WORLD TRADE ORGANIZATION

WT/DS269/R
30 May 2005

(05-2074)

Original: English

EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF FROZEN BONELESS CHICKEN CUTS

Complaint by Brazil

Report of the Panel

TABLE OF CONTENTS

Page

LIST OF ANNEXES vii

TABLE OF CASES CITED IN THIS REPORT ix

LIST OF ABBREVIATIONS x

I. INTRODUCTION 1

II. FACTUAL ASPECTS 2

A. EC SCHEDULE LXXX 2

B. THE EUROPEAN COMMUNITIES' COMBINED NOMENCLATURE 3

C. HARMONIZED SYSTEM 4

D. EC REGULATIONS AND DECISIONS 6

1. EEC Regulation No. 2658/87 6

2. EC Regulation No. 535/1994 6

3. EC Regulation No. 3115/1994 7

4. EC Regulation No. 1223/2002 8

5. EC Decision 2003/97/EC 9

6. EC Regulation No. 1871/2003 10

7. EC Regulation No. 1789/2003 10

8. EC Regulation No. 2344/2003 11

III. PARTIES' REQUESTS FOR FINDINGS, RECOMMENDATIONS AND SUGGESTIONS PARTIES' REQUESTS FO

2. Relationship between the European Communities' Combined Nomenclature and the Harmonized System 19

C. THE PANEL'S TERMS OF REFERENCE 19

1. Defining the scope of the Panel's terms of reference 19

2. Measures 20

(a) Measures specifically identified in the Panel requests 20

(b) Measures not specifically identified in the Panel requests 20

(i) Arguments of the parties 20

(ii) Analysis by the Panel 22

3. Products 24

(a) Arguments of the parties 24

(b) Analysis by the Panel 25

4. Summary and conclusions regarding the Panel's terms of reference 25

D. INTERPRETATION OF THE EFFECT OF THE MEASURES AT ISSUE 25

(i) EC Regulation No. 1223/2002 25

(ii) EC Decision 2003/97/EC 25

Arguments of the parties 25

Analysis by the Panel 26

(iii) Summary and conclusions regarding the effect of the measures at issue 27

E. CHARACTERIZATION OF PANEL'S TASK IN THIS CASE 27

1. Arguments of the parties 27

2. Comments by the World Customs Organization 28

3. Analysis by the Panel 29

F. ARTICLE II OF THE GATT 1994 30

1. Main claims of the parties 30

(a) Parties' claims 30

(b) Analysis by the Panel 30

2. Treatment of the products at issue 32

(a) Arguments of the parties 32

(b) Analysis by the Panel 33

(i) Treatment in the EC Schedule 33

(ii) Treatment under the measures at issue 33

(iii) Less favourable treatment 34

3. Burden of proof 35

4. Summary and conclusions regarding the interpretation of Article II of the GATT 1994 35

G. INTERPRETATION OF THE EC SCHEDULE 36

Summary and conclusions regarding the EC Schedule 65

(iii) The Harmonized System *65*

Does the Harmonized System qualify as "context" for the interpretation of the EC Schedule? 65

Arguments of the parties 65

Analysis by the Panel 66

Interpretation of the relevant aspects of the Harmonized System 67

Interpretative approach 67

Terms and structure of the HS 68

Arguments of the parties 68

Comments by the World Customs Organization 69

Analysis by the Panel 70

Explanatory Notes to the HS 72

Arguments of the parties 72

Comments by the World Customs Organization 75

Analysis by the Panel 75

General Rules 76

Arguments of the parties 76

Comments by the World Customs Organization 78

Analysis by the Panel 79

Overall appraisal of the Harmonized System 80

(iv) Other WTO Members' schedules *80*

Arguments of the parties 80

Analysis by the Panel 80

(v) Summary and conclusions regarding "context" *81*

(c) Matters to be taken into account together with the context: Article 31(3) of the *Vienna Convention* 81

(i) Subsequent practice: Article 31(3)(b) of the Vienna Convention *81*

Classification practice since 1994 81

Whose classification practice should be considered for the interpretation of the EC Schedule? 81

Arguments of the parties 81

Analysis by the Panel 82

Classification practice: Imports into the EC 84

Arguments of the parties 84

Analysis by the Panel 87

Classification practice: Imports into and exports from Brazil and Thailand 90

Arguments of the parties 90

Analysis by the Panel 92

Classification practice: Imports into and exports from the Hme parties

Arguments of the parties 92

Analysis by the Panel 93

Summary and tentative conclusions regarding "subsequent practice" 93

WCO letters of advice 94

Arguments of the parties 94

Qualification under Article 31(3)(b) of the Vienna Convention? 94

1997 letter of advice from the WCO 95

2003 letter of advice from the WCO 95

Analysis by the Panel 96

Subsequent Explanatory Notes to the Combined Nomenclature 96

Arguments of the parties 96

Analysis by the Panel 97

Final conclusion regarding "subsequent practice" 97

(d) Object and purpose: Article 31(1) of the *Vienna Convention* 98

(i) Arguments of the parties *98*

The WTO Agreement and the GATT 1994 98

The EC Schedule 99

(ii) Comments by the World Customs Organization *100*

(iii) Analysis by the Panel *101*

The WTO Agreement and the GATT 1994 101

The EC Schedule 103

(iv) Summary and conclusions regarding the "object and purpose" *104*

(e) Special meaning: Article 31(4) of the *Vienna Convention* 104

(f) Preliminary conclusions under Article 31 of the *Vienna Convention* 105

(g) Supplementary means of interpretation: Article 32 of the *Vienna Convention* 105

(i) Preparatory work *105*

Arguments of the parties 105

Analysis by the Panel 107

(ii) Circumstances of conclusion of the EC Schedule *107*

Substantive and temporal scope of "circumstances of conclusion" 107

Arguments of the parties 107

Analysis by the Panel 108

EC law 111

EC Regulation No. 535/94 111

Arguments of the parties 111

Analysis by the Panel 115

Dinter and *Gausepohl* judgements 118

Arguments of the parties 118

Analysis by the Panel 123
EC Explanatory Notes 127
Arguments of the parties 127
Analysis by the Panel 129
Other Additional Notes 130
Arguments of the parties 130
Analysis by the Panel 130
Classification practice prior to 1994 130
Arguments of the parties 130
Classification practice prior to 1994 ....Efication E Tc ( ) Tj -399D0y0l...

LIST OF ANNEXES

ANNEX A

Contents		Page
Annex A	Executive Summary by Thailand after the first substantive meeting (21 October 2004)	A-1

ANNEX B

SUBMISSIONS BY THIRD PARTIES

Contents		Page
Annex B-1	Third Party Executive Summary by China	B-2
Annex B-2	Third Party Oral Statement of the United States at the First Meeting of the Panel	B-5

ANNEX C

RESPONSES TO QUESTIONS BY THE PANEL AND OTHER PARTIES

Contents		Page
Annex C-1	Responses by Brazil to Questions posed by the Panel after the First Substantive Meeting (14 October 2004)	C-2
Annex C-2	Responses by Brazil to Questions posed by the Panel and the European Communities after the Second Substantive Meeting (2 December 2004)	C-31
Annex C-3	Comments by Brazil on the European Communities' Responses to Questions after the Second Substantive Meeting (9 December 2004)	C-44
Annex C-4	Responses by Thailand to Questions posed by the Panel after the First Substantive Meeting (14 October 2004)	C-59
Annex C-5	Responses by Thailand to Questions posed by the Panel and the European Communities after the Second Substantive Meeting (2 December 2004)	C-70
Annex C-6	Comments by Thailand on the European Communities' Responses to Questions after the Second Substantive Meeting (9 December 2004)	C-76
Annex C-7	Responses by the European Communities to Questions posed by the Panel, Brazil and Thailand after the First Substantive Meeting (14 October 2004)	C-80
Annex C-8	Responses by the European Communities to Questions posed by the Panel and Brazil after the Second Substantive Meeting (2 December 2004)	C-106
Annex C-9	Comments by the European Communities on the Complainants' Responses to Questions following the Second Substantive Meeting (9 December 2004)	C-125
Annex C-10	Responses by China to Questions posed by the Panel after the First Substantive Meeting (14 October 2004)	C-130
Annex C-11	Responses by the United States posed by the Panel after the First Substantive Meeting (14 October 2004)	C-132
Annex C-12	Responses by the World Customs Organization to Questions posed by	C-134

Contents		Page
	the Panel after the First Substantive Meeting (29 October 2004)	
Annex C-13	Responses by the World Customs Organization to Questions posed by the Panel after the Second Substantive Meeting (2 December 2004)	C-142
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)	C-145

ANNEX D

Contents		Page
Annex D	Chapter 2 of the Harmonized System (1992 Version)	D-1

ANNEX E

REQUESTS FOR THE ESTABLISHMENT OF A PANEL

Contents		Page
Annex E-1	Request for the Establishment of a Panel by Brazil (WT/DS269/3)	E-2
Annex E-2	Request for the Establishment of a Panel by Thaila 66t91 0o75 rewNOg00.1684 Tc 0.2726 To75 rew	

LIST OF ABBREVIATIONS

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

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

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

Chairman: Mr Hugh McPhail

Members: Ms Elizabeth Chelliah
Mr Manzoor Ahmad

1.8

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

0210.90 - Other, including edible flours and meals of meat or meat offal:

-- Meat:

0210.90.20 --- Other

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

B. THE EUROPEAN COMMUNITIES' COMBINED NOMENCLATURE

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

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

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

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

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

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

C. HARMONIZED SYSTEM

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

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

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

2.12 The EC became a contracting party to the HS on 22 September 1987, Brazil on 8 November 1988 and Thailand on 16 GN), which came into existence on 1

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

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

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

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

D. EC REGULATIONS AND DECISIONS

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

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

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

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

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

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

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

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

2.21 An EC Commission Regulation,

Incorporated in Annex I to this Regulation are amendments resulting from the adoption of the following measures:

...

– Commission Regulation (EC) No. 535/94 of 9 March 1994 (OJ No L 68, 11.3.1994, p. 15);

..."

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

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

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

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

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

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

---

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

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

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

ANNEX

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

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

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

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

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

---

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

[17] Article 2 of Commission Decision.

[18] Article 1 and Annex.

[19] Recital (3).

[20] Recital (5).

[21] Recital (8).

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

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

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

> "[T]he classification in Chapter 2 of the Combined Nomenclature depends essentially on the process employed to ensure long-term preservation of a given product. The General Harmonized System explanatory note to Chapter 2 describes the structure of that chapter. Chapter 2 covers uncooked meat and meat offal which are fresh or chilled or have undergone one of the various processes required for long-term
> c 0.1875 Tw (1 i.e.65p the Offal which areoz TD 23 4/al 0. i.e.Ee2 Tfoa-6.,mbT 72 797.25 TD (

Re277.0.03 Tc -0.53 Tc2003

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

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

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

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

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

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

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

III. PARTIES' REQUESTS FOR FINDINGS, RECOMMENDATIONS AND SUGGESTIONS

A. BRAZIL[29]

3.1 Brazil requests the Panel to:

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

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

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

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

---

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

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

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

European Communities, that the European Communities immediately repeal EC Regul

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

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

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

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

V. ARGUMENTS OF THE THIRD PARTIES

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

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

VI. INTERIM REVIEW

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

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

A. PARTIES' ARGUMENTS

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

6.4 Brazil also suggested an addition to paragraph 3.1(d) of the Interim Report, which contains the parties' requests for findings, recommendations and suggestions. The Panel declined to include

t,incthe Ianel 's view,the Ipropose Tj 134.75 0 TD -0.315 Tc 0 .335 Tw (toext) Tj 22775 0 TD -0.3094 Tc 0.2681 T
'c 1.0814 Tw (twhat i)alreadycontains0 7nctaragraph 3.1(d) ond she Tj mmaryof trazil ')arguendt

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

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

6.10 Secondly, Brazil refers to the Appellate Body's decision in *Chile – Price Band System* and suggests that, on the basis of that decision, EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 should be included in the Panel's terms of reference because they clarify measures specifically identified in its request for establishment of a panel. The European Communities responds that the purpose of EC Regulation No. 1871/2003 was to clarify heading 02.10 and not EC Regulation No. 1223/2002. The Appe2late Body's commen

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

> "... We understand the Amendment as having clarified the legislation that established Chile's price band system. Regulation No. 1223/2002.-1agkmg715 0 T T T T uj 118.5D -0.8
>
> R4E0663Regc 0.1875 T.25Raegc 0 9.2we 398 Tc 7clarified the 5

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

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

E. SEPARATE PANEL REPORTS

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

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

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

VII. FINDINGS

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

7.1 The fundamental issue for the Panel's determination in this case is whether certain EC measures result in treatment for certain products that is less favourable than that provided for in

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

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

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

B. BACKGROUND FOR THE PANEL'S ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

C. THE PANEL'S TERMS OF REFERENCE

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

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

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

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

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

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

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

2. Measures

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

(a) Measures specifically identified in the Panel requests

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

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

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

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

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

(b) Measures not specifically identified in the Panel requests

(i) Arguments of the parties

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

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

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

7.21 According to Brazil, EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 are measures that are "closely related" or "subsidiary" to the ones specifically identified in Brazil's Panel request so much so that they may be considered as "part of the application" of those measures.[49] In particular, Brazil argues that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 were enacted as a result of changes in classification and tariff treatment brought about by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC. Brazil submits that, since EC Regulation No. 1223/2002 and EC Decision 2003/97/EC

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

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

(ii) Analysis by the Panel

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

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

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

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

[55] EC's second written submission, para. 19. 55,336 0.1289 Tc -0.3164 Tw (EC's second written subm6Tc 0 Tw (19.) Tj 1

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

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

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

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

---

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

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

[62] Panel question No. 6.

(b)

7.40 The **European Communities** submits that Article 1 of EC Decision 2003/

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

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

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

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

E. CHARACTERIZATION OF PANEL'S TASK IN THIS CASE

1. Arguments of the parties

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

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

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

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

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

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

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

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

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

7.50 The **European Communities** submits that both complainants refused the European Communities' suggestion, made at the consultation stage, to take this dispute to the WCO to the extent that it concerns matters of classification.[85] The European5 0 TD /F1 mive oation.

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

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

3. Analysis by the Panel

7.54 The Panel recalls that it is called upon in this dispute to determine whether or not the measures at issue violate Article II:1(a) and Article II:1(b) of the GATT 1994. In the process of making such a determination, we will need to determine whether the measures at issue result in treatment that is less favourable than that provided for in the EC Schedule and whether the imposition were i0ting padule and whether t0 TD 0 96c 0.1875 Te i56

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

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

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

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

F. ARTICLE II OF THE GATT 1994

1. Main claims of the parties

(a) Parties' claims

7.60 **Brazil** and **Thailand**

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

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

> "The terms of Article II:1(a) require that a Member 'accord to the commerce of the other Members treatment no less favourable than that provided for' in that Member's Schedule…. Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule."excess of thn1 (nt less favou"7fic kind of practi favouras Tw (l04m8t or those di) Tld th941h5ys be) vourable

2. Treatment of the products at issue

(a) Arguments of the parties

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

7.67 The **European Communities** submits that the products covered by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC fall under heading 02.07 of the EC Schedule and are subject to a duty of 102.4€ per 100 kilogram.[105] The European Communities notes that, in addition, thes.75 Tf 5 TD(10

(b)

CN. In addition, the European Communities has informed us that the products at issue – that is, those covered by EC Regulation No. 1223/2002 and EC Decision 2003/97/EC – are subject to a duty of 102.4€ per 100 kilogram

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

3. Burden of proof

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

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

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

7.78 The complainants' fundamental claim in this dispute is that the products at issue fall within the scope of the concession contained in heading 02.10 of the EC Schedule whereas, under the measures at issue, they are currently classified as if they fall within the scope of the concession contained in heading 02.07 of the EC Schedule.[116]

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

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

G. INTERPRETATION OF THE EC SCHEDULE

1. The essence of the interpretative issue

(a) Arguments of the parties

7.81 The **European Communities** denies that the products at issue are covered by heading 02.10 of the EC Schedule.[117] The European Communities explains that it is not arguing that, because the products at issue are frozen, and heading 02.07 of the EC Schedule covers "frozen" chicken, therefore they

they

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

(b) Analysis by the Panel

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

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

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

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

Decision 2003/97/EC, have the effect of treating frozen boneless chicken cuts that have been impregnated with salt, with a salt content of 1.2% – 3%

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

7.92 In *US* –

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

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

(b) Analysis by the Panel

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

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

---

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

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

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

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

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

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

which is at the focus of both Articles 31 and 32 of the *Vienna Convention*.[144] Regarding "context"

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

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

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

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

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

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

ni5 TW18 0.90.ion,

--- Other"

7.105 The Panel notes that our starting point in determining the ordinary meaning of

Brazil concludes that the term "salted" is associated with food to indicate the content of salt, the taste and smell, the treatment or whether or not the food has been preserved.[157] Brazil and Thailand argue that, in essence, the term "salted" refers to meat that contains or is impregnated with salt.[158] Brazil also submits that the ordinary meaning of the term "salting" indicates that it is a process that prepares meat for different purposes[159] and that what distinguishes meat of heading 02.10 from meat of other headings of Chapter 2 of the EC Schedule is not the process of preservation employed but, rather, the process of preparation.[160] Thailand further submits that it does not consider that the purpose for which a product undergoes the process of salting is relevant to determine the ordinary meaning of the term "salted". Thailand argues that, since the salting of a meat product may be carried out for different purposes, the ordinary meaning of salted must

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

Analysis by the Panel

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

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

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

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

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

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

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

Arguments of the parties

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

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

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

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

Desalting

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

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

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

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

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

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

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

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

border, not based on whether the product is subse

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

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

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

7.136 In response, the **European Communities** indicates that the products referred to by Thailand would be classified by the European Communities under heading 02.10 but disputes that these types of products require additional means of preservation.[211] The European Communities submits that, in any event, the possibility of applying the means to ensure further preservation to meat covered by heading 02.10 would not affect the classification of that meat.[212] Further, according to the European Communities, the fact that the useful life of meats preserved by salting can be extended by the use of chilling or freezing does not mean that they have not been preserved.[213] In this regard, the European Communities submits that the complainants' arguments appear to be premised on the notion that "preservation" means protection against deterioration and decay for an indefinite period.[214] In addition, the European Communities submits that preserved meat is often sliced and packaged in preparation for retail sale and that this may contaminate the meat. The European Communities notes that it is not arguing that meat retains the same qualities following such processing. The European

7.136Europe2hailand

an Chapc 0 2 whisaltinvidchilledvacuumies n0.11 following such process4and Mod Tw (

European Commu.10 bu1.6isputes th.mE c49e qualitucD 0ng. The Commus ture further preservationn

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

7.139 The **European Communities** submits that defining heading 02.10 by reference to the criterion of preservation is straightforward; allowssy75 3g9ne /F0 11.25 86.25 0 TD -is presec 0.2687 Tw (The)

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

Flavour, texture, other physical properties

7.141
heading

t

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

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

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

Preservation

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The text of the EC Schedule

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

<u>Other terms contained in heading 02.10 of the EC Schedule</u>

Arguments of the parties

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

[255] *Yearbook of the International Law Commission*, 1966, Vol. II, p. 221, para. 13.

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

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

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

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

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

Brazil	Thailand

W T / D S 2 6 9 / R

Dictionaries Relied Upon	Concise Oxford Dictionary (1999)	Webster's New Encyclopaedic Dictionary (1993)	New Shorter Oxford English Dictionary (1993)

"In

Structure of Chapter 2 of the EC Schedule

Arguments of the parties

7.164 **Thailand** submits that the structure of the ten headings contained in Chapter 2 of the EC Schedule, of which heading 02.10 is one, indicates that products are either classified as "fresh",

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

Analysis by the Panel

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

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

> "02.01 Meat of bovine animals, fresh or chilled
>
> 02.02 Meat of bovine animals, frozen
>
> 02.03 Meat of swine, fresh, chilled or frozen
>
> 02.04 Meat of sheep or goats, fresh, chilled or frozen
>
> 02.05 Meat of horses, asses, mules or hinnies, fresh, chilled or frozen
>
> 02.06 Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen
>
> 02.07 Meat and edible offal, of the poultry of heading No 0105, fresh, chilled or frozen
>
> 02.08 Other meat and edible meat offal, fresh, chilled or frozen
>
> 02.09 Pig fat free of lean meat and poultry fat (not rendered), fresh, chilled frozen, salted, in brine, dried or smoked
>
> 02.10 Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal."

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

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

from non-prepared meat referred to in the other headings of Chapter 2 of the EC Schedule. On the other hand, the European Communities argues that preservation is an important feature for

Other parts of the EC Schedule

Arguments of the parties

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

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

7.175 Thailand submits that, in contrast to headings 08.12 and 08.14, heading 02.10 makes no reference to "preservation". Thailand also submits that, under the general principles of interpretation of Article 31 of the *Vienna Convention*, the Appellate Body has stated that an interpreter must not "adopt a reading [of a treaty provision] that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[281] Therefore, according to Thailand, a reading of "salted" as meaning for the purpose of long-term preservation would reduce to inutility the terms "preserved" in headings 08.12 and 08.1 [illegible]

intended to widen the scope of heading 08.14 to include not only fresh, frozen and dried products but also those provisionally preserved by p

Terms and structure of the HS

Arguments of the parties

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

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

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

25 -5.25 TD /F0 11.25 Tf 0 .6c 0.1875 Tw4

acac

7.194 The **European Communities** quotes the WCO's reply to a question from the Panel, which the European Communities submits indicates that the rationale behind the product coverage in the HS was to meet the needs of those involved in international trade by including goods or groups of goods for which there was a significant volume of international trade.[314] According to the European Communities, the WCO's response confirms that the drafters of the HS put meats which had been "salted, in brine, dried or smoked" for preservation in a specific heading because they constituted a significant category in international trade. The European Communities further submits that trade in meat

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

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

Analysis by the Panel

7.197 The contents and structure of the HS are identical to the EC Schedule at the 6-digit level. The Panel considers that, to the extent that the terms of heading 02.10 in the HS and the structure of Chapter 2 of the HS are identical to the terms of the concession contained in heading 02.10 and

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

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

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

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

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

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

---

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

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

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

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

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

Explanatory Notes to the HS

Arguments of the parties

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

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

n9thoritativ14ute thacotedw -1ter -12.7s5 Tsmdo a /F0 6proTw (-) TTj 11.25 24.

7.208 With respect to *the Explanatory Note to heading 02.10 in the HS*, **Brazil** and **Thailand** state that the Note makes it clear that heading 02.10 covers meat that has been "prepared" in the manner described in the heading – that is, through salting, brining, drying or smoking.[327] Thailand submits that, therefore, any meat that has been prepared in a manner decribed in the heading must be classified under heading 02.10.[328] Brazil adds that there is nothing in the Note to indicate that "salting" is a process used to ensure [long-

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

7.209 In response, the **European Communities** submits that, when viewed as a whole, it is doubtful that the term "prepare" was used as a term of art in the Explanatory Note to heading 02.10 in the HS.[330] In addition, the European Communities submits that the purpose of the Note is not to

HS.

of "salted, in brine, dried or smoked" is also not related to preservation.[340] Further, a

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

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

General Rules

Arguments of the parties

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

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

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

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

---

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

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

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

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

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

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

7.229 Brazil and Thailand note that General Rule 3(a) provides that the heading that provides the most specific description of a good is to be preferred to a heading that provides a more general description.[362] Brazil submits that the adjective "specific" means "clearly defined", "relating to, characterizing, or distinguishing a species" or "special, distinctive, or unique".[363] Brazil and Thailand submit that salting confers upon the specific, distinctive 9 flavour and texture of [364] In support, they point to the different
affects consumer choices, the fj 2 that ,qeadthat has been deeply and homogenously impregnated with
specific uses.[365]
Brazil and Thailand submit that, in contrast, the freezing of chicken does not modify the
9 [366]

7.230 Further, Brazil submits that the reference to poultry in heading 02.07 does not make it more pecific than heading 02. 10. Brazil submits because that the European Communities has not tisputed the fj 2 argues that,
es all kindc of ,qea, heading 02.10 could easily have referred
nimals, horses, lambs, goats, geese, turkeys, chicken, etc.[367] Thailand submits that while, in abstrj 2 t4.ms, poultry is more pecific th
for the purposes of det4.mining the appropriate heading for the classific
in this tispute as an analysis of the headings showdthat heading 02.10 is

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

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

Overall appraisal of the Harmonized System

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

(iv) Other WTO Members' schedules

Arguments of the parties

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

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

Analysis by the Panel

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

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

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

(v) Summary and conclusions regarding "context"

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

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

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

Classification practice since 1994

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

Arguments of the parties

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

---

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

practice" under Article 31(3)(b) of the *Vienna Convention*

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

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

4 1 2

customs authorities constituted a concordant, common and consistent sequence of acts that lasted over six years, beginning shortly after the conclusion of the Uruguay Round, i.e. in 1996, and ending in 2002, when the measures at issue were adopted by the European Communities.[416] Brazil submits that this six-year practice was sufficient to establish a discernible pattern

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

7.270 With respect to the *BTIs* available to the Panel, the Panel has been provided with a number of BTIs concerning the products at issue. It has also been provided with a BTI concerning another product. Regarding BTIs that pertain to the products at issue,[429] these Exhibits indicate that, until September 2002, the products at issue, which were apparently covered by these BTIs, were classified under heading 02.10.[430] The BTIs relate to imports into Germany, the Netherlands and the United Kingdom. The Panel also notes that it is evident from EC Decision 2003/97/EC that at least 66 BTIs classified the products at issue (or a subset thereof) under heading 02.10.[431] The European Communities has not produced

2

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

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

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

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

---

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

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

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

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

[439] Working Document TAXUD/120m9f Tw (question No.) Tj 51.75 0 TD 028D 0.15403 Tf 467 in15wers th

that GATT Contracting Parties recognized this in the GATT Council Decision of 12 July 1983 on "GATT Concessions under the Harmonized System Commodity Description and Coding System".[461] In that Decision, the Contracting Parties noted that "[i]n addition to the benefits for trade facilitation and analysis of trade statistics, from a GATT point of view adoption of the Harmonized System would help ensure greater uniformity among countries in customs classification and, thus, a greater ability for countries to monitor and protect the value of tariff concessions." The European Communities notes that the Appellate Body has held that tariff negotiations are a process of "give and take" between exporting and importing Members. A common basis of understanding for the classification of the goods is, therefore, necessary. The European Communities submits that, in light of the foregoing, the complainants are wrong to suggest that classification on export is any less relevant than classification on import.[462]

Analysis by the Panel

7.284 The Panel notes that it does not have any import classification data for Brazil and Thailand in respect of the products at issue because, apparently, these countries export rather than import these products.[463] As for export classification data, this appears to be inconsistent at least with respect to Brazil.[464] In any event, we are not convinced of the utility of making reference to export classification data from Brazil and Thailand given that, evidently, export classification is less rigorous because duties are not levied on products upon exportation.[465] In this regard, we note that Article 1(b) of the HS Convention defines "customs tariff nomenclature" as "the nomenclature established under the legislation of a Contracting Party for the purposes of *levying duties of Customs on imported goods*" (emphasis added).

Classification practice: Imports into and exports from the US and China

Arguments of the parties

7.285 **Brazil** refers to four US classification rulings during the period 1996 - 1998 which classify bacon from Denmark under heading 02.10.[466] Brazil also refers to a US bill of lading, in which the importer claimed tariff treatment for its frozen sliced bacon product under heading 02.10.[467]

7.286 In relation to the US bill of lading, the **United States**[468] notes that an importer's claim for tariff treatment under a particular subheading does not represent an official statement by US customs authorities on the correct classification of the product. The United States submits, however, that in a

---

[461] L/5470/Rev. 1.

[462] EC's reply to Panel question No. 28 citing Appellate Body Report, *EC – Computer Equipment*, para. 109.

[463] Brazil's reply to Panel question No. 16; Thailand's oral statement at the first substantive meeting, para. 44; Thailand's second written submission, para. 70. The European Communities does not dispute that Brazil and Thailand are exporters rather than importers of the products at issue.

[464] We note that the EC refers to data in Table 3 of its first written submission and in Exhibits EC-17 and EC-18, which it says indicates that the complainants consistently classified the products at issue under heading 02.07 rather than under heading 02.10: EC's first written submission, para. 180. However, Brazil has produced an October 2001 bill of lading, export registration and export receipt (contained in Exhibit BRA-42(c)) and a November 2001 bill of lading, export registration and export receipt (contained in Exhibit BRA - 42(d)) according to which, upon export from Brazil, the products at issue were classified under heading 02.10. This evidence indicates that the export classification of, at least, Brazil is not consistent with respect to the products at issue.

[465] Further, we note that, in Brazil and Thailand, exporters rather than customs officers classify the products at issue, at least in the first instance: Brazil's reply to Panel question No. 85; Thailand's reply to Panel question No. 85.

[466] Exhibit BRA-39.

[467] Exhibit BRA-19.

[468] The United States is a third party to this dispute.

1996 ruling, US customs authorities ruled that frozen bacon from Denmark was properly classified under heading 02.10.[469]

7.287 **China**[470] notes that, in 2000 and 2001, there were imports and exports under subheading 0210.90.00 of China's tariff classification nomenclature but there have been no more such imports or exports since 2002.[471] China also submits that, in 2000, there were imports and exports under subheading 0207.14.00 of China's tariff classification nomenclature but that there have been no more such imports or exports since 2001.[472]

Analysis by the Panel

7.288 During these proceedings, Brazil referred to certain examples of what could broadly be referred to as US classification practice regarding the equivalent of heading 02.10 in the US schedule. In addition, China provided some information regarding its classification practice for headings equivalent to headings 02.10 and 02.07 of the EC Schedule. In the Panel's view, this evidence is too limited to draw any conclusions regarding the consistency or otherwise of classification practice of other WTO Members. Further, with respect to the evidence that is available of US classification practice, the relevant US classification rulings do not relate to products identical or similar to the products at issue; they do not indicate the salt content-24 T Tc 0Eo219oe5ei 5 T90plaw0 68g(exporing the consister

1997 letter of advice from the WCO

7.294 The **European Communities** refers to a 1997 letter of advice from the WCO Secretariat to the Cypriot customs authorities. The European Communities notes that the matter at issue concerned the headings in Chapter 3 of the HS, which covers fish, and in many respects parallel those being examined in this dispute under Chapter 2. Regarding the type of salting necessary to bring fish within the ambit of heading 03.05, the European Communities notes that the WCO Secretariat stated in its letter that "salted" fish, classifiable in heading 03.05, is not normally lightly salted to render it necessary for freezing. The WCO further stated that salt is intended to penetrate the meat to give the fish a long preservative life.[481]

7.295 **Brazil** submits that the 1997 WCO Secretariat letter of advice regarding frozen salted fish is not consistent with the 2003 WCO Secretariat letter of advice referred to by Brazil immediately below regarding frozen salted swine meat and, therefore, the former does not qualify as "subsequent practice" in the interpretation of the EC Schedule.[482] **Thailand** submits that the 1997 WCO Secretariat letter is of little probative value to the dispute before the Panel as it conclusions are tentative and are based on unclear facts.[483]

2003 letter of advice from the WCO

7.296 **Brazil** points to a letter of advice from the WCO Secretariat dated May 2003 regarding the meaning of the term "salted" in heading 02.10.[484] Brazil notes that the 2003 WCO Secretariat letter was written in response to a question posed by the Bulgarian customs administration on whether imports "of bellies of swine, deboned, frozen, to which salt has been applied on the surface before freezing (sic)" should be classified under subheading 0203.29 or under subheading 0210.12. Brazil notes that, in that case, "the results of the laboratory analysis, after thawing, show that the salt only penetrated a very limited layer (just below the surface of the product), and not in depth (sic)", and the authority believed, guided by the language under Additional Fn1.1017 ted that sa10ac1 -12p0.4s2 under Addi1.89

7.297 In response, the **European Communities** submits that, although the issue dealt with in the 2003 WCO Secretariat letter might be relevant to the present dispute, the WCO Secretariat avoided taking a position and did not provide classification advice to the Bulgarian authorities. The European Communities submits that Brazil cannot, from the fact that the WCO Secretariat declined to take a view, infer that it rejected "preservation" as the basis for heading 02.10. The European Communities submits that, consequently, the letter in question is not relevant "subsequent practice" for the purposes of Article 31(3)(b) of the *Vienna Convention*.[488]

Analysis by the Panel

7.298 In *EC – Computer Equipment*, the Appellate Body specifically stated that decisions taken by the HS Committee of the WCO might have been relevant to the interpretation of the EC Schedule in that case. [illegible]

(d) Object and purpose: Article 31(1) of the *Vienna Convention*

(i) Arguments of the parties

The WTO Agreement and the GATT 1994

7.304 **Brazil** and **Thailand** submit that the security and predictability of tariff concessions is the main object and purpose of the GATT 1994.[497] According to Brazil, such security and predictability

issue in the

basis. The European Communities submits that, consequently, the object and purpose of the tariff structure in question clearly supports the European Communities' interpretation of its obligations.[515]

7.311 **Brazil** submits that the "object and purpose" of a concession contained in the schedule of a particular Member must be determined on the basis of the common understanding of all parties, not just the alleged will or purpose of the party making the concession. Brazil submits that, for all intents and purposes, when the European C

character of a "frozen" or a "salted" product. The WCO surmises that it would probably be straightforward to determine whether or not a product is "frozen" whereas recourse to laboratory analysis might be required to determine whether a product can be regarded as a "salted" product within the meaning of heading 02.10.[521] The WCO also notes that practical aspects associated with the verification of classification criteria are taken into account for the purposes of classification of commodities at the HS level once they have become part of the legal text or of the Explanatory Notes.[522]

(iii)

> trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994."[524]

The Appellate Body made clear in that case that security and predictability is not to be based on the "subjective views" of exporting Members but, rather, on the common intentions of the parties at the time of the conclusion of the negotiations.[525]

7.319 With respect to the object and purpose of the GATT 1994, in *Argentina – Textiles and Apparel*, the Appellate Body stated that:

> "[A] basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule. Once a tariff concession is agreed and bound in a Member's Schedule, a reduction in its value by the imposition of duties in excess of the bound tariff rate would upset the balance of concessions among Members."[526]

7.320 Taken together, the relevant aspects of the WTO Agreement and the GATT 1994 indicate that concessions made by WTO Members should be interpreted so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs. It is also clear that such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous. In other words, the terms of a concession should not be interpreted in such a way that would disrupt the balance of concessions negotiated by the parties. Finally, the interpretation must ensure the security and predictability of the reciprocal and mutually advantageous arrangements manifested in the form of concessions.

7.321 With respect to the last point referred to in the preceding paragraph, namely that an interpretation of the WTO Agreement and the GATT 1994 must ensure the security and predictability of the reciprocal and mutually advantageous arrangements manifested in the form of concessions, the question has arisen in this case as to whether the interpretation of the concession contained in heading 02.10 of the EC Schedule to include a long-term preservation criterion could undermine this objective. In this regard, we note that all the parties to this dispute, including the European Communities, agree that, in characterizing a product for the purposes of tariff classification, it is necessary to look exclusively at the "objective characteristics" of the product in question when presented for classification at the border.[527] The WCO has suggested that a visual inspection may suffice for some products whereas laboratory analyses may be required for others. As regards the present case, the WCO surmises that laboratory analyses might be required to determine whether a product can be regarded as "salted" within the meaning of heading 02.10 of the HS.

7.322 With respect to the products at issue, the European Communities has stated that, if a product has been "frozen" within the meaning of heading 02.07, it will still be classified under heading 02.10 of the EC Schedule as a "salted" product provided that the salting has been undertaken for the purposes of "long-term preservation" within the meaning of EC Regulation No. 1223/2002 and EC Decision 2003/97/EC.[528] However, despite questioning by the Panel and by Brazil[529], the European

---

[524] Appellate Body Report, *EC – Computer Equipment,* para. 82.

[525] Appellate Body Report, *EC – Computer Equipment,* paras. 82 and 84.

[526] Appellate Body Report on *Argentina – Textiles and Apparel,* at para. 47.

[527] Brazil's reply to Panel question No. 13; Thailand's oral statement at the first substantive meeting, paras. 51-53; Thailand's second written submission, paras. 38-41; EC's replies to Panel question Nos. 90 and 105.

[528] EC's replies to Panel question Nos. 49 and 70; EC's second written submission, paras. 27, 30, 41 and 45; EC's oral statement at the second substantive meeting, paras. 9, 14 and 15.

[529] Panel question No. 118. Brazil's question Nos. 1-3 to the EC following the first substantive meeting.

Communities has not provided the Panel with any clear idea of what is meant by "long

7.326 Besides, as noted above in paragraph 7.317, it is the Panel's view that, for the purposes of this case, Article 31(1) of the *Vienna Convention* mandates us to consider the object and purpose of the WTO Agreement and GATT 1994. We do not consider that Article 31(1) of the *Vienna Convention* requires consideration of the object and purpose of particular terms of the treaties in question – in this case, the term "salted" in heading 02.10 of the Ev675ychedule.Tj 272l 24.-12j -204 ,2j -4nsideranstion

(f) Preliminary conclusions under Article 31 of the *Vienna Convention*

7.331 Following an analysis of the term "salted" in the concession contained in heading 02.10 of the EC Schedule pursuant to Article 31 of the *Vienna Convention*, the Panel concludes on a preliminary basis that:

(a) The "ordinary meaning" of the term "salted" is: to season, to add salt, to flavour with salt, to treat, to cure or to preserve. The ordinary meaning of the term "salted" is not necessarily limited to salting with common salt (NaCl).

(b) The factual context indicates that the ordinary meaning of the term "salted" is that the character of a product has been altered through the addition of salt.

(c) WT/D02o saltin5714 of the
WT/D902Tj 12 0 TD uct has biz.1606480 Tw (WT/D16eading 020eat, to TDbify th

Convention is 1 September 1986.[538] In this regard, the European Communities submits that agricultural tariffs were established on the basis of the Modalities Agreement, pursuant to which there was a significant reliance upon information dating from the commencement of the Uruguay Round.[539] Furthermore, according to the European Communities, the use of the starting date of negotiations as a basis for agreed changes has been common practice in the GATT/WTO system. The European Communities submits that such a date has the advantage of providing certainty and preventing parties from changing their law and/or practice in order to improve their negotiating positions. The European Communities contends that, in the absence of any other expression of intention by the parties, the parties to the Uruguay Round negotiations must be taken to have intended this date as the principal point at which the scope of individual tariff concessions should be defined.[540] The European Communities submits that, therefore, it is not plausible to argue that the common intention of the negotiating parties could be affected by unilateral acts, absent some evidence from the complainants (such as a footnote in the EC Schedule) to the contrary.[541] The European Communities submits that, consequently, in so far as EC law and practice on the scope of headings is to be taken into account as "circumstances of conclusion", they should be the law and practice as they stood on 1 September 1986.[542] According to the European Communities, in any event, the critical date should not be later than 15 December 1993 when the Uruguay Round negotiations formally terminated.[543] The European Communities submits that, throughout this period, both EC law and practice supported the principle of long-term preservation with respect to heading 02.10 of the EC Schedule.[544]

7.334 **Thailand** submits that the Modalities Agreement may theoretically be considered as "preparatory work" within the meaning of Article 32 of the *Vienna Convention*. However, Thailand questions the probative value of this document as a supplementary means of interpretation.[545] Thailand submits that paragraph 3 of the Modalities Agreement states that "[f]or agricultural products currently subject to ordinary customs duties only, the reduction commitment shall be implemented …only on the level applied as at 1 September 1986". According to Thailand, this statement merely requires that products subject to ordinary customs duties be bound at the level applied as at 1 September 1986.[546] Thailand argues that it is common to agree at the beginning of multilateral trade negotiations on a date in the past to be used to determine the tariff levels to which any agreement on tariff reductions would be applied. According to Thailand, Members, therefore, did agree in the Modalities Agreement to use the level of duties applied as at 1 September 1986. However, that agreement cannot be taken to mean that the scope of the EC Schedule should be determined as at the beginning of the Uruguay Round.[547]

7.335 **Brazil** does not consider that the Modalities Agreement is "preparatory work" under Article 32 of the *Vienna Convention*. Brazil notes in this regard that the introductory note to the Modalities Agreement states that "[t]he revised text is being re-issued on the understanding of participants in the Uruguay Round that these negotiating modalities shall not be used as a basis for dispute settlement proceedings under the MTO Agreement *(sic)*."[548] Brazil submits that, through this statement, WTO Members unequivocally expressed their intention not to use the Modalities Agreement as a basis for dispute settlement proceedings under the WTO Agreement and, given that the WTO dispute settlement system serves "to clarify the existing provisions of those agreements in

[538] EC's second written submission, para. 107.
[539] EC's second written submission, paras. 103 and 107 relying upon Exhibit EC-9.
[540] EC's second written submission, paras. 104-105.
[541] EC's reply to Panel question No. 58.
[542] EC's second written submission, para. 107.
[543] EC's second written submission, paras. 96 and 110.
[544] EC's second written submission, para. 118.
[545] Thailand's reply to Panel question No. 78.
[546] Thailand second written submission, para. 76.
[547] Thailand's comments on the EC's reply to Panel question No. 87.
[548] The Modalities Agreement is contained in Exhibit EC-9.

accordance with customary rules of interpretation of public international law"[549], Members determined that the Modalities Agreement may not be used as "preparatory work" within the meaning of Article 32 of the *Vienna Convention* for purposes of dispute settlement proceedings. In addition, Brazil points out that "preparatory work" is to be used in the interpretation of a treaty – in this case the EC Schedule – and not in the interpretation of the European Communities' import practice at the conclusion of the Uruguay Round.[550]

Analysis by the Panel

7.336 The Panel recalls that the European Communities argues that the effect of taking the Modalities Agreement into account is that the date for considering the scope of the relevant tariff headings in the EC Schedule as evidenced through the circumstances of its conclusion under Article 32 of the *Vienna Convention* is 1 September 1986.[551] As noted previously, this argument concerns the temporal scope of the term "circumstances of conclusion" in Article 32 of the *Vienna Convention*. As explained in greater detail below in paragraphs 7.340 *et seq*, we do not consider that the term is limited in temporal terms. Since the reason for the European Communities' reliance on the Modalities Agreement is to argue that the date for considering the meaning of heading 02.10 of the EC Schedule as evidenced through the "circumstances of its conclusion" under Article 32 is 1 September 1986, in light of our conclusions regarding the temporal scope of Article 32, we do not consider it is necessary

Viey" wi.75 -0.08uls 1 September 275 Tc (A) Tj 8.25under D -0.1793 Tc 1.1168 Tw (under-88ysis 96y the Panel 1168 C
to detTc yote87 T TD 0C1rrticle 32,

Tw'00 mmconsitat the basi 1mavt Tdalevat thonsita TD TD -0.072779ms4e 112gC28-86 Tj 2mst774es of ijiaa5Tj 132 .5

W

part of the "circumstances of conclusion".[571] As for how such relevance may be demonstrated, it is the Panel's view that it must be shown that the event, act or other instrument has or could have influenced the specific aspects of the ultimate text of a treaty that are in issue.[572]

7.344 Having stated that, in theory, there is no temporal limitation on what may qualify as "circumstances of conclusion" and that relevance is the more appropriate criterion for determining such qualification, we acknowledge that there may be some correlation between the timing of an event, act or other instrument (i.e. how far back in the past they took place, were enacted or were adopted) and their relevance to the treaty in question. It would be fair to state that, generally speaking, the further back in time that an event, act or other instrument took place, was enacted or was adopted relative to the conclusion of a treaty, it is less likely to have influenced the ultimate text of the treaty and, therefore, it is less likely that it is relevant to the interpretation of that treaty. Furthermore, the fact that Article 32 of the *Vienna Convention* refers to "circumstances of *conclusion*" indicates to us that the event, act or other instrument should be temporally proximate to the conclusion of a treaty in order for it to be taken into account for the interpretation of that treaty under Article 32 as "circumstances of conclusion". In our view, what is considered temporally proximate will vary from
is

be achieved. In our view, provided that parties have deemed notice of a particular event, act or instrument through publication, they may be considered to have had constructive knowledge and that such knowledge suffices for the purposes of Article 32 of the *Vienna Convention*.[574]

7.347 In light of the foregoing, we will consider EC law and the EC's classification practice during the Uruguay round negotiations to the extent that they are relevant to the conclusion of the EC Schedule pursuant to Article 32 of the *Vienna Convention*.

<u>EC law</u>

EC Regulation No. 535/94

Arguments of the parties

7.348 *With respect to the question of whether or not EC Regulation No. 535/94 qualifies as "circumstances of conclusion" under Article 32 of the Vienna Convention,* **Brazil** and **Thailand** submit that EC Regulation No. 535/94 is part of the circumstances surrounding the conclusion of the EC Schedule within the meaning of Article 32 of the *Vienna Convention* and should, therefore, be considered in interpreting the terms of the European Communities' concession under heading 02.10.[575] They submit that, from 15 February until 25 March of 1994, Members were given the opportunity to check and control the scope and definition of each other's tariff concessions.[576] They argue that, prior to the end of the verification process for tariff schedules during the Uruguay Round and the conclusion of the EC Schedule, the European Communities amended the CN as contained in Annex I to EEC Regulation No. 2658/87 through EC Regulation No. 535/94.[577] Brazil points out that the definition of the term "salted" for heading 02.10 contained in EC Regulation No. 535/94 577They argue2049 0 TD /4

current trade, it would, nevertheless, be applicable to future trade. Therefore, according to Brazil, the mere knowledge by the European Communities' negotiating partners of what the European Communities considered to be "salted" meat of heading 02.10 was enough for the purposes of check and control of the scope and definition of tariff concessions.[581]

7.349 In response, the **European Communities** submits that all of the issues dealt with during the verification process concerned matters that were apparent in the texts of the schedules and none concerned aspects of national practice.[582] The European Communities argues that, therefore, parties must have assumed that national developments would not change the substance of concessions, at least unless they were specifically brought to the attention of negotiators.[583]

7.350 **Brazil** understands that EC Regulation No. 535/94 was not enacted as a response to requests made by WTO

7.352 **Thailand** submits that EC Regulation No. 535/94 was incorporated into the CN through EC Regulation No. 3115/94. Thailand notes that the preamble of EC Regulation No. 3115/94 refers, *inter alia*, to the need to "amend the combined nomenclature to take account of ... changes in requirements relating to statistics or commercial policy, in particular by virtue of Council Decision bringing into force simultaneously the acts implementing the results of the Uruguay Round of multilateral trade negotiations and Council Regulation concerning certain measures resulting from the conclusion of negotiations under Article XXIV:6 and other measures necessary for simplification purposes." Thailand asserts that, therefore, EC Regulation No. 3115/94 recognizes that EC Regulation No. 535/94 – defining the term "salted" under heading 02.10 – was one of the acts implementing the results of the Uruguay Round.[593] Thailand also notes that the content of EC Regulation No. 535/94 was enacted many times as a Council Regulation through the annual issuance of the European Communities' CN.[594] Thailand submits that EC customs authorities in the EC member States relied on this definition of "salted" to classify chicken meat, frozen and impregnated with a salt content of over 1.2% under 02.10 of the CN from 1996 - 2002, when EC Regulation No. 1223/2002 entered into force.[595]

7.353 In response, the **European Communities** disputes that EC Regulation No. 535/94 was an act implementing the Uruguay Round Agreements.[596] According to the European Communities, the mere fact that EC Regulation No. 535/94 was referred to in EC Regulation No. 3115/94, which implemented the annual revision of the European Communities' CN in 1994, does not mean that it was intended to implement the Uruguay Round Agreements since EC Regulation No. 3115/94 also consolidated changes made to the CN during 1994.[597] The European Communities argues that EC Regulation No. 535/94 is a unilateral act, which cannot determine the scope of a tariff concession, becaus

terms "preservation" and "long-term preservation" were not included in the definition of "salted" for heading 02.10 contained in EC Regulation No. 535/94.[603] Further, Thailand refers to the minutes of a meeting of the EC Customs Code Committee dated 25 January 2002 to argue that the EC Commission expressly acknowledged that the principle of long-term preservation was excluded from the final definition of "salted" meat for the purposes of classification under heading 02.10 in EC Regulation No. 535/94 and, subsequently, in Additional Note 7, which was introduced into the CN through EC Regulation No. 535/94.[604] Thailand notes that, according to ECJ jurisprudence, an Additional Note constitutes an authentic interpretation of a heading in the EC's CN as it becomes part of the heading to which it refers with binding effect. Therefore, Thailand considers that Additional Note 7 – introduced at the time of the conclusion of the WTO Agreement – constituted an authentic interpretation of the EC's concession under heading 02.10 as it became part of that heading with binding effect.[605]

7.356 The **European Communities** submits that EC Regulation No. 535/94 is part of a consistent pattern of treating preservation as the basic criterion for classification under heading 02.10.[606] The European Communities submits that, throughout the Uruguay Round negotiations, the European Communities' Explanatory Notes to the CN contained a number of provisions emphasizing that "salting" must be for preservation, which was a reflection of the ordinary practice of EC customs authorities.[607] Further, the European Communities argues that, in *Gausepohl*[608], the ECJ interpreted heading 02.10 as requiring salting for preservation. According to the European Communities, ECJ rulings are binding on the EC Commission and constitute the authoritative interpretation of the CN.[609] The European Communities submits that the effect of EC Regulation No. 535/94 and the *Gausepohl* judgement when read in conjunction is that the figure of a 1.2% salt content was conceived of as a minimum salt content above which it was possible that a meat product could be preserved by salting alone. The European Communities argues that, in other words, in order to be classified under heading 02.10, a product had to meet the criteria of EC Regulation No. 535/94 and be salted in order to ensure its preservation as required by heading 02.10 of the CN.[610] The European Communities submits that the specific salt content that would make a product salted would depend on the nature of the meat in question, its preparation, and other environmental factors.[611]

7.357 In response, **Brazil** submits that the 1.2% threshold in EC Regulation No. 535/94 was not a pragmatic minimum salt content rule below which a product was not salted for preservation. According to Brazil, no WTO Member looking at EC Regulation No. 535/94 could presume that it established a minimum salt content below which it could not be considered that a product was salted for preservation.[612] Further, according to Brazil, the European Communities itself has indicated that it does not know of any type of meat deeply and homogeneously salted with 1.2% salt, which is preserved for many or several months.[613]

7.358 The **European Communities** submits that, while Additional Note 7 may have contained a condition, nevertheless, as a matter of logic, it could have stood alongside a requirement of long-term preservation given that it was not, by its terms, exclusive.[614] Further, the European Communities rejects the argument that EC Regulation No. 535/94 excluded the principle of preservation because

---

[603] Brazil's first written submission, para. 98; Brazil's reply to Panel question No. 77; Thailand's first written submission, para.137.
609lat403

the European Communities had made a policy decision to no longer interpret heading 02.10 in such a way.[615] The European Communities submits that the minutes referred to by Thailand reflect preparatory discussions for EC Regulation No. 1871/2003, not for any of the measures at issue, nor for EC Regulation No. 535/94. The European Communities adds that such minutes are not legislative acts of the European Communities, nor do they represent the reasons justifying legislative action by the European Communities, nor are they authoritative interpretations of EC acts.[616] The European Communities submits that, therefore, such documents provide no basis for interpreting EC law.[617]

Analysis by the Panel

7.359 The first question for determination by the Panel is whether EC Regulation No. 535/94 qualifies as "circumstances of conclusion" of the EC Schedule within the meaning of Article 32 of the *Vienna Convention.*

7.360 The Panel recalls that, when discussing supplementary means of interpretation under Article 32, the Appellate Body stated in *EC – Computer Equipment* that "[i]f the classification practice of the importing Member at the time of the tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, surely that Member's legislation on customs classification at that time is also relevant."[618] Accordingly, the mere fact that an act, such as EC Regulation No. 535/94, is unilateral, does not mean that that act is automatically disqualified from consideration under Article 32 of the *Vienna Convention*.

7.361 The Panel notes that EC Regulation No. 535/94 was adopted on 9 March 1994, was published on 11 March 1994 and came into force on 1 April 1994.[619] In other words, EC Regulation No. 535/94 was introduced, adopted and published during the verification period of the Uruguay Round negotiations and came into force just prior to the conclusion of the EC Schedule on 15 April 1994. In our view, since EC Regulation No. 535/94 was published prior to the conclusion of the EC Schedule, the WTO Membership may be considered to have had constructive knowledge of that Regulation at the time the EC Schedule was concluded for the purposes of Article 32 of the *Vienna Convention*. In this regard, we disagree with the European Communities that Members should have specifically raised EC Regulation No. 535/94 during the verification period in order for it to form part of the "circumstances of conclusion".[620]

7.362 Further, it appears to us that EC Regulation No. 535/94 was enacted in the context of the conclusion of the Uruguay Round negotiations. This is apparent from the preamble to EC Regulation No. 3115/94,[621] which constituted the 1994 annual revision to the CN and incorporated into the CN, *inter alia*, the amendments proposed by EC Regulation No. 535/94. In particular, the preamble provides that:

"Whereas it is nece

negotiations and Council Regulation concerning certain measures resulting from the conclusion of negotiations under Article XXIV:6 and other measures necessary for simplification purposes;

– the need to align or clarify texts;

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

..." (emphasis added)

7.363 In addition, Article 3 of EC Regulation No. 3115/94 states that:

"Incorporated in Annex I to this Regulation are amendments resulting from the adoption of the following measures:

...

– *Commission Regulation (EC) No 535/94 of 9 March*

..." (emphasis added)

7.364 In light of the foregoing, we consider that EC Regulation No. 535/94 is relevant to the conclusion of the EC Schedule and, therefore, qualifies as "circumstances of conclusion" of the EC Schedule within the meaning of Article 32 of the *Vienna Convention*.

7.365 The second question for determination by the Panel is the impact of the definition of "salted" in EC Regulation No. 535/94 on the interpretation of the concession contained in heading 02.10 of the EC Schedule.

7.366 We note that Article 1 of EC Regulation No. 535/94 provides that:

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

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

Article 1 makes it clear that an effect of EC Regulation No. 535/94 was to insert an Additional Note into the CN. As is evident from Article 1, the Additional Note in question related to the definition of "salted" in heading 02.10 of the CN.

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

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

> weight appears an appropriate criterion for distinguishing between these two types of products;
>
> ..."

This excerpt of the preamble to EC Regulation No. 535/94 suggests to us that, if the criteria contained in the definition of "salted" in EC Regulation No. 535/94 had

7.371 We turn now to the question of whether or not the effect of EC Regulation No. 535/94 should be considered in the context of other EC acts and instruments.

Dinter and *Gausepohl* judgements

Arguments of the parties

7.372 *With respect to the question of whether or not the ECJ Dinter and*[118] *Gausepohl judgements*

118

118

expected to be aware of every ECJ judgement because each ECJ judgement is related to a specific

transportation."[656] According to Brazil, nowhere is it stated that the period exceeding transportation is equal to "many" or "several" months, being the period of time the European Communities has apparently equated with long-term preservation. Brazil notes that, in *Gausepohl*, the "period considerably exceeding the time required for transportation" was only two days. Brazil submits that the European Communities' expert has attested that the products at issue can be preserved for that period and, therefore, may be considered as preserved for the long-term when transported from Switzerland to Germany, for example.[657] Since the European Communities has submitted that a salted/dried/smoked product can be further preserved by chilling/freezing and still fall under heading 02.10, and given that a product may be considered preserved for the long term when transported from Switzerland to Germany, Brazil submits that it is only fair that the same products would also be considered preserved for the long term when transported from Brazil to Germany, even if further preserved by chilling or freezing.[658]

7.384 The **European Communities** submits that, within the European Communities, the authoritative source of interpretation of the HS is the ECJ.[659] The European Communities submits that, should any conflict occur between EC legal instruments and ECJ judgements interpreting the HS, ECJ judgements would prevail.[660] The European Communities submits that, therefore, EC Regulation No. 535/94 cannot be viewed in isolation from the European Communities' institutional framework and, in particular from the *Dinter* and *Gausepohl* judgements in which the ECJ confirmed the consistent view in the European Communities that, in order to qualify as "salted" meat under heading 02.10, salting must be sufficient to ensure preservation.[661]

7.385 In response, **Thailand** submits that the ECJ itself has stated that an Additional Note "becomes part of the heading to which it refers and has the same binding effect, whether it constitutes an authentic interpretation of the [relevant] heading or supplements it."[662] Further, Thailand refers to the ECJ judgement in

ECJ considered that the *Dinter* judgement had been delivered in different circumstances to those facing the ECJ when *Gijs van de Kolk-Douane Expéditeur BV* was decided. In particular, an ISO standard had been issued, which confirmed the objectivity of sensory testing, thereby rendering the ECJ's criticism of such a method of testing in *Dinter* moot. The European Communities further submits that the ECJ only upheld Additional Note 6(a) because it merely concerned the technical means for an objective assessment of the characteristics of a product, but did not alter the scope of the headings concerned. The European Communities argues that, in contrast, the insertion of a criterion that all meat products with a salt content exceeding 1.2% can be considered as "salted" under heading 02.10 even if such salting does not ensure preservation would significantly alter the scope of heading 02.10 as consistently interpreted by the ECJ in *Dinter* and *Gausepohl*.[668]

7.387 In response, **Brazil** submits that the *Gausepohl* judgement was also delivered in different circumstances. In particular, at the time the ECJ decided the *Gausepohl* case, Additional Note 7 to Chapter 2 of the CN, defining "salted meat" of heading 02.10, did not exist. Once that note was inserted in the CN, a "different circumstance" was created that would, for example, affect any judgement subsequent to *Gausepohl* regarding "salted meat" of heading 02.10.[669] **Thailand** submits that the legal effects of the ECJ's judgment in *Gausepohl* were modified by the provisions of Additional Note 7, which specified the criteria to be taken into account for the classification of products under heading 02.10.[670] Thailand further submits that EC Regulation No. 535/94 does not change the scope of the chapters, sections and headings of the HS nor the EC's CN nor the EC Schedule. According to Thailand, that Regulation merely specifies the objective criteria to be taken into account for classifying goods under heading 02.10.[671] Thailand further submits that EC Regulation No. 535/94 has been enacted many times as an EC Council Regulation through the annual issuance of the EC's CN.[672]

7.388 The **European Communities** submits that the relationship between judgements such as *Gausepohl*, which interprets the CN, and a later EC Commission Regulation inserting an Additional Note, is an issue of "hierarchy of norms" as opposed to a question of hierarchy between ECJ judgements and EC Commission Regulations.[673] The European Communities explains that the wording and structure of heading 02.10 compels a requirement of preservation as confirmed by the ECJ in *Gausepohl.* The European Communities submits that, in *Gausepohl*, the ECJ confirmed the scope of heading 02.10 in the CN (i.e. a Council Regulation). According to the European Communities, the later addition by the EC Commission of Additional Note 7 through EC Regulation No. 535/94 is a legal act which is inferior to the CN. The European Communities submits that the EC Commission is not entitled to modify, through an EC Commission Regulation, the content or the scope of a tariff heading laid down in the CN (i.e. a Council Regulation implementing the HS). Therefore, any EC Commission act must necessarily be read together at all times with the superior norm (i.e. the CN) and its interpretation by the ECJ. According to the European Communities, to the extent there was a conflict between the EC Commission act and the CN, the scope of heading 02.10 in the CN as interpreted by the ECJ would prevail.[674] In addition, the European Communities submits that EC Regulation No. 535/94 could not undo the ECJ's finding in the *Gausepohl* case because the HS is an international convention binding on the European Communities and precludes the

Gause

674

EC Commission from altering the subject-matter of the tariff headings which have been defined on the basis of the HS.[675]

7.389 In response, **Brazil** submits that the European Communities' argument that Additional Note 7 to Chapter 2, inserted in the CN by means of EC Regulation No. 535/94 could not alter heading 02.10 as it is found in the HS and, therefore, must be read in the context of the long-term preservation structure of Chapter 2 of the HS is misleading. In particular, Brazil submits that the argument assumes that long-term preservation is what defines the structure of Chapter 2 and the processes of heading 02.10 of the HS, a view that Brazil does not subscribe to.[676] Brazil submits that, in *Gausepohl*, the ECJ was requested to construe EEC Regulation No. 2658/87 establishing the European Communities' CN pursuant to Article 177 of the EEC Treaty.[677] Brazil submits that, according to EEC Regulation No. 2658/87, the EC Commission can adopt a Regulation that inserts an Additional Note in a Chapter of the CN, such as EC Regulation No. 535/94.[678] According to Brazil, when the ECJ in *Gausepohl* was asked to construe the CN, "long-term preservation" was neither part of the CN nor the HS.[679] Brazil submits that, therefore, the ECJ in the *Gausepohl* case did not confirm the scope of heading 02.10 in the CN since confirmation implies validation of something that already existed. Brazil submits that EC Regulation No. 535/94 is in perfect harmony with what is provided under heading 02.10 of the CN. Brazil further submits that, while the ECJ has the authority to interpret an act of the EC Council, such as the CN, it does not have the authority to interpret the HS.[680]

Analysis by the Panel

7.390 The first question for determination by the Panel is whether the ECJ judgements, *Dinter* and *Gausepohl*, qualify as "circumstances of conclusion" of the EC Schedule within the meaning of Article 32 of the *Vienna Convention.* The Panel considers that there are two elements associated with this question as it relates to the *Dinter* and *Gausepohl* judgements. The first is whether, as a theoretical matter, court judgements can be considered under Article 32. The second is whether the timing of issuance of the ECJ judgements at issue, and more particularly the *Dinter* judgement, necessarily disqualifies it from consideration under Article 32.

7.391 Regarding the question of whether or not court judgements can be considered as "circumstances of conclusion" under Article 32 of the *Vienna Convention*, the Panel recalls that, in *EC – Computer Equipment*, the Appellate Body explicitly stated that the importing Member's classification practice during the Uruguay Round and that Member's "legislation" that was applicable at that time should have been taken into consideration under Article 32. As has been noted by the parties in this case, the issue arises as to whether the Appellate Body's list is exhaustive or, rather, is merely linked to the particular facts of that case, implying that other unlisted items may also qualify. The Appellate Body's report tends to indicate that the latter interpretation is the valid one – that is, the Appellate Body was merely making a pronouncement on the basis of the facts that were available to it in that case rather than seeking to provide an exhaustive list of items qualifying as "circumstances of conclusion" in all cases. This would suggest that a valid distinction cannot be drawn between, on the one hand, EC legislation and, on the other hand, ECJ judgements for the purposes of Article 32 of the

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

[676] Brazil's oral statement at the second substantive meeting. para. 57; Brazil's comments on the EC's reply to Panel question No. 93.

[677] -conclusi0.1850322 rather(23Tj 3 0 TD 0.1875 Tc-76.75 Tf 0.375 Tc 0 Tw (677) Tj 11.25 -4.5 9D

Vienna Convention.[681] Accordingly, the Panel considers that court judgements, such as the *Dinter* and *Gausepohl* judgements, may be considered under Article 32 of the *Vienna Convention*.

7.392 With respect to the timing of the ECJ judgements, we recall that Brazil and Thailand have submitted that the *Dinter* judgement should not be considered by the Panel under Article 32 of the *Vienna Convention* because it was issued in 1983, prior to the launch of the Uruguay Round.[682] We recall our conclusion in paragraph 7.344 above that, in theory, there is no temporal limitation on what may qualify as "circumstances of conclusion" under Article 32 and that "relevance" is the more appropriate criterion for determining such qualification. We also stated in that paragraph that there may be some correlation between the timing of an event, act or other instrument and its relevance to the treaty in question and *Vienna Convention* refers to
s of *conclusion*" indicates that the event, act or other instrument in question must be
oximate to the conclusion of a treaty in order for it to be taken into account for the
of that treaty under Article 32.

ary to what has been argued by Brazil and Thailand, it is our view 0.1428g33Fact 0.142the
sued in 1983 does not, in itself, suggest 0.142it is temporally too remote from
Schedule to have influenced (or, at least, had the possibility of influencing)
g 142issue in this dispute. We say this in light of the Fact 0.14 ,
for the aspects that were dealt with in Additional Note 6(a) to the CN[683], *Dinter*
Nevertheless,
n to examine the scope of heading 16m02 of the CN,
uch an examination, the ECJ made general comments
to poultry.
h e

[681] This conclusion would seem to be particularly valid in relation to the present case where the ECJ judgements in question interpret EC legislation. In our view, it would be an odd situation if such legislation could be considered under Article 32 of 0.e *Vienna Convention* but not cour42judgements,2which interpret that legislation.

[682] ritten submission, para.

salt content is merely a minimum above which it is possible that meat qualifies under heading 02.10, presumably subject to meeting other conditions.

7.400 We consider that our understanding of the ECJ's judgement in *Gausepohl* as far as it concerns the concession at issue in this case is consistent with other evidence available to us. As noted above, we have evidence to indicate that, during the period of 1996 - 2002, EC customs authorities considered that the products at issue – frozen boneless chicken cuts deeply and homogeneously impregnated with salt, with a salt content between 1.2% – 3% salt – qualified as "salted" products for the purposes of heading 02.10 of the EC Schedule.[690]

7.401 Further, we refer to the minutes of the meeting of the EC Customs Code Committee dated 25 January 2002, which state in relevant part that:

> "Additional Note 7 of Chapter 2 [introduced by EC Regulation No. 535/94] was introduced with a view to respecting the [*Gausepohl* judgement]. The judgement ruled the following:
>
> > 'Heading 0210 of [the Combined Nomenclature]... must be interpreted as meaning that meat of bovine animals may be classified under that heading as salted meat only if it has been deeply and evenly impregnated with salt in all its parts for the purposes of long-term preservation so that it has a minimum total salt content of 1.2% by weight.'
>
> However, Additional Note 7 to Chapter 2 introduced then into the Combined Nomenclature does not copy the writing of this reflect [sic] this judgement completely. In the afore-mentioned note reference was made to any kind of meat and not only to meat of bovine animal; in addition the criterion of salting for the purpose of long-term preservation has not been introduced into [Additional Note 7 to Chapter 2]."[691]

As noted previously, the minutes indicate that the principle of long-term preservation was excluded from the definition of "salted" in EC Regulation No. 535/94. They also tend to indicate that the *Gausepohl* judgement only related to bovine meat whereas EC Regulation No. 535/94 applies more generally to all meat.

7.402 Even if the ambiguities concerning the meaning and effect of the *Gausepohl*

is "seasoned" for the purposes of Chapter 16 of the CN – was replaced by the criterion contained in Additional Note 6(a).[694]

Schedule.[698] The European Communities submits that these Notes indicate that, at the time of the Uruguay Round, the notion of preservation was intrinsic to the European Communities' understanding of the meats in heading 02.10. According to the European Communities, that the specific Notes refer to pigmeat is irrelevant for the purposes of this dispute given that they incontrovertibly show that the European Communities interpreted the term "salted" at the time of the Uruguay Round as referring to

submits that the normal practice in the European Communities is not to apply provisions of one Explanatory Note to another, unless the Note states that it shall apply *mutatis mutandis*.[708]

7.409 The **European Communities** also refers to an Explanatory Note of December 1994 to subheadings 0210.11.11 and 0210.11.19 of the CN. The European Communities submits that the importance of the Note lies in the fact that it assumes the existence of the principle of long-term preservation with respect to heading 02.10.[709]

7.410 **Brazil** and **Thailand** submit that the Explanatory Note in question relates to salted meat of domestic swine and not to all "salted meat" of heading 02.10 and that, therefore, it cannot be applied to poultry meat.[710] According to Brazil, had the European Communities desired to apply the provisions on salted meat of domestic swine to all meat covered under heading 02.10 it would have done so through a general Explanatory Note to heading 02.10 rather than through an Explanatory Note to a particular subheading.[711]

Analysis by the Panel

7.411 The first question for determination by the Panel is whether Explanatory Notes to the CN and to its predecessor, the Common Customs Tariff, qualify as "circumstances of conclusion" of the EC Schedule within the meaning of Article 32 of the *Vienna Convention*. For the reasons referred to in paragraph 7.391 above, the Panel does not consider that the fact that the Explanatory Notes were not explicitly mentioned by the Appellate Body in *EC – Computer Equipment* as a source under Article 32 means that such Notes cannot be taken into account under that Article. In our view, since the Explanatory Notes are considered in interpreting the CN, even if they are not, strictly speaking, part of the CN, they could qualify under Article 32 of the *Vienna Convention*.

7.412 However, even if these Explanatory Notes qualify for consideration under Article 32 of the *Vienna Convention* whether as "circumstances of conclusion" in the case of the 1981 and 1983 Explanatory Notes or more generally under Article 32 in the case of the December 1994 Explanatory Note, we note that they appear to be non-binding.[712] The ECJ has also stated that, while Explanatory Notes may play an important interpretative role in cases of uncertainty, they cannot amend provisions of the CN.[713] In contrast, the ECJ has made it clear that Additional Notes become part of the headings to which they relate and have binding effect.[714] On the basis of the foregoing, we understand that Additional Notes to the CN take precedence over Explanatory Notes in the hierarchy of EC classification rules. Therefore, we consider that, to the extent that there was any inconsistency between the Explanatory Notes in question and EC Regulation No. 535/94, which introduced Additional Note 7, Additional Note 7 would prevail.

7.413 The Panel recalls its finding in paragraph 7.369 that, according to EC Regulation No. 535/94, if any meat is deeply and homogeneously impregnated with salt and has a minimum salt content of 1.2% by weight, it will meet the requirements of that Regulation and will qualify as "salted" meat under the concession contained in heading 02.10 of the EC Schedule. We do not consider that the notion of long-term preservation is reflected in that Regulation. Therefore, even if the Explanatory

---

[708] Thailand's reply to Panel question No. 75; Thailand's second written submission, para. 92.

[709] EC's oral statement at the second substantive meeting, para. 70.

[710] Brazil's second written submission, para. 93; Thailand's second written submission, para. 92.

[711] Brazil's second written submission, para. 94.

[712] This is apparent from Article 1(2)(c) of the CN, which provides that the CN comprises, *inter alia*, "preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings". No mention is made of Explanatory Notes in Article 1(2)(c) of the CN.

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

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

Notes relied upon by the European Communities may be considered to reflect the principle that salting under heading 02.10 is for the purposes of preservation, as the European Communities asserts they do on the basis of the terms of the CN and ECJ jurisprudence, the Panel understands that Additional Note 7, which does not reflect this principle, takes precedence. Therefore, we will disregard those Explanatory Notes in our interpretation of the concession contained in heading 02.10 of the EC Schedule.

Other Additional Notes

Arguments of the parties

7.414 **Thailand** notes that, in 1983, prior to the launch of the Uruguay Round, the European Communities introduced Additional Note 6(c) to the CN [later renumbered as Additional Note 6(b)] which stated that: "However, prAddi128 Tc 1.85ej 0 Tc -0.5625 Tw ( ) Tjtory Notes in d.5 f t -29TD ( ) Tj 3

With regard to the United States, the European Communities refers to a US customs ruling of

namely the United States – during the Uruguay Round negotiations. Such evidence concerns products other than those at issue in this dispute. The Panel does not consider that this limited evidence has any probative value regarding the interpretation of the concession contained in heading 02.10 of the EC Schedule for the purposes of this dispute and, therefore, it will be disregarded.

7.422 The Panel notes that we have dealt with classification practice after 1994 in section VII.G.3(c)(i) above as "subsequent practice" under Article 31(3)(b) of the *Vienna Convention*. Even if such practice does not qualify as "subsequent practice" under Article 31(3)(b), we consider that it may, nevertheless, be taken into consideration under Article 32 of the *Vienna Convention*.[725] If so, our conclusions regarding the relevance of subsequent practice for the interpretation of the concession contained in heading 02.10 of the EC Schedule apply equally here.

(iii) Summary and conclusions regarding "supplementary means"

7.423 The Panel recalls that, following its analysis of the concession contained in heading 02.10 of the EC Schedule pursuant to Article 31 of the *Vienna Convention*, the Panel concluded that the products at issue appeared to be covered by that concession. The Panel sought to confirm that conclusion through a reference to supplementary means of interpretation of the concession in question pursuant to Article 32 of the *Vienna Convention*. We considered

(i) Conclusions regarding the application of Article II of the GATT 1994 in this case

7.425 The Panel recalls that, in paragraph 7.79 above, we stated that, if we were to conclude that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule, there is no question that the treatment accorded to those products under the measures at issue is less favourable than that provided for in the EC Schedule because undisputed pricing data indicates that the duty levied on the products at issue can and has exceeded 15.4% *ad valorem*, being the bound duty rate for products covered by heading 02.10.

7.426 It is the Panel's view that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule. Therefore, such products are entitled to treatment provided for by that concession. Since the products at issue are not being accorded such treatment, the European Communities is in violation of Article II:1(a) and Article II:1(b) of the GATT 1994.

7.427