (b) the 1983 Explanatory Note for subheadings 0210.11-31 and 0210.11-39 of the EC's Common Customs Tariff; (c) the 1983 *Dinter* judgement of the ECJ; (d) the 1993 *Gausepohl* judgement of the ECJ; and (e) the December 1994 Explanatory Note to subheadings 0210.11.11 and 0210.11.19 to the EC's Combined Nomenclature?

(a)-(d) form part of the EC's practice, to be considered under Article 32 of the *Vienna Convention* as circumstances of conclusion.

(e) To the extent that it is subsequent practice, it is relevant under Article 31 (3)(b) of the *Vienna Convention*.

76. Can the Harmonized System be considered as comprising "relevant rules of international law" within the meaning of Article 31.3(c) of the Vienna Convention? If so, please explain by demonstrating how the various elements in Article 31.3(c) have been fulfilled

Paragraph 3(c) of Article 31 of the *Vienna Convention* says that there "shall be taken into account together with the context … any relevant rules of international law applicable in the relations between the parties". For this purpose the "relevant rules of international law" include those of treaties to which the parties are also party.[18] The Convention establishing the Harmonized System is an international treaty to which the vast majority of WTO Members are parties and use it as a basis for negotiating tariff concessions. The Harmonized System is relevant insofar as it sets forth headings and provides for Chapter and Explanatory Notes that elucidate the meaning of a heading. As described in our First Written Submission, and as stated by the Appellate Body in *EC – Computer Equipment*, the Harmonized System and its Chapter and Explanatory notes provide, therefore, relevant context for the interpretation of the EC Schedule.[19]

77. Apart from the issue of timing, what is the difference, if any, in the nature of evidence of classification practice that must be adduced to prove the existence of "subsequent practice" within the meaning of Article 31.3(b) of the Vienna Convention as compared to the nature of evidence that is needed regarding classification practice for the purposes of Article 32 of the Vienna Convention?

The EC believes that there is a fundamental difference in the way practice may be used in these two situations. In the case of subsequent practice (Article 31.3(b)), the practice is used both as evidence that the parties intended they should be bound by what they are practising, and as evidence of the nature and scope of the obligation. (The EC has already described in its First Written Submission (para. 170) the need for 'concordant, common and consistent' practice among the parties.)

In the second situation – that of prior practice as one of the 'circumstances of conclusion' of a treaty mentioned in Article 32 – only the second of these statements is true. The practice itself provides no evidence whatsoever as to whether the parties intended to bind themselves to observe that practice in future. That intention must be established entirely from other sources. If, on the basis of those sources, that intention is established then the practice will provide evidence as to the content of the obligation.

[18] Sinclair, op. cit., p. 117, citing *Official Records, Second Session,* 13th plenary meeting (Fleischauer).
[19] First Written Submission by the EC, para. 107; Appellate Body Report, EC – Computer Equipment, para. 89.

78. Do the parties consider that the WTO Modalities for the Establishment of Specific Binding Commitments under the Reform Programme issued on 20 December 1993 amounts to "preparatory work" within the meaning of Article 32 of the Vienna Convention? If so, please explain why and indicate the significance parties attach to this document?

The EC considers the Modalities Agreement to be at the very least a "preparatory work" because its sets out the parameters of the negotiations. However, given that it already fixes particular dates and methodologies later reflected in the Schedules, it has a status as context under Article 31 of the *Vienna Convention*.

79. What common essential feature(s) do the parties consider characterise products that fall under:

(a) Chapter 2 of the Harmonized System?

The essential features are spelled out by the headings and chapter title. Thus, in the case of the Chapter, the essential features are summed up in the phrase 'Meat and edible meat offal'.

(b) Heading 0207 of the EC Schedule?

The essential common feature of heading 0207 – Meat and edible offal, of the poultry of heading 01.05, fresh, chilled or frozen – is that it concerns poultry meat, other than preserved meat falling within heading 02.10.

(c) Heading 0210 of the EC Schedule?

In the case of heading 02.10 the common essential feature is that it is meat or edible offal preserved by one of the listed processes.

80. In paragraph 20 of its oral statement during the first substantive meeting, Brazil submits that "[i]mporting Members have ample margin to define their offers in such a way that their interests are fully protected". Does this mean that, in the process of making tariff commitments, Members must be taken to have anticipated, or at least, assumed responsibility for all possible changes in trade patterns?

The EC is unclear as to the precise meaning of the phrase in Brazil's statement. The EC accepts that trade flows may change after tariff commitments are made. This does not mean, however, that such trade developments are without parameters. Any new trade flows must fall under the scope of the tariff commitment they claim. In the present case, the new trade flow does not fall under the EC's tariff commitment in respect of salted meat.

QUESTIONS POSED BY THAILAND

1. In the course of the first substantive meeting with the parties, the EC suggested that the European Court of Justice rulings are binding on the Commission and that they provide an authentic interpretation of the EC's Common Customs Tariff. Could the EC inform the Panel whether the European Commission may make an amendment to the EC's Combined Nomenclature that are based on classification criteria for a product different from the criteria that the Court of Justice used to resolve a dispute on the classification of that product prior to the amendment? Thailand notes that in the *Dinter* case[20] concerning the classification of seasoned meat, the Court ruled:

Heading 16.02 of the Common Customs Tariff must be interpreted as meaning that it also includes poultrymeat to which salt and pepper have been added even if the pepper can be detected only microscopically . (emphasis added).

Following the *Dinter* judgment, Thailand understands that the Commission inserted an additional note 6(a) into Chapter 2 of the EC's Common Customs Tariff:

"Seasoned meat" of poultry, swine or bovine animals – excluding the products described at (c) below – falls within subheadings 16.02 B +, 16.02 B III a) and 16.02 B III b) 1 aa) respectively. "Seasoned meat" shall be uncooked meat that has been seasoned either in depth or over the whole surface of the product with seasoning either visible to the naked eye or clearly distinguishable by taste.

Is it correct that Additional Note 6(a) effectively reversed the finding of the Court in *Dinter* by requiring that the seasoning only be visible to the naked eye or clearly distinguishable by taste (namely, the objective characteristics of the product) rather than requiring that the seasoning (the pepper) could only be detectable microscopically? Could the EC advise whether it is the Court's ruling in the *Dinter* case or Additional Note 6(a) that currently governs the customs classification of products falling under heading 16.02?

The EC fails to see a conflict between the *Dinter* judgment and the additional note which Thailand refers to. In that judgment, the Court ruled that meat to which pepper has been added, even if only visible microscopically, should be classified under Chapter 16 as seasoned meat. In the Additional Note, the first criterion is whether the pepper is visible to the naked eye. In the event that the pepper is not visible (and thus could only potentially be seen microscopically), then the customs official should taste it to determine whether pepper is present. While this does not require the customs official to check the meat with the aid of a microscope it does require him to check that pepper is present, even when it cannot be seen. The EC therefore disagrees with Thailand's contention that the EC has reversed the judgment of the ECJ.

As a matter of fact, the EC exercises its legislative powers carefully, with a view to ensuring that there is no conflict. Should any such conflict occur, there can be no doubt that the judgments of the Court of Justice would prevail. This is obvious from the Court's judgment in Case C-267/94 in which the Court held:

[20] EC First Written Submission, para. 76. Reference to Case C-175/82 *Dinter v Hauptzollamt Köln-Deutz* ECR [1983] p. 969. Exhibit EC-12.

> does not authorize it to alter the subject-matter of the tariff headings which have been defined on the basis of the harmonized system established by the Convention whose scope the Community has undertaken, under Article 3 thereof, not to modify.[21]

2. In para. 37 of its Oral Statement at the First Substantive meeting with the Parties, the EC states: "... had Regulation 535/94 meant that in order to qualify under 02.10 it was sufficient to add salt which was insufficient to preserve the product, one would logically have expected that the EC's Explanatory Notes, which referred to the concept of preservation, to be modified to remove any reference to preservation. This was not the case. The following Explanatory Notes have remained in place:

> **[reference to 0210 1111 to 0210 1119, 0210 1131 and 0210 1139]."**

Thailand notes that these Explanatory Notes cover domestic swine meat, namely hams and shoulders and cuts thereof, with bone in. Could the EC advise whether it is the EC's practice to provide specifically in the Explanatory Notes whether a certain rule applies also, mutatis mutandis, to other products? For example, Thailand notes that the Explanatory Note to subheading 0210 1211 [bellies and cuts of domestic swine, salted, in brine] provides as follows: "The Explanatory Notes to subheadings 0210 11 11 and 0210 11 19, apply, mutatis mutandis." It is Thailand's understanding that there is no similar Explanatory Note for subheading 0210 99 39 (salted meat). Could the EC, therefore, explain the relevance of the Explanatory Notes it cites in para. 37 of its Oral Statement for the purposes of interpreting subheading 0210 99 39?

In citing these notes the EC wished to show that at the time of the Uruguay Round the notion of preserving was intrinsic to the EC's understanding of the meats in heading 02.10. That the specific notes refer to pigmeat is irrelevant for the purposes of this dispute. They incontrovertibly show that the EC interpreted the term "salted" at the time of the Uruguay Round as referring to salting for preservation, irrespective of the specific product which the note concerned.

The notes in question were designed to draw a distinction between pigmeat preserved in different ways: on the one hand solely by salting or pickling in brine, on the other by drying or smoking (whether or not combined with salting or pickling). The distinction is made for various cuts of pigmeat, and is therefore repeated, using the phrase *mutatis mutandis*. This distinction was relevant to pigmeat only, so there would have been no point in applying it to other kinds of meat.

QUESTIONS POSED BY BRAZIL

1. For purposes of heading 0210, what does the phrase "long-term preservation" mean?

The term can best be understood by examining the types of meat that are regularly classified under heading 02.10. In its First Written Submission the EC has provided a table giving examples of these.

2. Is there a difference between preservation and "long-term preservation"? If so, what is it?

The question is not relevant to this dispute since no one maintains that the product at issue qualifies under either criterion.

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[21] Case C-267/94 *French Republic v Commission* ECR [1995] I-4845, para. 20 (Exhibit EC-22).

3. How long is "long-term preservation"?

See answer to question 1.

4. Is fresh meat of heading 0207 meant for "long-term preservation"? If not, how long must meat last before spoiling in order to be classified as fresh?

The EC does not understand the first question. The EC regards this and the following two questions as excessively theoretical and making no useful contribution to the present case. All parties have accepted that the crucial question is under what conditions products qualify under heading 02.10. It is the terms of this heading which must be interpreted.

5. Is chilled meat of heading 0207 meant for "long-term preservation"? If not, how long must chilled meat last before spoiling in order to be classified as chilled?

See answer to question 4.

6. Is frozen meat of heading 0207 meant for long-term preservation? If not, how long must frozen meat last before spoiling in order to be classified as frozen?

See answer to question 4.

7. At the time of importation, how can customs authorities assess whether certain meat of Chapter 2 is preserved or preserved for long-term?

The classification of products under heading 02.10 normally presents no problems, since the qualifying products are well-established.

8. Is "deeply and homogeneously impregnated with salt" related to how long a product is preserved? If so, how much salt is it needed to impregnate meat for preservation?

The EC understands that preservation by salt alone, a very unusual mode of preservation, is assisted if the product is 'deeply and homogeneously impregnated with salt'. The amount of salt is likely to vary according to the kind of meat. The EC notes that Brazil itself considers a salt content of 9-11% is necessary for preservation.

9. Taking into account the total imports, of Brazil to the EC, of frozen boneless chicken cuts impregnated with over 1.2% of salt from 1998 until the enactment of Regulation No. 1223/2002, please provide the percentage of imports of this product that entered the EC under heading 0207 and the percentage that entered under heading 0210.

Table 2 of the EC's First Written Submission gives data concerning imports under headings 02.07 and 02.10 from Brazil during the years in question. It can probably be assumed that virtually all the meat entered under heading 02.10 consisted of such chicken cuts.

10. In paragraph 92 of the EC's First Written Submission, the Communities state that "given the commercial importance of some of those customs offices (Hamburg, Rotterdam) substantial trade entered the Community" under heading 0210. Based on this assertion and on the allegation that imports of frozen chicken cuts impregnated with over 1.2% of salt entered the EC under heading 0207 through some customs offices, please provide the EC's understanding of what constitutes "substantial trade".

The EC meant that relatively significant volumes of the product at issue were imported through certain EC countries – corresponding to those where the customs offices were located.

11. In *Gausepohl*, it seems that the minimum 1.2% salt content required for long-term preservation of meat was established based on written observations made by the Belgian Government. Provide the studies or reports used in that case that indicate that the 1.2% salt threshold is sufficient to ensure long-tem preservation.

The European Court of Justice did not consider that 1.2% was sufficient to ensure long-term preservation. The Court did not have a study before it suggesting this. Rather, it clearly stated that 1.2% salt content would be an appropriate minimum, below which it would not even be necessary to enquire whether the meat in question had been salted for preservation.

See the EC's response to Panel Question 40.

12. If freezing is a process that can be "largely reversed", does that mean that meat after thawing will be identical or similar to what it was prior to freezing? Please explain.

No, it cannot be sold as fresh meat. Freezing and thawing of the meat brings about specific changes, as attested by the literature cited by Brazil and Thailand. Evidently, fresh, chilled and frozen meat can all be used by the processing industry to manufacture processed chicken products.

13. If not, how does freezing and thawing change the character of meat?

See answer to question 12.

14. Can meat after thawing still be used for the same purposes as prior to freezing?

See answer to question 12.

ANNEX C-8

**RESPONSES BY THE EUROPEAN COMMUNITIES
TO QUESTIONS POSED BY THE PANEL AND BRAZIL
AFTER THE SECOND SUBSTANTIVE MEETING**

(2 December 2004)

QUESTIONS POSED BY THE PANEL

FOR THE EUROPEAN COMMUNITIES

87. In EC's reply to Panel question No. 56, the EC argues that the Panel is tasked to assess the meaning of its concessions as of the date of Panel establishment according to Articles 3.2 and 11 of the DSU, namely on 7 and 21 November 2003. However, in para. 97 et seq of its second written submission and in paragraph 72 of its oral statement at the second substantive meeting, the EC submits that the relevant date for interpretation of the EC's tariff concessions on salted meat was the commencement of the Uruguay Round negotiations, i.e. 1 September 1986. Could the EC clarify the apparent inconsistency between these statements and clearly indicate when it considers the EC concessions in question should be interpreted.

1. In the EC's view, Question 56 ('the relevant time at which the meaning of headings of the EC Schedule – LXXX – should be assessed') has no single answer. The 'relevant time' depends on what precise issue is being discussed.

2. The EC reconfirms its view that in interpreting the EC schedule by applying Article 31 of the *Vienna Convention* the meaning of the concessions must be assessed as of the date of Panel establishment. Thus, for example, subsequent practice within the meaning of Article 31(3)(b) or relevant rules of international law within the meaning of Article 31(3) (c) must be assessed as of that moment.

3. The date for considering EC law is another issue. In so far as such law is relevant to determining the scope of the EC's Schedule within the context of Article 32 of the *Vienna Convention*, the common intention of the parties was expressed in the Modalities Agreement to use the level of parties' duties (or bindings) in 1986 as a base point.

88. With respect to the EC's reply to Panel question No. 32, is the EC suggesting that meat that has been "impregnated with salt" will necessarily be salted for the purposes of preservation? If not, please elaborate upon the reply.

4. No. In order to be preserved with salt, meat should be deeply and homogenously impregnated with a level of salt sufficient to ensure long-term preservation, i.e., much higher than 3%.[1] Impregnation with salt is a necessary but not sufficient condition. Whether the meat is salted for the purpose of preservation depends in particular on the level of salt content.

[1] See already EC Responses to Panel Questions 32 following the first substantive meeting and footnote 11 of the Second Oral Statement.

89. What inspections and/or analyses do EC customs officials undertake to ascertain the objective characteristics of the products at issue?

5. When a product arrives at the border, customs officials carry out:

- inspection of customs and sanitary documents accompanying the good, also of any BTI;
- physical inspection by customs officers of container, packaging, labelling;
- physical inspection of the product, in particular its temperature, smell, taste, colour;
- if necessary, samples are sent to laboratory for analytical control to verify conformity of product with customs specifications.

6. The relevant legal provisions are contained in Articles 68 to 70 of the EC Customs Code, Regulation 2913/92, which provide as follows:

Article 68

For the verification of declarations which they have accepted, the customs authorities may:

(a) examine the documents covering the declaration and the documents accompanying it. The customs authorities may require the declarant to present other documents for the purpose of verifying the accuracy of the particulars contained in the declaration;

(b) examine the goods and take samples for analysis or for detailed examination.

Article 69

1. Transport of the goods to the places where they are to be examined and samples are to be taken, and all the handling necessitated by such examination or taking of samples, shall be carried out by or under the responsibility of the declarant. The costs incurred shall be borne by the declarant.

2. The declarant shall be entitled to be present when the goods are examined and when samples are taken. Where they deem it appropriate, the customs authorities shall require the declarant to be present or represented when the goods are examined or samples are taken in order to provide them with the assistance necessary to facilitate such examination or taking of samples.

3. Provided that samples are taken in accordance with the provisions in force, the customs authorities shall not be liable for payment of any compensation in respect thereof but shall bear the costs of their analysis or examination.

Article 70

1. Where only part of the goods covered by a declaration are examined, the results of the partial examination shall be taken to apply to all the goods covered by that declaration. However, the declarant may request a further examination of the goods if he considers that the results of the partial examination are not valid as regards the remainder of the goods declared.

2. For the purposes of paragraph 1, where a declaration form covers two or more items, the particulars relating to each item shall be deemed to constitute a separate declaration.

90. The EC is requested to respond to the comment made in Brazil's reply to Panel question No. 13 and in paragraph 11 of its oral statement at the second substantive meeting that the EC considers the "objective characteristics" of a product to be a decisive criterion for classification.

7. It is true that under Community law in implementing the HS the objective characteristics of a product are decisive for classification. However, as noted before, the issue of classification is different from the determination of the scope of a Schedule for the purpose of Article II of the GATT 1994.

91. In the EC's reply to Panel question No. 44, the EC submits that the application of the principle of preservation has rarely been problematic because it is "normally" obvious whether a product has been preserved by one of the means mentioned in heading 02.10. What is meant by "normally" obvious? Further, please explain how a product is dealt with by customs officials when it is not obvious that a product has been preserved by one of the means mentioned in heading 02.10?

8. The EC used 'normally' in the sense of 'usually'. The EC meant simply that customs officials, applying the inspections and analyses mentioned in the EC's response to Panel Question 89 above, would have no difficulty in telling that a particular product has been preserved. The preservation techniques referred to in heading 02.10 leave the meat with specific characteristics (e.g., colour, saltiness, dryness) that are readily detectable (e.g., in Parma ham). In fact, as the EC has pointed out, this heading is not one that in practice creates difficulties, as evidenced by the very small number of instances in which it features in official records, either national or international, as an issue.

92. In its reply to Panel question No. 50, referring to a BTI concerning the classification of frozen smoked salmon, the EC submits that the German customs authorities could immediately see that the product in question there was one that had undergone one of the processes listed in heading 03.05 to ensure preservation. The EC also submits that the customs authorities checked that the product had gone through a process of preservation (i.e. smoking) by checking the products appearance, smell and taste. Please specifically identify the investigations undertaken by the customs authorities in that case to enable them to be convinced that the product was classifiable under heading 03.05? Are these investigations commonplace with respect to products that are sought to be classified under heading 03.05?

9. The EC's answer to Panel Question 50 related to the procedure followed by the German Customs Authorities in issuing one binding tariff information. The application covered only one type of product and included the following particulars:

- a detailed description of the goods permitting their identification and the determination of their classification in the Combined Nomenclature;
- the composition of the goods and any methods of identification used to determine their classification;
- samples and labelling which may assist the German Customs Authorities in determining the correct classification.

10. Actually the goods were packed, vacuum-sealed in plastic foil with the following labelling "Grande Luxe R/genuine smoked salmon". It is well known that smoking is one the oldest way of preserving food, and in particular salmon. Smoking gives the salmon flesh or fillets a 'fruity' flavour and taste which can be instantly recognized. Smoking imparts a distinctive character to the product.

11. The product at issue was examined by the German Customs Authorities in the Hamburg Customs Laboratory. Colour, smell and taste were readily identified as giving a flavour and taste indicating that the product had been smoked. In doing so the Authorities followed the Customs Laboratory Guide issued by the World Customs Organization. The Guide recommends an initial screening analysis of the good which consists of the examination of the appearance and nature of the sample. This examination is based on the sense of sight, smell and hearing. In that case the German Customs Authorities were in a position to decide immediately that the good had undergone a smoking process covered by heading 03.05.

93. Do the products at issue in this case meet the criteria set out in EC Regulation 535/94?

12. No. As the EC has explained in its various submissions, Regulation 535/94 sets a minimum salt content, a pragmatic rule, below which it cannot be considered that a product is salted for preservation. The requirement of preservation that flows directly from heading 02.10 of the Combined Nomenclature as interpreted by the Court in standing case law stands undisturbed by Regulation 535/94 (See also responses to Panel Questions 113-114). Consequently, in order to be classified under heading 02.10 a product has to meet the criteria of Regulation 535/94 and be salted in order to ensure its preservation as required by the Combined Nomenclature, heading 02.10. This was the case when Regulation 535/94 was enacted, and remains the case today.

13. The EC does not dispute that the products at issue were deeply and homogeneously impregnated with salt in all parts. However, Brazil and Thailand themselves restrict their claims to products containing more than 1.2% salt. They admit that such salt content does not suffice to ensure long-term preservation.

94. In its reply to Panel question No. 25, the EC submits that the products covered by EC Regulation 1223/2002 and EC Commission Decision 2003/97/EC of 31 January 2003 fall under heading 02.07 of the EC Schedule and are subject to the duties applicable to these tariff lines under the EC's Common Customs Tariff. Could the EC indicate precisely what those duties are.

14. The products in question fall under CN subheading 0207.14.10 and the import duties applicable to these products are 102.4€ per 100 kilogram. In addition, these products may be subject to the special safeguard mechanism provided for in Article 5 of the *Agreement on Agriculture*. The EC also notes that it has a Tariff Rate Quota (TRQ) covering this tariff line of 15,500 tonnes from which Brazil and Thailand benefit, among others. The in-quota rate is 0. This TRQ has already been the subject of WTO dispute settlement between Brazil and the EC.

95. Please comment on the price data for the products at issue referred to in paragraph 57 of Brazil's first written submission and in paragraph 11 of Thailand's first written submission. In particular, does the EC accept that these were the applicable prices at the relevant time for imports of the products at issue from Brazil and Thailand respectively?

15. The EC does not dispute the pricing data provided by the Complainants.

96. In paragraph 19 of Thailand's oral statement at the first substantive meeting and paragraph 37 of Thailand's second written submission, Thailand submits that salted products require an additional means of preservation. In support, Thailand refers to Exhibits THA-25(a), 25(b) and 25(c), which include packages of Parma ham, prosciutto and jamón serrano. Which heading of the EC's Combined Nomenclature are these products classified under? Please provide all necessary evidence in support.

16. Only very small quantities of dried or smoked hams, bone-in or boneless, are imported into the EC (2001: 250 tonnes; 2002: 240 tonnes; 2003: 235 tonnes). The Community classifies these products upon export, under heading 0210.11.31 for hams, bone-in, and under 0210.19.81 for boneless hams. The latter heading applies if the hams in question are sliced.

17. The EC is providing extracts from its agricultural exports nomenclature (Exhibit EC-31), which is based on the HS, and refers explicitly to 'Prosciutto di Parma' (which is commonly known as Parma ham) and 'Prosciutto di San Daniele' under these subheadings. There is no specific provision for 'jamón serrano' in this nomenclature, but it would be included under the same subheadings. The EC does not agree with Thailand that these types of products require additional means of preservation and is providing an expert opinion from Professor Dr. Karl-Otto Honikel, an international authority also referred to by the Complainants (see Exhibit EC-32). These products are shelf-stable for months – they can be seen hanging in tapas bars throughout the world. Slicing contaminates the surface with moulds, yeast or other microbes, nevertheless, the sliced product is still stable at ambient temperature. In practice the sliced products are chilled as yeasts/moulds but not microbes could start growing on the cut surface and the attractiveness of the product for the consumer is lessened.

97. With respect to the EC's replies to Panel questions No. 48 and 71 and paragraph 36 of its oral statement at the second substantive meeting, is the list of products set out in Exhibit EC-5 an exhaustive list of all products traditionally traded under heading 02.10? If not, please identify any other products that are traded under that heading. Please identify with all necessary proof the salt content of each of those products which are described as "salted".

18. In the table in Exhibit EC-5 the EC included representative examples of the various kinds of salted, dried and smoked meat. The list cannot be comprehensive since there are numerous small producers of ham similar to the examples give, which is cured, in some cases smoked, and then air dried in varying degrees and styles. On the other hand, the EC would wish to add bacon to the list. This also occurs in a range of forms, and in particular may or may not be smoked. The EC has described it as the only meat product that is preserved by salting alone,[2] but it would be more accurate to speak of 'curing' since a combination of common salt (NaCl) and sodium nitrite and nitrate are used. The latter have an additional preservative effect, and bring about the changes that give the meat its characteristic red colouring.[3]

19. The common salt content of the various meats is indicated in the table in Exhibit EC-5, where it is relevant to preservation, although the EC emphasises that in none of these cases, nor in the case of bacon, does salting with common salt provide the sole basis for preservation. In fact, the EC knows of no meat that is preserved by the use of common salt alone. In contrast, that is the only treatment given to chicken which is the subject of this dispute. Brazil claims that the level of salt in this chicken is enough to preserve it. To counter this claim, made at a late stage in the proceedings,[4] the EC has obtained an expert's opinion (Exhibit EC-32) which confirms that a minimum of 7% salt in the meat is necessary for this purpose. The expert, Professor Dr. Karl-Otto Honikel, is a leading authority in this field and cited as an authority in the material presented by Brazil in support of its assertions.

[2] EC First Closing Statement, para. 4.
[3] EC First Written Submission, para. 116.
[4] Brazil Second Oral Statement, para. 2.

20. It should be said that the volume of trade in these products is small. EC imports under heading 02.10 on average about 2,000 tonnes per year, about half of which consist of preserved beef from Switzerland ('*viande de grison*'). However, while frozen salted chicken cuts were being classified under this heading the annual volume of imports rose over one hundredfold.[5] This episode is instructive. The Complainants pretend that their arguments are specific to the EC's Schedule on the basis that they involve Regulation 535/94.[6] In fact they invoke this Regulation only in order to *confirm* their interpretation of heading 02.10 in the Schedule following the use of the Harmonised System as context. On their interpretation, which amounts to an interpretation of HS heading 02.10, any amount of salting, drying or smoking would be sufficient for a product to qualify under this heading. Brazil's own evidence[7] shows how classification under this heading secures significant tariff reduction for chicken cuts under many national tariff schedules. Furthermore, the Complainants' interpretation is not limited to chicken cuts, but applies to all meats. If this interpretation were adopted, wherever a Member's Schedule has a lower tariff for a meat under heading 02.10 than it has for the corresponding meat in headings 02.01 to 02.08 that Member could expect the same dramatic distortion of trade through the use of slightly salted, etc., meat that the EC experienced from salted frozen chicken.

98. Please respond to Brazil's question posed in paragraph 29 of its oral statement at the second substantive meeting on why it is necessary to "further preserve" products that are classified under heading 02.10 if they have already been subjected to a process to ensure long-term preservation.

21. One short answer to the question why meat that has been preserved for the long-term (by salting, drying, etc.) should be further preserved (by chilling or even freezing) is so that it may be preserved for an even longer term. The EC has listed[8] various factors which affect the life or presentation of preserved meat. In particular, such meat is no longer stored in the fashion originally intended, and it is often sliced in preparation for retail sale (see Exhibit EC-32).

22. The use of additional preservation techniques for meat falling with heading 02.10 is explicitly envisaged in the HS Explanatory Notes to Chapter 2 which provide that vacuum packing (Modified Atmosphere Packing) does not alter the classification of a product under Chapter 2.[9]

99. In paragraph 40 of its second written submission, the EC submits that the examples of products referred to by the complainants to support their argument that salted products may not necessarily be preserved by salting alone are almost all of fish rather than meat. The EC is requested to explain in precise terms what differences exist between fish and meat to warrant different conclusions in this regard.

23. The EC made this point in order to illustrate that the products which the Complainants had identified as being preserved by one of the processes in heading 02.10 were mostly fish products and not meat products. The EC was not suggesting that different conclusions should necessarily be drawn from fish products than would be drawn from meat products.

24. Rather, the EC would point out that it is Brazil that specifically rejects that analogies can be drawn from Chapter 3 of the HS. In the context of its comments on the WCO letter to the Cypriot

[5] EC First Written Submission, para. 58, Table 3.
[6] E.g., Thailand Second Oral Statement, para. 20.
[7] Exhibit BRA-37.
[8] E.g., Second Written Submission, para. 43.
[9] EC Second Oral Statement, para. 9.

authorities[10] Brazil argues that salted frozen fish is a product that is different from the product at issue and cannot therefore 'be seriously considered by the Panel as relevant subsequent practice'. However, Brazil appears in two minds on the issue, since it also uses examples of the classification of frozen fish in support of its arguments.[11]

25. In the EC's view the overall structure of Chapter 3 is similar to that of Chapter 2, so that the WCO's comments on fish are of significance to the present dispute.

100. In paragraph 35 of its second written submission, the EC submits that, even if the complainants were correct that heading 02.10 depends upon preparation rather than preservation, all existing practice suggests that it must be preparation which places the meat in a "recognisably different state". Is the EC suggesting that preservation may not be necessary for classification under heading 02.10 provided that the state of the product in question has been recognisably changed? If not, please explain what the EC meant by this comment. Further, please explain how the EC interprets "recognisably different state".

26. The EC made these comments by way of presenting an alternative argument should the Panel not accept that all the processes referred to in heading 02.10 involve preservation of the meat. In the EC's view the change of state is brought about by preservation, but that there *is* such a change is undeniable. By the phrase 'recognisably different' we mean in particular that the meat is obviously different from raw meat in appearance and texture. A Customs officer examining the goods would have no difficulty recognising them for what they were. We can say that all the meats which we are aware of as being classified under heading 02.10 share this characteristic (see the table in Exhibit EC-5). Furthermore, all such meats have names, either general (like 'bacon') or specific (like 'Parma ham'). Frozen chicken with added salt shares none of these characteristics. Not only does it look like chicken meat when arriving at the border, moreover, as confirmed by the expert opinion from Professor Dr. Karl-Otto Honikel (Exhibit EC-32), the effect of salting between 1.2 and 3% has none of the effects (preservation and drip loss) claimed by the Complainants to distinguish it from unsalted chicken meat.

101. In its reply to Panel question No. 69, the EC suggests that the purpose underlying the states referred to in heading 02.07 is irrelevant because those states are "instantly detectable". In contrast, the EC submits that the purpose underlying the states referred to in heading 02.10 is significant. Does the EC consider that purpose is important for heading 02.10 because the states referred to therein are considered not to be "instantly recognisable"? If so, how does the EC reconcile this with its submission in its reply to Panel question No. 69 that, as a practical matter, for customs authorities, what is important is that preserved meats have particular physical characteristics which are readily identifiable. If not, please explain in precise terms why purpose is significant for heading 02.10 but not for heading 02.07.

27. The EC finds this question difficult to answer because it seems to imply a dichotomy between meat that is chilled or frozen, and that which is salted, etc., within the meaning of heading 02.10. As the EC has pointed out, meat in heading 02.10 can also be chilled or frozen, and will not lose its classification for that reason. Consequently, the status of these terms in Chapter 2 is not the same. Once meat is found to be salted, etc., it will be classified under heading 02.10.[12] But finding that the meat is frozen does not determine which heading is appropriate; for this one must know more about it.[13]

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[10] Brazil Second Written Submission, para. 63.
[11] E.g., Brazil First Written Submission, para. 94.
[12] Leaving aside heading 02.09.
[13] To be precise, this would exclude heading 02.01, and several subheadings.

28. As regards 'purpose', the EC regards it as undeniable that heading 02.10 was created to cover meats that had been processed in particular ways (salting, etc.) in order to put them in a preserved state.[14] Meats in this state are 'readily identifiable' as such, and one could also say 'instantly recognizable'.

102. In its reply to Panel question No. 49, the EC submits that the shelf life of preserved meats is many months at ambient temperatures. Is the EC submitting that ensuring a shelf-life of many months amounts to long-term preservation? If not, what is meant by long-term preservation in the context of heading 02.10 of the EC Schedule?

29. The EC has shown that the notion of preservation is at the heart of heading 02.10 in the Harmonised System, the EC's Schedule and the EC's Combined Nomenclature. The Complainants have not established that the product at issue meets this criterion, and their claims must therefore fail. The EC has observed that meats that are preserved for several months are clearly preserved for the purposes of heading 02.10. See also the EC's response to Panel Question 118.

103. In its reply to Panel question No. 14, Brazil describes the salting methods used by Brazilian producers and exporters of salted chicken meat. Which, if any, of those methods result in the deep and homogeneous impregnation of salt?

30. Dry tumbling, tumbling in brine, and injection, can achieve such impregnation.

104. With respect to the EC's reply to Panel question No. 64, which salts are used to preserve the products that the EC considers typically fall under the scope of heading 02.10?

31. Sodium chloride, sodium nitrate, sodium nitrite. Unless nitrates and nitrites are used the preserved meat will not have its customary red colour.[15] The EC does not know of any meat that is preserved with sodium chloride (common salt) alone.

105. Please comment on Brazil's reply to Panel question No. 18 and Exhibit BRA-34, which Brazils says indicate that the EC itself considers that frozen salted/dried/smoked fish should be classified under heading 03.05 and not under headings 03.03 or 0304.

32. Once the fish is sufficiently salted, etc., to preserve it, whether it is also frozen or not will not affect its customs classification. The EC has always based the classification of goods on their "objective characteristics" which are mostly based on their composition or properties, which can be established by laboratory examination whether in a Customs laboratory or a private laboratory. The state of the products at issue as being salted or in brine, dried or smoked for long term preservation can be established by laboratories by determining the moisture content and water activity.

33. For instance, frozen salted or in brine herring filets were classified on a case by case basis as either 03.05 or 03.04 (Exhibit EC-33).

106. In paragraph 42 of second written submission, the EC has identified the CCCN as the predecessor to the Harmonized System. To what extent is the structure and rationale of Chapter 2 of the CCCN different from or similar to that of the equivalent Chapter in the Geneva Nomenclature?

34. Many of the elements of Chapter 2 of the Geneva draft were carried into the CCCN.

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[14] See, e.g., the discussion of the evolution of the terms.
[15] See EC First Written Submission, para. 116

35. The strategy of dealing with most meat on an animal-type base (beef, sheep, pig, etc.) is followed in both (but 'Dead game', Item 15 in the Geneva draft, has no equivalent in the CCCN). Whether or not the meat was frozen is not a factor in the CCCN, although it was so in the Geneva draft (and became so again in the HS). It is noteworthy that the word 'preserved' is linked to refrigeration (Item 13, also in Item 19), a practice that is carried over into the Notes of the CCCN (and HS).

36. Item 17 'Bacon' in the Geneva draft is best understood by reading the accompanying Explanatory Notes, from which it becomes clear that it actually corresponds to CCCN heading 02.05 (and HS heading 02.09) on pig and poultry fat.

37. Item 18 is corresponds to CCCN heading 02.06 (HS heading 02.10), except that the phrase 'cooked or otherwise simply prepared' disappeared. The EC has addressed this point in its Second Oral Statement.[16] Cooked meats were moved into Chapter 16 of the CCCN, but traces of the word 'prepared' remained in the Explanatory Notes (and continued in those of the HS).

107. If, as submitted by the EC, the processes listed in heading 02.10 are for bng-term preservation and Chapter 2 is structured according to preservation methods, what is the rationale for categorizing the processes listed in heading 02.10 – "salted", "in brine", "dried", or "smoked" – under a separate heading instead of as a tertiary item under each of the headings preceding it (i.e. headings 02.01 through 02.08) together with "fresh", "chilled" or "frozen"?

38. By way of introduction, the EC observes that, despite repeated assertions of the Complainants to the contrary, it has not submitted that Chapter 2 is 'structured according to preservation methods'. Nevertheless, preservation is clearly an important feature of the Chapter.

39. It is evident from the structures of the successive nomenclatures – 1937, CCCN, HS – that the drafters regarded meats that had been salted, etc., as having two particular characteristics. Firstly, they were markedly different to meats that had not been processed in these ways, so much so that they were not even included in the same headings. Secondly, they were so similar to each other that they could be treated under a common heading. Both of these characteristics arise from the fact the meats are preserved; meat that has been only slightly salted, or dried, etc., is not significantly different from unprocessed meat, and such meat from one animal bears no particular resemblance to slightly salted, etc., meat from another animal.

40. The importance of freezing meat has altered over the years (it was not a feature of the CCCN), but even in the HS it is evidently not regarded as such a radical process as preservation by salting, etc., since it is reflected by a categorization that is made only within animal types, and in most cases by means of subheadings.

41. The EC believes that these considerations provide the answer to the Panel's question.

108. In paragraph 119 of its second written submission, the EC submits that throughout the Uruguay Round negotiations, EC law on classification under heading 02.10, including Regulation 535/94, was based on the concept of preservation. Please explain where the concept of preservation is reflected in Regulation 535/94.

42. Regulation 535/94 did not need to explicitly restate that heading 02.10 is based on the concept of preservation. As put succinctly by the European Court in the *Gausepohl* case:

[16] Para. 42.

> It is […] clear from the scheme of that chapter that, for tariff classification purposes the meat covered by it is either fresh or chilled meat of bovine animals or meat that has undergone one of the various processes required for long-term preservation. [17]

43. As noted in our response to Panel question 40 at the first meeting, this was undisputed between all relevant Member States, the Court, Commission and the importer himself.

44. The EC explained in its response to Panel Question 93, that Regulation 535/94 sets a minimum salt content, a pragmatic rule, below which it cannot be considered that a product is salted for preservation (see also response to Panel Question 113). Consequently, in order to be classified under heading 02.10 a product has to meet the criteria of Regulation 535/94 and be salted in order to ensure its preservation.

109. In paragraph 107 of its second written submission, the EC submits that, in respect of heading 02.10 of the EC Schedule, as at 1 September 1986, the EC's law and practice supported the principle of long-term preservation. Apart from the 1983 *Dinter* judgement and the 1981 Explanatory Note to the CCT to which the EC has already referred, what other support exists for the view that, as at 1 September 1986, the principle of long-term preservation was well-entrenched in the EC?

45. Although prior to the Uruguay Round the EC had few bindings on agricultural products, its nomenclature was exactly based on the CCCN (the Member States were parties to the treaty establishing the CCCN, and bound by that to observe its terms). Heading 02.06 of the CCCN contains effectively the same wording as HS heading 02.10, and both of them, as the EC has established, enshrine the principle of preservation. This is reflected in Regulation 3331/85, which contains the EC's Common Customs Tariff for 1986, and reproduces the headings of the CCCN. Relevant extracts from this are presented as Exhibit EC-34. The same CCCN-based nomenclature had been in use in the EC since 1960 if not earlier. Consequently the principle of long-term preservation was well-entrenched in the EC and confirmed already as early as 1983 in *Dinter*.[18] Any other measures could have only restated the preservation requirement but not modified it.

110. Are ECJ judgments published? If so, how and when? Are they publicly accessible? Please indicate the means through which such judgments were publicly accessible as at: (a) 1 September 1986; (b) 15 December 1993; and (c) 15 April 1994.

46. The judgments of the European Court of Justice are delivered in open court (Article 37 of the *Statute of the Court* and Article 64, paragraph I, of the *Rules of Procedure of the Court*).

47. On the day of delivery, the judgments are accessible to the public outside the courtroom and will be sent by the Registry to anyone upon request after delivery.

48. According to *Article 68 of the Rules of Procedure of the Court*, the Registrar arranges for the publication of reports of cases before the Court and in principle all judgments are published in the European Court reports.

49. From the middle of the 1970's the Court's judgments have been accessible in a Community law database (CELEX) run by the Communities' Publications Office.

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[17] Para. 10. See EC First Written Submission, para. 82 for full extract from judgment.

[18] See Judgement in Case 175/82 *Dinter* (Exhibit EC-12), para. 6 as well as the description of the import of that case law by Advocate General Tesauro, in C-33/92 *Gausepohl* (Exhibit EC-14), para. 4. The standing case law was reconfirmed in the Court in *Gausepohl* (Exhibit EC-14), para. 16.

50. In addition, the Court notifies both the commencement of a legal proceeding as well as the judgment rendered and its conclusions in the Official Journal of the European Communities. To illustrate this, the EC attaches as Exhibit EC-35 the excerpts from the Official Journal in cases *Dinter* and *Gausepohl.*

51. The above means of publications existed at all dates specified by the Panel. From 1997 on all judgements have also been made available on the Court's own website (www.curia.eu.int).

111. Please comment on Brazil's contention in paragraph 90 of its second written submission that the Advocate-General in the *Dinter* case considered smoking to be a preparation process.

52. The EC understands that Brazil in paragraph 90 of its second submission attempts to provide counterevidence to the EC's explanation that the notion of preservation was at the heart of its classification practice on heading 02.10. The only legal document Brazil refers to is Advocate General Mancini's opinion in *Dinter*, that is the independent legal opinion provided to the Court during the proceeding, which the Court is in no way bound to follow.

53. The document Brazil refers to if at all confirms the EC position. First, Advocate General Mancini in para. 3 of his opinion distinguishes between the addition of salt under chapter 2 as "the better to preserve the product" as opposed to adding of salt by way of seasoning. That is, he expressly states that "salting" for the purposes of heading 02.10 clearly requires salting for preservation. Second the case concerned seasoning with salt and pepper and not smoking. Moreover, the Court in its judgment (which is the final and binding) authority confirmed that chapter 2 "comprises poultry meat which has undergone a preserving process" (para. 6).

112. With respect to the EC's reply to Panel question No. 47, please explain why and how it is implicit in the *Gausepohl* judgement that the amount of salt required for preservation will vary from meat to meat.

54. The Court in *Gausepohl* found support for its interpretation of heading 0210 to require salting for long-term preservation in an Explanatory Note relating to swine meat.[19] As noted in the Report for the Hearing (para. 33) that Explanatory Note to the Combined Nomenclature states that the salt content "may vary considerably between different types and cuts of meat".

113. In cases where an ECJ judgement is issued to clarify a particular Regulation, under EC law, is it necessary to read that judgement in conjunction with a Regulation enacted after the issuance of the judgment which was expressly enacted to amend the first Regulation upon which the judgement was based?

55. There is no procedure under which the European Court of Justice is tasked to "clarify a particular Regulation". Under the *EC Treaty*, a Regulation can either be directly attacked in an action for annulment (Article 230 of the *EC Treaty*) or it can be examined by the Court in the context of a preliminary ruling proceeding and be found invalid (Article 234 of the *EC Treaty*). The legal consequence is under both proceedings that the Regulation is invalid and no longer in effect *ex tunc* (unless otherwise specifically indicated by the Court).

56. A later act that replaces the invalidated act is self-standing and contains the motivation for its adoption in accordance with Article 253 of the *EC Treaty*. It is therefore generally not necessary to read it in context with a judgement that invalidated the preceding act, unless specific reference is made to that judgement in the motivation clauses.

[19] Judgement of the Court in Case C-33/92 *Gausepohl* (Exhibit EC-14), para. 12.

57. If the EC understands correctly, the Panel is interested in the relationship between judgements such as *Gausepohl* which interprets the Combined Nomenclature and a later Commission Regulation inserting an Additional Note. However, this is an issue of hierarchy of norms as opposed to a question of hierarchy between Court judgements and Commission Regulations.

58. In *Gausepohl*, for example, the Court confirmed the scope of heading 02.10 in the Combined Nomenclature (a Council Regulation). The later addition by the Commission of Additional Note 7 through Commission Regulation 535/94 is a legal act which is *inferior* to the Combined Nomenclature (Council Regulation). The Commission is not entitled to modify, through a Commission Regulation, the content of the scope of a tariff heading laid down in the Combined Nomenclature (Council Regulation implementing the Harmonised System). Therefore, any Commission act must necessarily be read together at all times with the superior norm (the Combined Nomenclature) and its interpretation by the Court. In other words, the scope of heading 02.10 which on the basis of its wording and structure already compels a requirement of preservation as confirmed by the Court in *Gausepohl* stands entirely undisturbed by any legal act subsequently adopted by the Commission. Indeed, as noted by Advocate General Tesauro in its opinion in *Gausepohl*:

> Chapter 2 of the Combined Nomenclature, as the case-law of the Court confirms, comprises meat which has undergone a preserving process that may consist of freezing or salting inter alia.[20]

59. It is the Commission act that must be read harmoniously with the Council act and its interpretation by the Court, not the other way round. To the extent there was a conflict (*quod non*), the scope of heading 02.10 in the Combined Nomenclature as interpreted by the Court would prevail.

114. Please comment on Brazil's and Thailand's submission in paragraphs 56 and 8 respectively of their oral statements at the second substantive meeting that the legal effects of an ECJ judgement may be reversed or altered by a change in the law, including the enactment of a new Regulation.

60. In the above-mentioned paragraphs, the Complainants continue their attempt to justify their selective reliance on Commission Regulation 535/95 and their mis interpretation of the import of that Regulation. Specifically, the Complainants' arguments, as the EC understands them, are as follows:

61. Brazil argues with reference to a Community law book that the legal effect of an ECJ judgement may be reversed or altered by a change in the law, including the enactment of a new Regulation, and that therefore superseding legislation is not subject to the findings of the ECJ under previous "different circumstances".[21]

62. Thailand attempts to deduce from the judgement of the ECJ in *Van de Kolk* that "in a situation of 'conflict' between a Court judgement and a subsequent Commission Regulation, the European Court of Justice has itself made clear that the subsequent Regulation will prevail".[22]

63. As will be explained bebw, both propositions are entirely misconceived.

64. With respect to Brazil's point, the EC notes, at the outset, that Brazil has not provided the Panel with the original quote from the Community law authority to which it refers in footnote 62 to support its statement. The EC exhibits the relevant page 495 of the Community law book, where Lasok describes the legal effects of Court judgements as follows:

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[20] C-33/92 *Gausepohl*, Opinion of Advocate General Tesauro (Exhibit EC-14), para. 4.
[21] Brazil's second oral statement, para. 56.
[22] Thailand's second oral statement, para. 8.

> The legal effect of a judgement of the Court may in principle be reversed or altered by a change in the law administered by the Court, such as by an amendment of the Treaties.[23]

65. This quote does not stand for the proposition of Brazil that the adoption of a Commission Regulation (such as 535/94) following a Court Judgement (such as *Gausepohl*) reverses the legal import of the earlier judgement. To the contrary, Lasok confirms the EC's explanation in response to Panel Question 113 that there is no rule of conflict whereby a later legislative act of the Commission or Council supersedes any previous Court Judgement. Lasok refers to a situation where the Court examined the compatibility of a measure with norms administered by the Court. Lasok refers particularly to the *EC Treaty*, because it trumps all other norms under Community law. A Council Regulation must also be compatible with principles of Community law, and international obligations of the Community. A Commission Regulation must be compatible with all these acts, plus with all Council Regulations. To illustrate this with a hypothetical, if the *HS Convention* was altered so as to provide that all meat products with a salt content above 1.2% are covered by heading 0210, an importer could attack Commission Regulation 1871/2003 as being incompatible with heading 02.10 of the Combined Nomenclature, and the Court would reverse its standing case law on the interpretation of heading 02.10. The situation in *Gausepohl* and Commission Regulation 535/94 is not such. There was no change in the superior norm looked at in *Gausepohl*, i.e., heading 02.10 of the HS and or the Combined Nomenclature. The only legislative change was a Commission Regulation introducing a minimum salt content below which a preservative effect can be excluded. As explained in response to question 113, the legal effect of such Commission Regulation can never be to change the scope of the heading 02.10 in the higher ranking Council Regulation as interpreted by the Court.

66. To explain why Thailand's attempt to assimilate Commission Regulation 535/94 to the Council Regulation 3400/84 and a very specific sequence of cases is wrong, it is useful to briefly recap this sequence of cases and regulations.

67. In *Dinter* the Court was faced with a customs decision that classified peppered and salted poultry under chapter 2. The customs authority refused to consider it as seasoned within the meaning of chapter 16 of the CN because the salt and pepper were neither organoleptically nor optically perceptible. The Court applied a general principle of interpretation according to which the classification under the Customs Tariff must be sought in the objective characteristics and properties of the product.[24] The Court considered such sensory test as subjective and not capable of meeting the requirement of a classification based on objective characteristics.

68. Shortly after *Dinter* the Council inserted Additional Note 6a, which requires organoleptic and optical test for the determination of seasoning.

69. That Additional Note was challenged in *Van de Kolk* as being incompatible with the principle of classification based on objective characteristics as interpreted in *Dinter* and the *Convention on the Nomenclature* (the predecessor of the HS). The Court found that the Council had not violated those norms for the following reasons:

> […] it must be pointed out that that judgement was delivered in different circumstances from those in the present case; there was no provision in a regulation on the interpretation of the Common Customs Tariif and at the time of the national authorities' inspection of the goods Standard ISO 4120 had not yet been devised.

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[23] Lasok, The European Court of Justice Practice and Procedure (2nd ed., London, 1994), p. 495 (Exhibit EC-36).

[24] Judgement of the ECJ in Case C- 175/82*Dinter* (Exhibit EC-12), para. 9.

> In those circumstances, it must be concluded that in laying down the abovementioned criteria, the Council did not infringe the principle of legal certainly and did not otherwise exceed the discretionary power conferred on it in that field.
>
> Nor is the note at issue contrary to the Convention on the Nomenclature under which the Contracting Parties undertake not to make changes in the chapter or section notes in a manner modifying the scope of the chapters, sections and headings (Article II (b)(ii)).
>
> Additional Note 6(a) does not change the scope of the chapters, sections and headings of the Nomenclature. It merely specifies the criteria to be taken into account for classifying certain goods under a particular heading of the Common Customs Tariff in accordance with the interpretation given in relation to that heading by the Customs Council.[25]

70. Contrary to what Thailand argues in para. 8 of its second oral statement, the reference by the Court to the fact that the Council had legislated cannot be misunderstood to mean that the Court was bound by the Council's Regulation. This is entirely non sensical, because the impugned measure at issue before the Court was precisely that Council Regulation inserting Additional Note 6a! The Court's reference to the Council legislation as part of the change of circumstances merely reflects judicial self-restraint from second guessing the Council's technical Regulation that provides for uniform standards on sensory testing throughout the Community on the basis of an ISO standard. However, the key change of circumstances noted by the Court was the ISO standard which confirmed the objectivity of sensory testing thereby rendering the Court's criticism in *Dinter* moot.

71. Moreover, Thailand conveniently ignores that Council Regulation 3400/84 was also scrutinised for whether it modified the scope of the heading contrary to the Communities obligations under the Convention on the Nomenclature. In *Van de Kolk*, the Court only upheld the Additional Note providing for sensory tests as inserted by the Council because it merely concerns the technical means for an objective assessment of the characteristics of a product, but does not alter the scope of the headings concerned. By contrast, the insertion of a criterion that all meat products with a salt content exceeding 1.2 % can be considered as " salted" under heading 02.10 even if such salting does not ensure preservation would significantly alter the scope of heading 02.10 as consistently interpreted by the Court in *Dinter* and *Gausepohl.* The EC refers to its response to Question 97 and Exhibit EC-32.

115. Which of Additional Note 6(a) to the Combined Nomenclature or the *Dinter* judgement take precedence regarding the appropriate criterion to be used to identify whether or not a meat is "seasoned" for the purposes of Chapter 16 (i.e. detection through sensory perception or by microscopic means)?

72. Currently Additional Note 6a as upheld in *Van de Kolk* applies. As the Court confirmed in that case, its criticism of sensory techniques made in *Dinter* has been superseded by a change of circumstances and is therefore moot. Yet (to avoid any misunderstanding) it should be noted that the legal effect of the *Dinter* judgement providing a preliminary ruling on compatibility with Community law of the German authority's classification decision in that particular case and providing a number of legal interpretations including the interpretation of heading 0210 remain otherwise valid.

[25] Judgement of the ECJ in Case C-233/88 *Van de Kolk* (Exhibit THA-35), paras. 16-18.

116. The minutes of a meeting of the EC Customs Code Committee in February 2002 (Exhibit THA-23) indicate that the Committee considered it necessary to amend Additional Note 7 to Chapter 2 "to introduce the condition of 'long-term preservation'" (emphasis added). Why was such an introduction necessary in light of what the EC has submitted regarding the importance and effect of the *Dinter* and *Gausepohl* judgements?

73. As explained in responses to Questions 113, it was not necessary under Community law to "introduce" a *new* legal concept of "preservation" or "long-term preservation", because that concept already existed. The term "introduce" in that context describes the act of *inserting a clarification* which the Commission had not considered necessary with a view to standing case law interpreting heading 0210 as requiring salting for long-term preservation (*Dinter* and *Gausepohl*). However, the experience of erroneous national BTIs made it desirable to restate the meaning of heading 02.10 as interpreted in *Dinter* and *Gauspohl.* The EC recalls its response to Panel Question 45 following the first meeting clarifying that minutes of the EC Customs Code Committee have no legal effect whatsoever.

117. Please provide copies of BTIs of instances where the products at issue were classified under heading 02.07 rather than heading 02.10 before the introduction of Regulation 1223/2002 and Commission Decision 2003/97 of 31 January 2003.

74. The EC can identify no such BTIs. However, the EC repeats the warning that it gave in para. 51 of its Second Written Submission about the dangers of relying on BTIs as comprehensive indication of customs practice. The EC would add that it is possible under Community law to withdraw an application for a BTI where the outcome is considered unfavourable by the importer. The absence of such BTIs has therefore no legal consequences, in particular on the scope of heading 02.10 of the Combined Nomenclature as interpreted by the Court as requiring long-term preservation. In any event, the EC recalls that it has provided some examples of BTIs interpreting 02.10 as covering meats preserved by some of the techniques mentioned therein (Exhibit EC-25).

118. What is the distinction between "preservation" and "long-term preservation"?

75. The EC believes that the distinction posited in the questions is not relevant for this case. Whereas EC law on classification contains the term 'long-term preservation', the word 'preservation' is not to be found in HS heading 02.10. Rather, the EC has shown that heading 02.10 has at its heart a concept which the EC in these proceedings has termed 'preservation' but which it might have as easily have referred to as 'long-term preservation'. Consequently, the distinction which the Panel refers to has no bearing on this dispute. 'Long-term preservation' is the phrase that the EC has used to represent the preservation criterion that is inherent in heading 02.10, whether in the Harmonised System, or the EC's Schedule, or the EC's Combined Nomenclature.

119. At the time the EC concluded its Schedule, was there evidence of the existence of trade in meats under heading 02.10 which, through salting, were preserved for less than a few months?

76. Trade in salted chicken appears to have begun only in 1996 (Thailand) and followed by Brazil in 1998. The salted beef that was at issue in the *Gausepohl* case was not classified under heading 02.10. The EC is not aware of any other trade in products of this type.

120. With respect to Brazil's suggestion in its reply to Panel question No. 3 that the Panel should draw adverse inferences regarding the EC's failure to provide certain information requested of it by the Panel, is there any basis for the Panel drawing similar inferences regarding Brazil's and Thailand's refusal to provide export classification practice for the headings at issue?

77. The EC notes there are a number of conditions for drawing of adverse inferences. The first one is refusal by the party who has evidence to cooperate. The EC never refused or failed to co-operate. The EC provided the requested BTIs in Response to Question 34 (Exhibit EC-24).

78. Since both Complainants conceded the existence of export classification practice as alleged by the EC in its statistics and sample documents and in any event failed to cast doubt on the EC's substantiated allegations by providing counter-evidence, the Panel can consider this point undisputed without drawing adverse inferences. That said, the EC considers that the conditions for drawing of adverse inferences against the Complainants would be fulfilled, because the Complainants failed to provide counterevidence despite the specific request of the Panel to do so.

121. What relative weight should the Panel accord to inferences that may be drawn for the headings at issue in this case from:

(a) the structure of Chapter 2 of the HS and its predecessors;

(b) the Explanatory Notes that are relevant to Chapter 2 of the HS and to its predecessors; and

(c) General Interpretative Rule 3 of the HS.

79. All parties to the dispute are agreed that General Interpretative Rule 3 is not applicable in the present case. The mere existence of a controversy regarding the classification of a product does not mean that the condition for applying that Rule is satisfied. From the point of view of the EC, there is ample basis for reaching a clear interpretation of heading 02.10 vis-à-vis the product at issue.

80. Regarding the relative weight to be accorded to the elements mentioned in points (a) and (b), the EC observes that, in its view, the question is hypothetical since all the factors mentioned lead in this case to the same conclusion. However, were the question to arise the EC notes, first, that Explanatory Notes are not legally binding documents, and are therefore necessarily of a subsidiary status. It is significant that the WCO did not refer to them in its letter of advice. Secondly, the HS Explanatory Notes are reproduced neither in the EC's Schedule nor in its Combined Nomenclature, nor in its Explanatory Notes. In contrast, the terms of Chapter 2, and consequently its structure, are found in both the Schedule and the CN.

81. Finally, the EC refers to its observations on the pertinence of GIR3.

82. For these reasons it is the EC's view that the structure of Chapter 2 and its predecessors is of most relevance among the factors mentioned.

122. Do the parties consider that actual knowledge during negotiations of a document or instrument is necessary on the part of some/all negotiators involved in the negotiation of a treaty in order for it to qualify for consideration as "preparatory work" and/or "circumstances of conclusion" of a treaty under Article 32 of the Vienna Convention? If so, please provide support for this view. If not, please provide support for this view.

83. Under public international law, the precise degree and nature of the knowledge of preparatory documents and circumstances of the conclusions varies between different types of treaties, and is assessed on a case to case basis depending on the status of the parties as original or acceding Members.[26] As regards WTO law, the EC believes that the fundamental criterion of the 'common intention' of the parties, as emphasised by the Appellate Body,[27] has an important bearing on the issue. The term common intention assumes "knowledge" of the parties. Yet, it is not conceivable that the interpretation of WTO obligations and concessions depends on the proof of actual knowledge of all market access negotiators. Neither can the interpretation of obligations differ between original Members and Members that acceded later. At the same time is clear that any documents relied upon in an interpretation of WTO obligations according to Article 32 of the *Vienna Convention* must have been in the public domain or accessible to WTO Members.

84. The EC considers that the Panel need not decide whether "actual" or "presumed" knowledge is determinative for the purpose of this case. The common intention of the parties negotiating the Uruguay Round Agreements was to respect the HS nomenclature and to use the level of parties' duties or bindings in 1986 as a base point. This is reflected in the Modalities Agreement.

85. Indeed, the only document that has been referred to by any party in this dispute as 'preparatory work' has been the Modalities Agreement, and there is no doubt that this was known to all the negotiating parties during the Round.[28]

86. Even if the Panel were to consider that unilateral developments of EC law as of 15 April 1994 were relevant in the interpretation of the EC's schedule as "circumstance of the conclusion", it would need to dismiss Brazil's assertion that both its negotiators and those of other parties had (actual or presumed knowledge of Regulation 535/94 but not of the preservation criterion at the heart of Community law.[29] First it should be pointed out that Brazil provided no supporting evidence for its statement that it had knowledge of Regulation 353/94.[30] Moreover, it is significant that Thailand, which also participated in the negotiations, has made no such claim. If Brazil was aware of the implications of Regulation 535/94 in early 1994 then it is perhaps surprising that it was another four years before Brazilian exporters began their exports of frozen salted chicken (1998), while Thailand started already in 1996.

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[26] The ICJ relied on presumed knowledge (something a party ought to have known) in its Advisory Opinion of 8 June 1960 – *Constitution of the Maritime safety Committee of the inter-governmental Maritime Consultative Organization*, ICJ Reports 1960, p. 170. However, see also the rulings referred to and criticised by Sinclair, *The Vienna Convention on the Law of Treaties*, (2nd Edition, Manchester 1984), pp. 141-147.

[27] Appellate Body Report, *EC – Computer Equipment*, paras. 88 and 93.

[28] The EC recalls that it has also argued that the Modalities Agreement should be considered under Article 31 of the Vienna Convention. In this respect it would like to draw the attention of the Panel to a decision of an arbitral panel established pursuant to Article 2008 of the North American Free Trade Agreement which suggested that the Modalities Agreement is part of the *travaux préparatoires* and circumstances of conclusion of the WTO Agreement on Agriculture, as well as being part of the context under Article 31(2): *Tariffs Applied by Canada to Certain US-Origin Agricultural Products*, http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/Canada/cb95010e.pdf para. 179.

[29] Brazil Second Oral Statement, para. 70; Second Closing Statement, para. 9.

[30] In delivering its Second Closing Statement Brazil's representative explained the system that it applied for monitoring national developments, but did not indicate how it had been used during the Uruguay Round.

87. In any event, the EC has demonstrated that even as of 15 April 1994, the requirement of salting for the purpose of long-term preservation was well-enshrined in Community law and remained entirely undisturbed by Commission Regulation 535/94 (See in particular Responses to Panel Questions 113 and 114). If Brazil pretends knowledge of Commission Regulation 535/94 because it suddenly took upon itself the burden to screen unilateral developments in the EC, it cannot deny the existence of the long-term preservation requirement which was well-enshrined in the interpretation of heading 02.10 of the Combined Nomenclature as interpreted by several judgements of the Court of Justice. As detailed in Response to Panel Question 110 all of these judgements were publicly available and even notified in summary in the Official Journal which is read by the Brazilian embassy in Brussels (as Brazil explained to the Panel at the second hearing).

88. Brazil cannot have it both ways. If it relies on Community law as of that date, it must accept the entire body of EC law as publicly accessible at that moment. If Brazil considers it too burdensome to continuously follow the development of complex bodies of law such as the Common Customs Tariff, it cannot selectively rely on one particular element such as Commission Regulation 535/94 taken entirely out of context.

QUESTIONS POSED BY BRAZIL

1. In paragraph 17 of the second oral statement, the EC states that it is "not distinguishing between products on the basis of their purposes, but on their essential characteristics at the time they are examined by the customs authorities". Please clarify whether the phrase "essential characteristics" is the same as the phrase "objective characteristics". If these phrases do not have the same meaning, please explain why.

1. The EC does not see any significant difference between the two expressions.

2. Is there any type of meat that deeply and homogeneously impregnated with 1.2% of salt can be preserved for "many" or "several" months without chilling or freezing? If so, please provide the types of meat.

2. The EC assumes that Brazil is speaking of common salt (sodium chloride) such as was used in the subject matter of this dispute. The EC does not know of any such meat.

3. Please indicate where in the *Gausepohl* case, or under Community law, is the principle of long-term preservation defined as preservation for "many" or "several" months.

3. Because of the paucity of disputes on this issue the matter has not been the subject of a specific definition. The EC has given ample guidance to Brazil and the Panel as to how the criterion of long-term preservation is enshrined in Community law.

4. How does the EC reconcile its position that further extension of a product's shelf-life does not change classification under heading 0210 with the reasons set out under the Annex to Regulation No. 1223/2002 that salted chicken cuts is meat frozen for long-term preservation? In other words, if freezing for further preservation is allowed under he ading 0210, and does not change classification under that heading, why are salted chicken cuts, which are frozen for further preservation, not classified under heading 0210?

4. Regulation 1223/2002 described the product which it was regulating as 'chicken meat frozen for long-term conservation'. The word 'further' was not used in the Regulation, and in particular it did not describe the meat as 'frozen for further preservation'. The EC therefore does not understand the questions which Brazil poses.

5. Brazil provided Schedule LXXX in Exhibit BRA-1. Please inform whether the tariff item numbers 0207.41.10 and 0210.90.20 expressed in column no. 1 of Schedule LXXX were taken from or are the same as those in the EC's Combined Nomenclature. If they were not taken from or are not the same as the ones found in the EC's Combined Nomenclature, please provide the nomenclature from which these tariff item numbers were taken from.

5. The EC believes that it demonstrated the parallel nature of the Combined Nomenclature and Schedule LXXX in Annex 1 to its First Written Submission.

ANNEX C-9

COMMENTS BY THE EUROPEAN COMMUNITIES ON THE COMPLAINANTS' RESPONSES TO QUESTIONS FOLLOWING THE SECOND SUBSTANTIVE MEETING

(9 December 2004)

I. INTRODUCTION

1. The European Communities thanks the Panel for providing it with an opportunity to comment on the answers provided by Brazil and Thailand to the Questions from the Panel and the EC following the second substantive meeting.

2. The invitation by the Panel to comment, as the European Communities understands it, is confined to new factual or legal arguments made by the Complainants in response to the further questions from the Panel. The Complainants have, however, largely repeated points made already before. Therefore, the fact that the European Communities does not specifically comment on them does not mean that they are no longer disputed by the European Communities. The European Communities refers the Panel to its positions on facts and legal arguments as previously expressed. In addition, the European Communities has sought to limit its comments to new elements that appear relevant to the Panel's deliberations.

COMMENTS ON BRAZIL'S ANSWERS TO THE PANEL'S AND EC'S QUESTIONS

Question 81

3. Brazil persists in the pretence that the Uruguay Round 'verification period' covering the months preceding 15 April 1994 was used for negotiating modifications to parties' draft schedules, and claims that Regulation 535/94 constituted such a modification.

4. As the EC has explained,[1] the purpose of the verification period was to ensure that Members' schedules complied with the concessions they had made during the negotiations that ended on 15 December 1993. The kind of issue to which negotiators' attention was directed is reflected in the issues raised by countries participating in the following meeting of the Trade Negotiations Committee, on 30 March 1994.[2] None of these issues concerned aspects of national practice. On the contrary, all the points made by participants in the discussion on the verification process concerned matters that were apparent in the texts of the Schedules. In particular, there were suggestions that the concessions appearing in those texts did not reflect the commitments made by the participants in the course of the negotiations. In the agricultural sector, above all, the particularly complex nature of the changes being made prevented participants using the verification stage for other purposes.

5. For this and other reasons detailed in our second submission,[3] the assumption of the parties must have been that national developments would not change the substance of the concessions, at least unless they were brought to the attention of the negotiators.

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[1] EC Second Written Submission, paras. 108 et seq.

[2] MTN.TNC/43, 1994 (Exhibit EC-37). For example, the US complained that the Korean Schedule did not reflect the commitment made during the negotiations regarding the 'chemical harmonization initiative', and that the EC did not intend to commence the implementation of its agriculture concessions until mid-1995.

[3] EC Second Written Submission, paras. 94 et seq.

6. Notwithstanding this, Brazil opines that had any party an "objection or an issue regarding the EC's definition of "salted meat" they had until 25 March 1994 to bring it up and discuss it with the EC". As the EC has shown, Brazil was also aware of the *Gausepohl* and *Dinter* judgements of the European Court of Justice. Had Brazil been of the view that Regulation 535/94 altered the definition of "salted meat", and that such a definition formed part of the EC's concessions, it surely would have been prudent for Brazil to check with the EC that its understanding of Regulation 535/94 is correct, in the light of those judgements. Brazil admits that it never requested such clarification.

Question 82

7. The EC's argument is that to operate a separate process of salting is economically inefficient, and has no technical advantages. The first point we have made already,[4] and the second point is made in Professor Honikel's opinion (Exhibit EC-32).

8. Brazil and Thailand were shipping to the EC over 200,000 tonnes of frozen salted chicken in 2001, and Brazil has evidenced this with invoices and other shipping documents. However, for the period following the disappearance of the tariff advantage in 2002/03 there are no such documents, although total imports of frozen chicken continued at the same level. All that Brazil has produced to support a supposed continuing demand for salted chicken are assertions from traders. Furthermore, the most recent examples (Exhibit BRA-41) refer exclusively to past behaviour, and give no indication that the firms continue to import frozen salted chicken. There are no invoices or similar documents.

9. Processors who intend to add salt to chicken may be content to receive chicken that is already salted. But the cost saving is minimal, since the processors ordinary operations permit the addition of salt with minimal cost.

10. The supposed advantage of salting in preventing drip loss is irrelevant in regard to meat that is to be further processed, because (as noted by Prof. Honikel) the processor cuts up the meat before it is unfrozen.

Question 86

11. Brazil asserts that the chicken meat currently exported to the EC is 'impregnated with a minimum of 1.2% salt', but it has provided no supporting evidence. None of the letters in BRA-30 or BRA-41 that assert the existence of a demand for salted chicken mentions the concentration of salt in the meat. This is especially notable in those that claim specific advantages for salt.

Question 118

12. Brazil apparently believes that the present proceedings consist of an indictment of the EC for making use of a criterion of 'long-term preservation' which it says is insufficiently precise. Paradoxically, Brazil at the same time maintains that the appropriate criterion for heading 02.10 is an indeterminate degree of salting, smoking or drying.

13. The real issue is quite different. It is simply whether chicken covered by the two EC measures – i.e., with up to 3% salt – was entitled to treatment under heading 02.10 of the EC's Schedule. The Complainants have not established that it was.

14. The EC has shown that the central criterion of heading 02.10 is one of preservation. However, even if it were merely one of 'preparation', that would nevertheless imply a definite change of state.

[4] EC First Written Submission, para. 27.

Question 119

15. Contrary to Brazil's statement, the EC has not suggested that 'a salt content of 1.2% alone preserved meats for a period of a few months'.

16. With regard to the WCO list presented as Exhibit BRA-43, the EC does not deny that, somewhere in the world, there may at some time have been trade in 'salted meat of chicken', any more than it denies the existence of trade in 'salted edible offal of Tibetan yak' and 'salted meat of beavers'. What it does say is that it has no knowledge of such trade. Furthermore, far from throwing any doubt on the criterion of preservation that lies at the heart of heading 02.10, the items on the list give support to it. The exotic nature of many of the meats suggests that trade would not have developed had it depended on the availability of refrigeration to preserve the meat. In other words, the salting must have brought about the preservation of the meat.

17. Brazil says that the various salted meats on the list are not recognisably different from their unprepared forms, but its claim is mere assertion since its knowledge of the meats derives exclusively from the list, and that provides no descriptions. Nor does Brazil even have support for its claim that the meats on the list do not have individual names. It is quite evident that the list does not make use of such names. For example, under heading 0210.20 there is an entry for 'dried beef'. There is no mention of 'charque', 'jerky' or 'viande de grison', although that is in practice how such meat is known.

Question 121

18. Brazil refers to a concern in the 1937 Nomenclature that whether meat was fresh or frozen should not be a major distinction. What it cannot explain is why that concern did not extend to salted, etc., meat, if, as it claims, such meat was not preserved in this way. If the salting, etc., had not preserved the meat, then it would require exactly the same treatment as fresh meat. However, the Nomenclature does not mention the possibility of refrigeration for such products. To say 'this was not a concern for salted meat because salt meat was not considered a method of preservation' is nonsense.

Question 122

19. Brazil cites *Sinclair* selectively in order to give tendentious support for its case. It fails to make clear that the topic being discussed in the extract is the very specific one of the status of preparatory work in regard to parties that *join an existing* multilateral treaty. For the benefit of the Panel the EC presents the learned author's comments in full (Exhibit EC-38). As noted by the EC in its own response to Panel Question 122 (footnote 26), there is mixed jurisprudence on the issue and the author notes that his view is at odds with some international judicial authority.

20. The Panel will note the extract the author takes from the majority opinion in the *Young Loan* arbitration. Although this case also concerned accession to a multilateral agreement, the opinion voices considerations of a more general character on what *is* preparatory work:

> A further prerequisite if material is to be considered as a component of *travaux préparatoires* is that it was actually accessible and known to all the original parties. Drafts of particular articles, preparatory documents and proceedings of meetings from which one member or some members of the contracting parties were excluded cannot serve as an indication of common intentions and agreed definitions unless all the parties had become familiar with the documents or material by the time the treaty was signed.

21. Thus, preparatory works are exemplified as "drafts of particular articles, preparatory documents and proceedings of meetings".

22. Under the vague criterion of 'circumstances of conclusion', Brazil seeks to infiltrate material that would never qualify as 'preparatory work'. In fact, if unilaterally produced documents could qualify as having influence on the interpretation of treaties merely by being pronounced to be 'circumstances of conclusion', the whole concept of 'preparatory work' would risk being undermined.

23. The EC refers to its response to Panel Question 122 where it highlighted again that the only preparatory document submitted in this dispute is the Modalities Agreement the purpose of which was precisely to avoid disparity in the interpretation of the schedules through later reference to shifting 'circumstances of conclusion'.

24. On a more general note, the EC observes that although in the present instance the interpretation proposed by the Complainants has focused on the benefit it accords to their exporters, the same interpretation would extend to all WTO Members and in respect of all measures adopted unilaterally during the Uruguay Round negotiations whether by the EC or other Members. Brazil's only qualification is that it should be established later that they had been published somewhere at some point before the signing. Apparently the evening before would have been sufficient.

25. Finally, the EC observes that, as usual in addressing such questions, Brazil is unable to explain, and indeed makes no attempt to explain, how its reference to Regulation 535/94 can be said to *confirm* the interpretation of the Schedule that it derives from the analysis of its ordinary meaning and context. Its continuing silence on this central issue speaks volumes.

Brazil's Response to EC Question

26. The extracts that Brazil has made from its supporting literature only serve to underline the fact that chicken impregnated with up to 3% salt is not preserved. Nothing that Brazil has presented in any way answers Professor Honikel's conclusion (Exhibit EC-32) that the minimum salt content for preservation of meat is 7%.

COMMENTS ON THAILAND'S ANSWERS TO PANEL'S AND EC'S QUESTIONS

Question 118

27. Contrary to Thailand's assertion, the EC has never said that 'preservation lies at the heart of Chapter 2'. Rather, it has said on several occasions that this notion lies at the heart of heading 02.10.

Question 119

28. To put the record straight regarding information on imports, the EC would like to make clear that the volumes of 'other salted meat' imported prior to the use of this subheading by frozen salted chicken (that is, prior to 1996) were extremely small. In most years it seems likely that the volume in question was achieved by the import of a single container. In this case, there is also a significant chance that the figure was the result of a recording error. Even if, after very considerable administrative effort, the date and location of the import could have been determined, there would have been no guarantee that the salt content of the particular consignment would have been recorded, even supposing the relevant records were still in existence.

29. As regards Thailand's comments on the *Gausepohl* case, the EC notes that, although the *Oberfinanzdirektion* initially issued a Binding Customs Tariff notice under subheading 0210 20 90, it later rescinded this and substituted a classification under subheading 0202 30 90. The EC does not know why the initial ruling was made, but is certain that Thailand assumes too much in saying that it implies the existence of trade in salted meat preserved for less than a few months. In any event, the

EC does not claim to know whether or not there was some trade in slightly salted meat. It merely denies that it would have been classifiable as salted, etc., meat under what is now heading 02.10.

Thailand's Response to EC Question

30. The EC notes that Thailand fails to explain why Additional Note 6(b) was not referred to in the *Gausepohl* case, if it stood for the proposition that heading 0210 referred simply to methods of preparation. Thailand can do no more than say that it was "not aware" why the note was not cited, and that the parties and the Court "could have relied on it". The reason it clear. It was undisputed in the EC (importers, Member States and Commission) that heading 0210 applied to meats which had been preserved, and it was undisputed that additional note 6(b) could not affect that understanding.

ANNEX C-10

RESPONSES BY CHINA TO QUESTIONS POSED BY THE PANEL

(14 October 2004)

China appreciates this opportunity to respond to the Panel's questions posed to third parties on 30 September 2004.

1. Has the product at issue in this case ever been imported to and/or exported from China? If so, please provide the details of classification practices that have been adopted by China concerning such product.

To China's best knowledge, China had imports and exports under subheading 02109000 of Customs Import and Export Tariff of the People's Republic of China ("Customs Tariff") in 2000 and 2001, and had no imports and exports under the same subheading since 2002. Descriptions of goods for imports and exports under subheading 02109000 read as follows:

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

China had imports and exports under subheading 02071400 of Customs Tariff in 2000, and China had no imports and exports under the same subheading since 2001. Descriptions of goods for imports and exports under subheading 02101400 read as follows:

> "Chicken cuts and offal, frozen."

For the Panel's information, relevant HS code and description of goods of China's Schedule of Concessions – Schedule CLII read as follows:

HS	Description
0210	Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal
02109000	- Other, including edible flours and meals of meat or meat offal
0207	Meat and edible offal, of the poultry of heading No. 0105, fresh, chilled or frozen"
02071400	- Of fowls of the species Gallus domesticus -- Cuts and offal, frozen

2. In paragraph 16 of its third party submission, China states that the only situation that chicken meat that has been both frozen and salted could fall under heading 0207 is when frozen chicken meat is "packed with salt as a temporary preservative during transport" rather than "impregnated with salt in all parts" with a minimum salt content of 1.2%. With regard to this statement, how does China consider chicken meat impregnated with salt in all parts could be distinguished from chicken meat packed with salt as a temporary preservative during transport?

The above-mentioned hypothetical reasoning in China's third party submission is intended to highlight the lack of textual support from the *Harmonized System* and its *Explanatory Notes* in the EC's reasoning as adopted in its Commission Regulation (EC) No. 1871/2003 of September 11, 2003.

As explained in its third party submission, China notes that the note to Chapter 2 of the *Harmonized System* and its *Explanatory Notes* explicitly provides that fresh (meat) includes meat and meat offal, packed with salt as a temporary preservative during transport. Besides, there are no identical or similar provisions or terms explaining the terms "chilled" or "frozen" in the note to Chapter 2 of the *Harmonized System* and its *Explanatory Notes*. Therefore, China understands that the note to Chapter 2 in the *Harmonized System* and its *Explanatory Notes* can not be understood as to imply that frozen meat also includes meat and meat offal, packed with salt as a temporary preservative during transport. Furthermore, even conceding that the reasoning for fresh meat could be read to apply equally to frozen meat (this concession is only made by China for argumentative purpose), frozen meat shall include meat and meat offal, packed with salt as a temporary preservative during transport only and nothing else.

China thanks this Panel for granting this opportunity to present its views on issues related to this proceeding, and hopes that this Panel will finds the above points helpful.

ANNEX C-11

RESPONSES BY THE UNITED STATES TO QUESTIONS POSED BY THE PANEL

(14 October 2004)

The United States appreciates this opportunity to respond to the Panel's questions about certain statements concerning the United States that the parties to this dispute made in their submissions. With respect to its answers to all these questions, the United States would like to recall its observation that this dispute concerns not *customs classification* as such, but rather *tariff treatment* – and in particular whether the European Communities ("EC") is providing tariff treatment to certain products that is less favorable than that provided for in its schedule of tariff concessions for the Uruguay Round, Schedule LXXX.[1] Consequently, the United States has not taken a view on the correct customs classification of the frozen boneless chicken cuts in dispute.[2] Turning now to the specific questions of the Panel:

1. With respect to the 1991 US tariff classification ruling on the classification of mechanically de-boned chicken meat from Canada referred to by Brazil in paragraph 79 of its first written submission, does the US agree with Brazil's assertion that it is possible to imply from that ruling that meat that has been frozen and cured should not be classified under heading 0207?

With respect to the 1991 US tariff classification ruling referred to by Brazil in paragraph 79 of its first written submission, the United States agrees that the product that was the subject of that ruling was classified under heading 0210. We also note, however, that the ruling does not pertain to the product that is at issue in this dispute.

2. The US is requested to comment on Brazil's argument in paragraph 95 of its first written submission that the two 1999 US classification rulings to which it refers show that frozen smoked salmon is to be classified under heading 0305 concerning, *inter alia*, fish that has been salted, in brine, dried or smoked rather than heading 0303 concerning frozen fish. In particular, is Brazil's interpretation of these rulings correct? If so, is this interpretation consistent with long-standing classification practice in the United States? Please provide all relevant support.

The two rulings to which Brazil refers in paragraph 95 of its first submission both classify frozen smoked salmon under heading 0305. The United States observes that neither of the rulings specifically discusses heading 0303 or heading 0304 (the heading referred to Brazil in paragraph 94 of its first submission), or analyzes why the fish is classified under heading 0305 rather than heading 0303 or heading 0304. Moreover, neither of the rulings specifically discusses whether the classification decision was based on the preparation or the preservation process to which the product was subject. Thus, the United States is not in a position to confirm Brazil's interpretation of the rulings reflected in paragraphs 94 and 95 of its first written submission.

[1] Third-Party Oral Statement of the United States, para. 2.
[2] *Id*. at para. 7.

3. The US is requested to comment on Brazil's argument in paragraph 96 of its first written submission that, in the US, bacon that has been salted/smoked but also frozen will be treated as salted/smoked bacon rather than frozen bacon. In particular, is Brazil's assertion correct as a general principle in the United States?

In support of its statements in paragraph 96 of its first submission, Brazil refers to a bill of lading, in which the importer claims tariff treatment for its frozen sliced bacon product under heading 0210. The United States notes that an importer's claim for tariff treatment under a particular subheading does not represent an official statement by US customs authorities on the correct classification of the product. In a 1996 ruling, however, US customs authorities ruled that frozen bacon from Denmark was properly classified under heading 0210.[3]

4. During the first substantive meeting, the EC referred to a US customs ruling of November 1993 (exhibited in EC-21) and noted that the ruling found that the product at issue fell under heading 0201 or 0202 (depending on whether it was fresh or frozen) rather than under heading 0210. Could the US indicate whether it agrees with the view expressed by the EC that this ruling stands for the proposition that frozen meat that has been deeply and homogeneously impregnated with salt should be classified under heading 0207 rather than under heading 0210 of the EC Schedule.

With respect to the 1993 ruling referred to by the EC, the United States notes that US customs authorities described the product at issue there as "similar to fresh beef sprinkled and packed in salt," whereas the product in this case is described as "deeply and evenly impregnated" with salt.[4] It is not clear how similar the two products are, and thus the United States is not in a position to confirm the proposition stated in the final sentence of this Question.

[3] New York Ruling Letter NY A80393 (March 7, 1996), as modified by Customs Ruling Letter HQ 960585 (July 20, 1998). *See* Exhibit US-1

[4] New York Ruling Letter NY A80393 (March 7, 1996), as modified by Customs Ruling Letter HQ 960585 (July 20, 1998). *See* Exhibit US-1.

ANNEX C-12

**RESPONSES BY THE WORLD CUSTOMS ORGANIZATION
TO QUESTIONS POSED BY THE PANEL
AFTER THE FIRST SUBSTANTIVE MEETING**

(29 October 2004)

This is with reference to your letter of 30 September 2004 requesting the WCO to respond to nine questions posed in connection with the WTO Dispute Settlement Panel on *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* pursuant to the requests by Brazil in document WT/DS269/3 and Thailand in document WT/DS286/5.

The WCO Secretariat's response is set out below. For ease of reference, the questions have been reproduced and the response follows immediately after each question:

1. What factors and material are considered when deciding the heading under which a product should be classified, including factors and material considered when interpreting the terms of headings and any relevant Explanatory Notes? In general terms, how are such factors and material assessed and applied to the product in question?

First of all, it should be pointed out that classification in the Harmonized System (HS) is based on the wording of the legal texts, i.e., the terms of the headings and any relative Section, Chapter and Subheading Notes and the General Interpretative Rules of the Harmonized System. Furthermore, the HS Explanatory Notes (the official interpretation of the Harmonized System), read in conjunction with the legal texts, are taken into consideration.

Note: The Explanatory Notes to the Harmonized System normally follow the systematic order of that instrument. They provide a commentary on the scope of each heading, giving a list of the main products included and excluded, together with technical descriptions of the goods concerned (their appearance, properties, method of production and uses) and practical guidance for their identification.

When goods are classified in the Harmonized System, it is always done on the basis of the objective characteristics of the product at the time of importation. The factor which determines the essential character of a product will vary from one product to another. It could, for example, be the nature of a material or the role of the constituent material. The determination of the essential character of a product can be done in several ways. The most obvious is through a visual inspection of the product, including indications on the packing. Reference can also be made to accompanying documents. In some cases, however, laboratory analysis may be required.

In the absence of clear criteria in the HS legal texts or in the HS Explanatory Notes, it is the normal perception that a term or an expression should reflect the common meaning, which would normally be the same as that used in trade. Therefore, in such cases the attributed lexicographic and commercial definitions could be applied when determining the characteristics of a product.

Since headings 02.07 and 02.10 cover "frozen" and "salted" products, respectively, it would have to be determined whether the product at issue has essentially the character of a "frozen" or of a "salted" product. It would probably be straightforward to determine whether or not the product is "frozen", whereas recourse to laboratory analysis might be required to determine whether it can be regarded as a "salted" product within the meaning of heading 02.10.

With regard to lexicographic definitions, the Tenth Revised Edition (2001) of the Concise Oxford Dictionary describes the term *"freeze" ("frozen")* as "be or cause to be very cold" and as a sub-sense "store at a very low temperature as a means of preservation", whereas the term *"salted'* refers to "season or preserve with salt".

2. What is the rationale behind the product coverage of the 4-digit heading and the 6-digit heading levels in the Harmonized System?

When the HS was developed, the principal objective was to meet the needs of all those concerned with world trade (Customs, international trade statistics, transport, etc.). Consequently, almost 60 countries and more than 20 international and national organisations (including GATT, UNCTAD, ISO, ICC, ICS, and IATA) took part in the activities by making proposals, commenting on proposals or participating in the decision making procedure by other means.

In general, the HS was developed from the former "CCC Nomenclature" (Customs Co-operation Council Nomenclature – CCCN) that was applied by a large number of countries before the HS entered into force on 1January 1988, as well as the United Nations Standard International Trade Classification (SITC), Rev. 2, which was correlated to the CCCN. However, account was also taken of a wide range of other national Customs tariffs or statistical nomenclatures based on the CCCN (Japan, Latin American Free Trade Association, EC's statistical nomenclature (NIMEXE), for example) as well as classification systems not based on the CCCN (such as the Customs Tariffs of USA and Canada). Furthermore, several transport nomenclatures were consulted.

The separate identification of goods or group of goods was, as a general rule, approved only if there was agreement amongst participants that the goods or group of goods were significant in international trade.

Consequently, the rationale behind the product coverage in the HS was to meet the needs of those involved in international trade by including goods or groups of goods with a significant volume of international trade, taking into consideration the structure of the nomenclatures consulted.

3. What is the rationale underlying the descriptions used in the various headings contained in Chapter 2 of the Harmonized System? Among other things, why is it that, in relation to pig fat covered under heading 02.09, no distinction is drawn between, on the one hand, frozen pig fat and, on the other, salted pig fat? In other words, why were separate headings not considered necessary for frozen pig fat and salted pig fat?

Chapter 2 of the Harmonized System is based on the structure of the CCCN. For information, it should be noted that the CCCN, which had been used since 1959, was, to some extent, based on the former "Geneva Nomenclature". The structure of Chapter 2 in the Geneva Nomenclature, the CCCN and the HS is set out in the Annex to this reply.

However, the historical development of the two HS headings at issue (02.07 and 02.10) has been as follows:

Item 14	Dead poultry. *(Geneva Nomenclature)*
02.02	Dead poultry (that is to say, fowls, ducks, geese, turkeys and guinea fowls) and edible offals thereof (except liver), fresh, chilled or frozen. *(CCCN)*
02.07	**Meat and edible offal, of the poultry of heading 01.05, fresh, chilled or frozen. *(HS)***

Item 18	Meat, salted, dried, smoked, cooked, or otherwise simply prepared. *(Geneva Nomenclature)*
02.06	Meat and edible meat offals (except poultry liver), salted, in brine, dried or smoked. *(CCCN)*
02.10	**Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal. *(HS)***

With regard to the questions relating to "pig far' covered by heading 02.09, reference should also be made to the Annex. As can be seen, this heading was (subject to minor editorial amendments) copied directly from the CCCN, and since no requests for further subdivisions in the HS had been received, all "pig fat, free of lean meat" was grouped under this heading.

4. What has been the history of interpretation of headings 03.03, 03.04 and 03.05 of the Harmonized System?

The Harmonized System Committee has not considered any classification issues related to headings 03.03, 03.04 or 03.05 in the past.

The Secretariat, however, has considered the classification of "frozen, salted fish" in 1997 at the request of one of its Members. The product at issue was described as "frozen, salted fish which was salted before freezing, not only as a temporary preservative during transportation but through a normal salting process".

In its response, the Secretariat noted that the Nomenclature does not offer any specific criteria as to the salt content needed to constitute "salted fish". In general, fish sprinkled with salt water or packed with salt or fish lightly salted as a temporary preservation during transportation is classified as fresh, chilled or frozen fish.

The Secretariat subsequently concluded that salted fish, classifiable in heading 03.05, did not need to be frozen since salt was added in such a way that it penetrated into the product and preserved it. The Secretariat further indicated that it was not aware of fish which had been salted in this way but still needed to be frozen in order to be preserved. Finally, the Secretariat expressed its doubts as to whether fish that had been slightly salted and subsequently frozen was classifiable in heading 03.05.

5. What is the relationship between, on the one hand, headings 03.03 and 03.04 of the Harmonized System and heading 03.05 on the other hand, if any?

The Secretariat would like to extend this question to include heading 03.02 as well, because headings 03.02 and 03.03 cover fish that are whole, headless, gutted, or in cuts containing bones or cartilage, whereas heading 03.04 covers fish fillets and other fish meat without bones. For the whole fish etc. a distinction has been made according to the processing, i.e., heading 03.02 covers fresh and chilled fish, whereas heading 03.03 covers frozen fish.

However, this distinction has not been made in heading 03.04 for fish fillets and other fish meat without bones, since this heading covers fresh, chilled and frozen products.

In heading 03.05 no distinction has been made between fish and fish cuts with bones in and fish fillets. Consequently, this heading covers all dried, salted or smoked fish and fish meat, including fillets.

The structure of these headings also stems from the CCCN. For example, the text of HS heading 03.05 is exactly the same as that of CCCN heading 03.02. The only change was the inclusion of a new product group "flours, meals and pellets of fish, fit for human consumption".

6. In the context of headings 02.07 and 02.10, would "specific" in General Rule of Interpretation 3(a) be relevant and in what way?

Provided that the product at issue cannot be classified in accordance with General Interpretative Rule (GIR) 1, i.e., according to the terms of the headings and any relative Section or Chapter Notes, GIR 3 would have to be applied.

GIR 3(a) reads:

> The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. *(emphasis added)*.

It is not possible to lay down hard and fast rules by which to determine whether one heading more specifically describes the goods than another. However, the Explanatory Notes to the Harmonized System provide the following guidelines in this respect:

(a) A description by name is more specific than a description by class (e.g., shavers and hair clippers, with self-contained electric motor, are classified in heading 85.10 and not in heading 84.67 as tools for working in the hand with self-contained electric motor or in heading 85.09 as electro-mechanical domestic appliances with self-contained electric motor).

(b) If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.

Examples of the latter category of goods are:

(1) Tufted textile carpets, identifiable for use in motor cars, which are to be classified not as accessories of motor cars in heading 87.08 but in heading 57.03, where they are more specifically described as carpets.

(2) Unframed safety glass consisting of toughened or laminated glass, shaped and identifiable for use in aeroplanes, which is to be classified not in heading 88.03 as parts of goods in heading 88.01 or 88.02 but in heading 70.07, where it is more specifically described as safety glass.

It should be noted that, in the Secretariat's view, the second part of GIR 3(a), indicating that "*when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods*" cannot be applied in this case, since it is not a "mixed or composite good".

With regard to the product at issue, it could be argued that:

- heading 02.07 provides the most specific description since it refers to *"meat of **poultry**, frozen"*, whereas heading 02.10 refers to *"**meat**, salted"*, in general;

or

- the reference to the specific type of meat (poultry) in heading 02.07 should not be taken into consideration since it is the processing *(freezing* and *salting)* that matters when determining the classification in the case at issue, giving rise to a possibility of 02.10 providing a more specific description.

7. From whose perspective are the "specific" characteristics of a product judged, i.e. consumers and/or producers or should such an assessment be made by reference to the objective intrinsic qualities of a product? If the latter, how are the intrinsic qualities of a product identified? What would be the intrinsic qualities attached to products covered by headings 02.07 and 02.10 of the Harmonized System?

When a product is classified in the Harmonized System, it is always done on the basis of the objective characteristics of the product at the time of importation and on the basis of the terms of the headings and any relative Section or Chapter Notes.

In the absence of clear criteria in the HS legal texts or in the HS Explanatory Notes, lexicographic and commercial definitions could also be applied when determining the characteristics of a product.

The Secretariat is not certain as to what is meant by the expression "intrinsic qualities". However, it has interpreted it to mean "essential character", which is a commonly known expression in connection with tariff classification (cf. for example GIR 3(b)).

As the Explanatory Note to GIR 3(b) (item (VIII) on page 4) stipulates, *"the factor which determines essential character will vary as between different kinds of goods. It may, for example, be*

determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a *constituent material in relation to the use of the goods."*

It is to be noted, however, that GIR 3(b) only relates to (i) mixtures, (ii) composite goods, consisting of different materials, (iii) composite goods consisting of different components and (iv) goods put up in sets for retail sales. Given that the product in question does not fall in any of the four categories, Rule 3(b), in the view of the Secretariat, would not operate.

In order to be classified in heading 02.07, the product should have the character of "frozen poultry meat" and it should not be more specifically covered by another heading in the Nomenclature. Similarly, a product classifiable in heading 02.10 should have (related to the Panel-case) the character of a "salted" product and it should not be more specifically covered by another heading in the Nomenclature.

See also the response to Question 1 above.

8. The WCO is requested to provide details of classification practice with respect to headings 02.07 and 02.10 of the Harmonized System.

The Harmonized System Committee has not considered any classification issues related to headings 02.07 and 02.10 in the past.

The Secretariat, however, received a Request for Classification Advice for a similar product in February 2003 from one of its Members (none of the countries involved in the WTO Panel Case). However, due to lack of precise information about the processing, the Secretariat was not in a position to express its opinion on the classification.

9. The WCO is requested to provide details of classification practice with respect to headings 03.03 and 03.05 of the Harmonized System.

Please refer to the response to Question 4 above.

ANNEX

Development of Chapter 2:

The **Geneva-Nomenclature** had the following structure with regard to "meat":

Item 13	Butcher's meat (i.e., beef, veal, mutton, Iamb, pork and horse).
Item 14	Dead poultry.
Item 15	Dead game.
Item 16	Other fresh, chilled or frozen meat, excluding bacon.
Item 17	Bacon.
Item 18	Meat, salted, dried, smoked, cooked, or otherwise simply prepared.

Chapter 2 of the **CCCN** (from 1959) was structured as follows:

02.01	Meat and edible offals of the animals falling within heading No. 01.01, 01.02, 01.03 or 01.04, fresh chilled or frozen.
02.02	Dead poultry (that is to say, fowls, ducks, geese, turkeys and guinea fowls) and edible offals thereof (except liver), fresh, chilled or frozen.
02.03	Poultry liver, fresh, chilled, frozen, salted or in brine.
02.04	Other meat and edible meat offals, fresh, chilled or frozen.
02.05	Pig fat free of lean meat and poultry fat (not rendered or solvent-extracted), fresh, chilled, frozen, salted, in brine, dried or smoked.
02.06	Meat and edible meat offals (except poultry liver), salted, in brine, dried or smoked.

Chapter 2 of the **Harmonized System** has the following structure:

02.01	Meat of bovine animals, fresh or chilled.
02.02	Meat of bovine animals, frozen.
02.03	Meat of swine, fresh, chilled or frozen.
02.04	Meat of sheep or goats, fresh, chilled or frozen.
02.05	Meat of horses, asses, mules or hinnies, fresh, chilled or frozen.
02.06	Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen.
02.07	Meat and edible offal, of the poultry of heading 01.05, fresh, chilled or frozen.
02.08	Other meat and edible meat offal, fresh, chilled or frozen.

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

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

The principal changes from CCCN Chapter 2 to HS Chapter 2 can be described as follows:

1. CCCN heading 02.01 was split into six new HS headings (02.01 to 02.06), with offals of the animals mentioned in the first five new HS headings grouped separately in new HS heading 02.06.

2. Fresh, chilled and frozen poultry liver falling within CCCN heading 02.03 was grouped with the fresh, chilled or frozen poultry meat and other edible poultry offal of CCCN heading 02.02 to form new HS heading 02.07.

3. The reference within brackets in CCCN heading 02.05 (HS heading 02.09) to "solvent extraction" was deleted in order to complement the provisions of heading 15.01 which had been amended to reflect that "pig or poultry fat" of that heading is always first rendered and then either pressed or solvent-extracted.

4. The words "(except poultry liver)" were deleted from CCCN heading 02.06 (HS heading 02.10), with the result that HS heading 02.10 will cover (i) poultry liver salted or in brine of CCCN heading 02.03 and (ii) dried and smoked poultry livers which were classified in CCCN heading 16.02. In addition, a specific reference to "edible flours and meals of meat or meat offal" was inserted in new HS heading 02.10; this did not, however, result in a change in scope.

ANNEX C-13

RESPONSES BY THE WORLD CUSTOMS ORGANIZATION TO QUESTIONS POSED BY THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

(2 December 2004)

This is with reference to your letter of 19 November 2004 requesting the World Customs Organization Secretariat to respond to five additional questions posed in connection with the WTO Dispute Settlement case on *European Communities – Customs Classification of Frozen Boneless Chicken Cuts.*

The WCO Secretariat's response is set out below. For ease of reference, the questions have been reproduced the response immediately following each question.

10. Please provide* an *illustrative list of the kinds of products the WCO Secretariat considers would clearly qualify for classification under heading 02.10.

On the basis of the text of heading 02.10, the Secretariat would like to note that this heading covers all kinds of edible meat and meat offal salted, in brine, dried or smoked, other than products covered in heading 02.09. Some examples are also provided in the pertinent part of the Explanatory Note to heading 02.10 (on page 21). The other group of products included in the said heading comprises edible flours and meals of meat or meat offal. Thus, products such as salted or smoked bacon, ham or shoulder, as well as salted or smoked edible offal such as feet, tails, livers, throats and tongues would, in the opinion of the Secretariat, clearly fall in heading 02.10.

11. Could or do practicalities associated with verification of criteria in tariff headings affect the way in which interpretation of tariff headings and classifications are undertaken by the WCO?

The Secretariat understands your question as follows: whether or not practical aspects of verification of classification criteria are taken into account for the purposes of classification of commodities by the WCO (i.e., the Harmonized System (HS) Committee and the WCO Council).

In this respect it should be noted that when such practical aspects are recognised as being applicable worldwide, they may be incorporated in the HS Nomenclature provisions or in the Explanatory Notes on the basis of respective decisions by the HS Committee. These decisions, are subsequently approved by the WCO Council. Hence, practical aspects of verification of classification criteria are taken into account for the purposes of classification of commodities at the HS level once they have become part of the legal text or of the Explanatory Notes (see, for example, testing methods for coated paper or paperboard in the General Explanatory Note to Chapter 48 (on page 871)).

12. What was the rationale for the reference to the term "provisionally preserved" in heading 08.14? What importance should be attached to this reference, if any, for other headings in the HS for which the term "preserved" has not been explicitly mentioned?

Having consulted the background documents, the Secretariat would like to inform you that heading 08.14 was originally included in the Customs Co-operation Council Nomenclature (CCCN) dated 1950 as heading 08.13 which read: "Peel of melons and citrus and other fruit, fresh, frozen, dried, in brine, in sulphur water, or in other temporary preservative solution." However, in the 1955 Nomenclature this text was replaced with the followin g: "Peel of melons and citrus fruit, fresh, frozen, dried, or provisionally preserved in brine, in sulphur water or in other preservative solutions."

However, no information has been traced by the Secretariat so far as to the rationale behind this amendment of the heading text.

In the 2002 edition of the HS Nomenclature heading 08.14 covers "peel of citrus fruit or melons (including watermelons) fresh, frozen, dried or provisionally preserved in brine, in sulphur water or in other preservative solutions". The same products having been preserved by processes other than those specified in the heading text (for instance, by vinegar, acetic acid or sugar), would be covered by Chapter 20. The Secretariat understands that the term "provisionally preserved" serves to distinguish between finished products of Chapter 20, on the one hand, and peel of citrus fruit or melons subjected only to certain preservation processes, but not further prepared, on the other. This reference is apparently intended to widen the scope of heading 08.14 to include not only fresh, frozen and dried products but also those provisionally preserved by processes listed in the heading text. It is to be noted that brine and sulphur water are examples of preservative solutions for the products of heading 08.14.

By virtue of General Interpretative Rule 1, "classification shall be determined according to the terms of the headings and any relative Section or Chapter notes". Thus, in the absence of an explicit provision that the term "preserved" has a certain bearing on headings other than 08.14, this term has no importance for the classification of products in other headings of the Nomenclature, unless the same term is found in the text of a heading as is the case with heading 08.12, for example.

13. With respect to the 1997 letter from the WCO Secretariat to Cypriot Customs authorities (WCO Ref. 97.N.971 – Ma/FI):

(a) Please explain what was meant by a "normal salting process"?

(b) Insofar as the WCO Secretariat expressed doubts as to whether fish that had been slightly salted and subsequently frozen was classifiable in heading 03.05, please explain what is meant by "slightly salted"?

(c) As regards the WCO Secretariat's statement that it was unaware of frozen fish which had been really salted and still required freezing to be preserved:

(i) What is meant by "really salted"?

(ii) Does the statement indicate that, if fish existed that had been "really salted" but was not preserved, it would, nevertheless, be classifiable under heading 03.05?

(d) Does the WCO consider that the analysis in this letter would have differed had the product in question been chicken? If so, in what respects?

14. Please comment on a letter dated 2003 from the WCO Secretariat to Bulgarian Customs authorities (WCO Ref. 03NL0217 – GI/FI). In particular, in this letter, is the WCO Secretariat suggesting that the ordinary meaning of a tariff heading may be determined according to relevant national legislation ? If not, please explain why and how the WCO Secretariat considered the EC's Combined Nomenclature to be relevant in the context of the issue before the WCO Secretariat in that case.

With respect to questions 13 and 14 in your letter, I note that they are related to correspondence between two WCO Members and the WCO Secretariat. This kind of correspondence should, in my view, not be taken into account by third parties unless the parties involved have

expressed their approval in using the information contained in that correspondence. I am not aware of such approval and will, therefore, refrain from commenting on the questions at issue.

Furthermore, the correspondence at issue appears not to be relevant with respect to the scope of certain HS headings referred to in your letter and consequently not relevant with regard to the appropriate classification of the product under consideration. Moreover, both requests did not provide the information necessary for the Secretariat to give a firm opinion vis-à-vis the appropriate HS classification.

Harmonized System Dispute Settlement

For my part, it appears that the case before your panel concerns a classification question involving several Contracting Parties to the HS Convention. In this connection, I would like to call your attention to the provisions of Article 10 of the said Convention, which stipulates that "any dispute between Contracting Parties concerning the interpretation or application of this Convention shall, so far as possible, be settled by negotiation between them" and "any dispute which is not so settled shall be referred by the Parties to the dispute to the Harmonized System Committee which shall thereupon consider the dispute and make recommendations for its settlement.

That being the case, and taking into account the fact that the parties involved, which are all Contracting Parties to the HS Convention, have not followed all the provisions of Article 10 referred to above, I suggest that the settlement procedure laid down in the HS Convention should be followed first before your panel may make its decision.

If the HS Contracting Parties involved in this dispute are not prepared or not able to follow this procedure, the WTO may wish to request the WCO Secretary General to take the necessary steps with a view to inserting this issue on the agenda of the HS Committee.

The next session of the HS Committee is scheduled from 14 to 24 March 2005. If the matter is to be included in the agenda for this session, please provide the WCO Secretariat with all information required for the HS Committee to arrive at a classification decision regarding the product under consideration. It would be appreciated to receive this information as soon as possible (and preferably by mid-January 2005), thus allowing the WCO Secretariat to prepare and publish the respective working document in good time.

ANNEX C-14

COMMENTS BY BRAZIL, THAILAND AND THE EUROPEAN COMMUNITIES ON THE RESPONSES BY THE WORLD CUSTOMS ORGANIZATION TO THE QUESTIONS POSED BY THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

(16 December 2004)

COMMENTS BY BRAZIL

In accordance with the timetable established by the Panel in "*European Communities – Customs Classification of Frozen Boneless Chicken Cuts*" (WT/DS269 and 286), please find attached Brazil's Comments on the Responses by the WCO to Questions posed by the Panel.

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Question 10

When asked to provide an illustrative list of the products that clearly fall under heading 0210, the WCO Secretariat's first and immediate response was that heading 0210 covers **all kinds** of edible meat salted, in brine, dried or smoked. Clearly, **all kinds** of meat cannot be reduced to a limited number, as proposed by the EC (Parma ham, prosciutto, jamón serrano, bacon).[1] We have shown that other salted/dried/smoked meats - such as rabbit meat; turkey meat; goat meat; duck meat; chicken meat; etc. - also fall under heading 0210.[2]

In sequence, the Secretariat informed that some examples of products covered by heading 0210 are provided in the Explanatory Note to heading 0210 and pointed out that "*products such as salted or smoked bacon, ham, shoulder would (…) clearly fall under heading 0210*". Regarding this part of the Secretariat's response, Brazil merely observes that the mentioned Explanatory Note refers to bacon, ham or shoulder as examples of smoked meat.[3] These examples were listed by the Secretariat precisely because they are explicitly provided in the HS Explanatory Note to heading 0210. These products, however, in **no** way make up an exhaustive list of products falling under heading 0210. In this regard, we have provided a more comprehensive list - taken from the WCO's HS Commodity Database – of examples of salted meat falling under subheading 0210.90 of the HS (1996 version). According to the HS Commodity Database, salted meat of chicken clearly qualifies for classification under heading 0210.

Question 11

Brazil would like to focus on the last part of the WCO Secretariat's response, which provides that "practical aspects of verification of classification criteria are taken into account for purposes of classification of commodities at the HS level **once they have become part of the legal text or of the Explanatory Notes**" (emphasis added). We remind the Panel that the Secretariat informed in an

[1] EC's First Written Submission, para. 41; Exhibit EC-5; EC's Closing Statement Following First Substantive Meeting, para. 4; EC's Replies to Panel's Questions Following the First Substantive Meeting, para. 91; EC's Replies to Brazil's Questions Following the First Substantive Meeting, paras. 5 and 11; EC's Second Written Submission, paras. 35 and 36; EC's Second Oral Statement, para. 36.

[2] Exhibit BRA-43.

[3] Exhibit BRA- 24 and Exhibit EC-27.

earlier response that, to date, the HS Committee had not considered any classification issues related to headings 0207 and 0210.[4] Thus, in the absence of HS Committee decisions on practical aspects of verification of classification criteria to be taken into account for purposes of classification of products under heading 0210, classification must be based simply on the wording of the legal text read in conjunction with the HS Explanatory Notes.[5] Regarding HS Explanatory Notes, we reproduce below part of a response provided by the WCO to the Panel:[6]

"*Notes: The Explanatory Notes to the Harmonized System normally follow the systematic order of that instrument. They provide a commentary on the scope of each heading, giving a list of the main products included and excluded, together with technical descriptions of the goods concerned (their appearance, properties, method of production and uses) and practical guidance for their identification*" (emphasis added)

We stress that **nowhere**, absolutely **nowhere**, in the legal text or in the HS Explanatory Note to heading 0210 are the criteria proposed by the EC in the verification of products under heading 0210 provided for ("readily detectable", "instantly recognizable", "recognizably different"). On the contrary, the only guidance provided in that Explanatory Note is that it applies to all kinds of meat which have been **prepared** as described in the heading. Furthermore, the criteria proposed by the EC are by no means "recognized as being applicable worldwide".

Question 12

In the case at hand, and as advanced by the WCO Secretariat, in the absence of an explicit provision that the term "preserved" has a certain influence on headings other than 0814 of the HS, the term "preserved" of heading 0814 has **no** importance for the classification of salted meat in heading 0210, unless that same term ("preserved") was found in the text of heading 0210. The term "preserved" is **not** found in the text of heading 0210. In fact, neither the text of heading 0210 nor the Explanatory Note to that heading refers to the terms "preserved" or "preservation". In contrast, the Explanatory Note to heading 0210 explicitly states that meat covered under that heading 0210 is that which has been **"prepared"** by salting, brining, drying and smoking.

Questions 13 and 14

To the WCO Secretariat, the correspondence mentioned in questions Nos. 13 and 14 – letters of advice to customs authorities on the classification of frozen salted fish under headings 0303 or 0305 and on the classification of frozen salted swine meat under headings 0203 or 0210 – are **not** relevant to the scope of headings 0207 and 0210 of the HS and, consequently, not relevant with regard to the appropriate classification of the product under consideration: frozen salted chicken cuts.

Apparently, the Secretariat understands that these letters of advice are **not** relevant because they dealt with products different from the one before the Panel. We agree. Within the context of interpretation of tariff concessions, we have stated that a letter of advice on a product that is different from the product at issue cannot be seriously considered as relevant subsequent practice in the application of heading 0210 of Schedule LXXX (Article 31.3(b) of the Vienna Convention).[7]

Nonetheless, we stress the fact that the WCO Secretariat letter to the Bulgarian customs authorities, mentioned in question No. 14, dealt precisely with classification under heading 0210 and

[4] WCO's Response to Panel's Questions, Question 8.
[5] WCO's Response to Panel's Questions, Question 1.
[6] *Id.*
[7] Brazil's Comments to the EC's Response to Questions Following the Second Substantive Meeting, Question No. 99.

Additional Note 7 of Chapter 2 of the CN **without ever** mentioning the EC's so-called "well-enshrined" concept of preservation.

Harmonized System Dispute Settlement

With regard to the WCO Secretariat's considerations regarding the dispute before the Panel and the HS dispute settlement, Brazil has the following comments.

Brazil is fully aware of the dispute settlement provisions of Article 10 of the HS Convention. Prior to our request for consultations at the WTO we sought guidance and clarification from the WCO with respect to the meaning of headings 0207 and 0210. At that time, the WCO provided no clarifications with respect to the interpretation of the mentioned headings and simply directed Brazil to the WCO dispute settlement provisions found in Article 10 of the HS Convention.

Brazil was, thus, aware of the settlement procedures at the WCO but deliberately chose not to pursue them. In the course of these proceedings, we have explained why Brazil decided to resort to the WTO's - and not WCO's - dispute settlement.[8]

The WCO's Secretariat does not seem to realize that the case at issue is not a classification case. It is a case of less favourable tariff treatment within the meaning of Article II of the GATT 1994. Specifically, it is a case of duties being imposed on imports of salted chicken meat in excess of the duty provided for that product in Schedule LXXX. WCO Secretariat fails to understand the nature of the instant dispute when it reduces it to "classification questions involving several Contracting Parties to the HS Convention".

In assessing whether the EC has violated Article II, the Panel must examine Schedule LXXX according to the rules of treaty interpretation found in the Vienna Convention. As already advanced, the HS and its Explanatory Notes are definitely relevant context in the interpretation of Schedule LXXX, but are **only** one part of the interpretative exercise the Panel must undertake. In turn, **WCO decisions** may be relevant in the interpretation of Schedule LXXX but as subsequent practice in the application of the treaty.[9]

We share the EC's opinion that "given the institutional frameworks of the two organizations, it is obviously important that the nature of WTO dispute proceedings should remain distinct from decision making in the WCO".[10] The two dispute settlement mechanisms are distinct in terms of obligations, timeframes, scope and procedures.

Most striking is the WCO Secretariat's advise to the Panel that, if the parties to this dispute are not prepared or able to follow the settlement procedure laid down in the HS Convention, "*the WTO may wish to request the WCO Secretary General to take the necessary steps with a view to inserting this issue on the agenda of the HS Committee.*"

The WCO Secretariat is obviously unaware of the nature of the WTO as reflected in its constituent agreements. It apparently ignores that the WTO is a Member-driven organization that does not have the power, or mandate, to act on behalf of its Members – certainly not on behalf of Brazil. Nor has any WTO representative or body been empowered to solve a dispute concerning two or more WTO Members outside the scope of the WTO.

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[8] Brazil's Response to the Panel's Question Following the First Substantive Meeting, Question No. 9.
[9] WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 90.
[10] EC's Second Oral Statement, para. 13.

It is also not clear to us who exactly is the WTO agent that would request the insertion of "this issue in the agenda of the HS Committee". The WCO Secretariat could not possibly be referring to the Panel, unless it is unfamiliar with the provisions of the DSU. Obviously, while the Panel has the right to seek information and technical advice from any individual or body which it deems appropriate, as provided under Article 13.1 of the DSU, it does **not** have the right to abdicate its function. A function that was conferred to it by the Members. Article 11 of the DSU establishes that the Panel's function is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. Accordingly, it is the Panel's task – and not the HS Committee's - to make an objective assessment of the matter before it, including the assessment of the facts of the case and the applicability of and conformity with the covered agreements. In the present case, the Panel is perfectly able to carry out its function in interpreting the precise obligations that derive from heading 0210 of Schedule LXXX.

The WCO Secretariat seems to think that if the HS Committee arrives at a classification decision, the Panel will then – and only then – be able to make its own ("*I suggest that the settlement procedure laid down in the HS Convention should be followed first before your panel may make its decision*"). As shown above, this is not so: this case is about the interpretation of tariff concessions. In this connection, we recall that the Appellate Body in *EC – Computer Equipment* considered that in interpreting tariff concessions in Schedule LXXX, **decisions of the WCO** may be relevant merely as subsequent practice in the application of Schedule LXXX.[11]

COMMENTS BY THAILAND

Thailand wishes to make the following comments on the letter dated 2 December 2004 from the Secretary-General of the World Customs Organization (WCO) responding to the Panel's five additional questions posed in connection with the referenced proceedings.

In its response to question 12 concerning the importance of the term "provisionally preserved" in HS heading 08.14, the WCO states that the reference to this term is apparently intended to widen the scope of heading 08.14 to include products provisionally preserved by processes listed in the heading text, namely those preserved in preservative solutions, such as brine or sulphur water. The WCO confirms the importance of the General Rule of Interpretation 1 which states that "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes." Thailand notes that the European Communities has stated in its response to question 118 posed by the Panel that "… the word preservation is not to be found in HS heading 02.10." The EC nevertheless continues to insist that heading 02.10 "has at its heart a concept which the EC in these proceedings has termed 'preservation' but which it might as easily have referred to as 'long-term preservation.'" However, the WCO has made clear that classification must be determined on the basis of the terms of the headings and not on any general concepts of preservation or long-term preservation that a party believes to be at the heart of a heading. The term "salted" appears in the heading text of 0210. The EC has itself provided a clear definition for the objective criteria to be taken into account for classifying goods as "salted" under heading 0210, namely the definition set out in Regulation 535/94.

On a more general note, Thailand wishes to express its strong concerns with the suggestion of the WCO Secretary-General that parties to this dispute should follow the settlement procedures laid down in the HS Convention before the Panel makes its decision, or failing the decision of the parties to take this step, that the WTO should "request the WCO Secretary-General to take the necessary steps" to place this issue on the agenda of the next HS Committee meeting. As Thailand has stated throughout these proceedings, this dispute involves the less favourable treatment accorded by the EC as a result of the classification of the product at issue and not the customs classification of the product

[11] WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 90.

per se in the Harmonized System. The main issue in this dispute, therefore, is the scope of the EC's obligations under its Schedule of Concessions at the time the EC agreed to be bound by the WTO Agreement. As the United States noted in its third-party oral statement, " … in analyzing the meaning of the terms of the relevant concession, one must consider evidence of how the EC understood those terms at the time the EC made the concession." Therefore, in Thailand's view, the issue in this dispute is not whether salted chicken that is frozen falls within heading 0210 of the Harmonized System, which the WCO may be competent to assess. The issue is whether salted chicken that is frozen falls within the terms of heading 0210 (as the EC understood the heading in 1994) of the EC's Schedule of Concessions, a matter which the WCO is not competent to assess.

Thailand is requesting the Panel to find that the EC is in violation of its WTO obligations by providing less favourable treatment within the meaning of GATT Article II by imposing ordinary customs duties on the product at issue in excess of those set forth in the EC's Schedule of Concessions. Thailand notes that Article 23 of the DSU provides that when Members seek redress of a violation of obligations under the covered agreements, they shall have recourse to, and abide by, the rules and procedures of the WTO dispute settlement system.

Furthermore, Thailand submits that the Panel's terms of reference require that it examine the matter referred to it by the Complainants in the light of the relevant provisions of the GATT. As provided in Article 11 of the DSU, the function of panels is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. The fact that the WCO has a dispute settlement mechanism for customs classification matters does not mean that the Panel is absolved from its responsibility to examine the matter in the light of the relevant provisions and to make the appropriate recommendations to assist the DSB to make its rulings.

Thailand trusts that the positive resolution of this dispute will remain within the jurisdiction of the WTO dispute settlement system.

COMMENTS BY THE EUROPEAN COMMUNITIES

Thank you for your letter dated 7 December 2004, transmitting the WCO responses to the second set of questions and inviting the EC to comment on them.

As regards the WCO's response to questions 13/14, the EC can confirm that, after having initially become aware of the 1997 letter from the WCO to the Cypriot authorities when examining the WCO's archives, it sought and obtained the agreement of the Cypriot customs authorities before submitting the correspondence to the Panel.[12]

The EC believes that such correspondence is relevant because the structure of Chapter 03 is similar in all material respects to that of Chapter 02. The WCO's letter to the Cypriot authorities clearly displays the WCO's understanding that the term "salted" in heading 0305 concerned those products which had been salted for preservation.

Finally, the EC reserves the right to comment further on the issues raised in the final four paragraphs of the WCO's letter in the event that any form of initiative is proposed in that respect.

[12] The EC would note that the Republic of Cyprus is now a Member of the EC, although in 1997 it was fully responsible for conducting its own customs and trade policy.