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EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF FROZEN BONELESS CHICKEN CUTS

AB-2005-5

Report of the Appellate Body

I. Introduction 1
II. Appeal by the European Communities 6
A. *Claims of Error by the European Communities – Appellant* 6
1. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention* 6
(a) Ordinary Meaning 7
(b) Context 8
(c) Subsequent Practice 11
(d) Object and Purpose 15
2. Interpretation of the EC Schedule in the Light of Article 32 of the *Vienna Convention* 16
(a) Circumstances of Conclusion 16
(b) Characterization of Relevant Law of the European Communities 18
B. *Arguments of Brazil – Appellee* 20
1. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention* 20
(a) Ordinary Meaning 20
(b) Context 21
(c) Subsequent Practice 22
(d) Object and Purpose 26
2. Interpretation of the EC Schedule in the Light of Article 32 of the *Vienna Convention* 27
(a) Circumstances of Conclusion 27
(b) Characterization of Relevant Law of the European Communities 28
C. *Arguments of Thailand – Appellee* 29
1. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention* 29
(a) Ordinary Meaning 29
(b) Context 31
(c) Subsequent Practice 32
(d) Object and Purpose 35
2. Interpretation of the EC Schedule in the Light of Article 32 of the *Vienna Convention* 36
(a) Circumstances of Conclusion 36
(b) Characterization of Relevant Law of the European Communities 37
III. Other Appeals by Brazil and Thailand 38

A. *Claims of Error by Brazil – Other Appellant* 38
1. Terms of Reference 38
(a) Measures within the Terms of Reference 38
(b) Products within the Terms of Reference 39
2. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention* 40
B. *Claims of Error by Thailand – Other Appellant* 42
1. Terms of Reference 42
(a) Measures within the Terms of Reference 42
(b) Products within the Terms of Reference 43
2. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention* 44
C. *Arguments of the European Communities – Appellee* 45
1. Terms of Reference 45
(a) Measures within the Terms of Reference 45
(b) Products within the Terms of Reference 46
2. Interpretation of the EC Schedule in the Light of Articles 31 and 32 of the *Vienna Convention* 47
IV. Arguments of the Third Participants 49
A. *China* 49
B. *United States* 51
V. Issues Raised in this Appeal 53
VI. Introduction 56
VII. Terms of Reference 59
A. *Measures Within the Terms of Reference* 59
B. *Products Within the Terms of Reference* 65
VIII. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention* 67
A. *The Ordinary Meaning of the Term "Salted" in Heading 02.10 of the EC Schedule* 67
1. Analysis of the Ordinary Meaning and "Factual Context" of the Term "Salted" 68
2. The European Communities' Claim under Article 11 of the DSU 69
3. Conclusion Concerning the Ordinary Meaning 73
B. *"Context"* 74
1. What Constitutes Context for Interpreting the Term "Salted" in Heading 02.10 of the EC Schedule? 75
2. The Meaning of the Term "Salted" in Heading 02.10 of the EC Schedule, Considered in its Context 79
(a) The Terms of Heading 02.10 Other than "Salted" 82
(b) The Structure of Chapter 2 of the EC Schedule and the Harmonized System and the Relevant Notes Thereto 84

3. Rule 3 of the General Rules for the Interpretation of the Harmonized System 90
4. Conclusion Concerning "Context" 92
IX. Object and Purpose 92
A. *Object and Purpose of the Treaty or of a Particular Treaty Provision* 93
B. *Did the Panel Rely on "Expansion of Trade" as an Interpretative Principle?* 94
C. *Does a Criterion of "Preservation" Undermine the Security and Predictability of Tariff Concessions?* 96
D. *Was Heading 02.10 Intended to Cover Frozen (Salted) Poultry Meat?* 98
X. Subsequent Practice 98
A. *What May Qualify as Practice?* 100
B. *How Does One Establish Agreement of Parties that Have Not Engaged in a Practice?* 105
C. *Was there "Consistency" of Customs Classification Practice in this Case?* 107
D. *Conclusion* 108
XI. Interpretation of the EC Schedule in the Light of Article 32 of the *Vienna Convention* 108
A. *Introduction* 108
B. *The Concept of "Circumstances of the Conclusion of a Treaty"* 110
1. The Concept of "Circumstances" 112
2. Relevance of Circumstances for Interpretation 113
3. "Circumstances " at What Time? 114
4. What Kind of Knowledge is Required? 115
5. Whose Acts or Instruments May Qualify as "Circumstances"? 117
6. What Types of Events, Acts, and Instruments? 119
C. *Characterization of Relevant Law of the European Communities* 121
1. EC Regulation 535/94 123
2. The *Dinter* and *Gausepohl* Judgments of the European Court of Justice 126
D. *Conclusion* 134
XII. Findings and Conclusions 134

ANNEX I Notification of an Appeal by the European Communities under paragraph 4 of Article 16 of the DSU
ANNEX II Notification of an Other Appeal by Brazil under Article 16.4 and Article 17 of the DSU, and under Rule 23(1) of the *Working Procedures for Appellate Review*
ANNEX III Notification of an Other Appeal by Thailand under Article 16.4 and Article 17 of the DSU, and under Rule 23(1) of the *Working Procedures for Appellate Review*
ANNEX IV Chapter 2 of the Harmonized Commodity Description and Coding System

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
Canada – Patent Term	Panel Report, *Canada – Term of Patent Protection*, WT/DS170/R, adopted 12 October 2000, as upheld by Appellate Body Report, WT/DS170/AB/R, DSR 2000:XI, 5121
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report, WT/DS302/AB/R
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Chicken Cuts (Brazil)	Panel Report, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil*, WT/DS269/R, 30 May 2005
EC – Chicken Cuts (Thailand)	Panel Report, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand*, WT/DS286/R, 30 May 2005
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
EC – Export Subsidies on Sugar	Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135

Short Title	Full Case Title and Citation
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Telecoms	Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1675
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS217/ARB/EEC, 31 August 2004
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248AB/R, WT/DS249AB/R, WT/DS251AB/R, WT/DS252AB/R, WT/DS253AB/R, WT/DS254AB/R, WT/DS258AB/R, WT/DS259AB/R, adopted 10 December 2003

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
BTIs	Binding Tariff Information
DSB	Dispute Settlement Body
Dinter judgment	European Court of Justice, Judgment, *Dinter v Hauptzollamt Köln-Deutz*, Case C-175/82, ECR [1983] 969
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
ECJ	European Court of Justice
EC Decision 2003/97/EC	Commission Decision of 31 January 2003 concerning the validity of certain binding tariff information (BTI) issued by the Federal Republic of Germany (*notified under document number C(2003) 77*) (2003/97/EC)
EEC Regulation 2658/87	Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff
EC Regulation 535/94	Commission Regulation (EC) No. 535/94 of 9 March 1994 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff
EC Regulation 1223/2002	Commission Regulation (EC) No. 1223/2002 of 8 July 2002 concerning the classification of certain goods in the Combined Nomenclature, and corrigenda
EC Regulation 1789/2003	Commission Regulation (EC) No. 1789/2003 of 11 September 2003 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff
EC Regulation 1871/2003	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
EC Regulation 2344/2003	Commission Regulation (EC) No. 2344/2003 of 30 December 2003 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff
EC Schedule	European Communities' Schedule LXXX
GATT 1994	*General Agreement on Tariffs and Trade 1994*
Gausepohl judgment	European Court of Justice, Judgment, *Gausepohl-Fleisch GmbH v. Oberfinanzdirektion Hamburg*, Case C-33/92, ECR [1993] I-3047
General Rules	World Customs Organization, General Rules for the Interpretation of the Harmonized System
Harmonized System	World Customs Organization, *Harmonized Commodity Description and Coding System*
ILC	International Law Commission
Panel Reports	Panel Report, *EC – Chicken Cuts (Brazil)* Panel Report, *EC – Chicken Cuts (Thailand)*

Abbreviation	Definition
Vienna Convention	*Vienna Convention on the Law of Treaties*, done in Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WCO	World Customs Organization
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Customs Classification of Frozen Boneless Chicken Cuts

European Communities, *Appellant/Appellee*
Brazil, *Appellant/Appellee*
Thailand, *Appellant/Appellee*

China, *Third Participant*
United States, *Third Participant*

AB-2005-5

Present:

Sacerdoti, Presiding Member
Baptista, Member
Ganesan, Member

I. Introduction

1. The European Communities, as appellant, and Brazil and Thailand, as other appellants, each appeal certain issues of law and legal interpretations developed in the Panel Reports, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (the "Panel Reports").[1] The Panel was established to consider complaints by Brazil and Thailand concerning certain measures of the European Communities, pertaining to the classification of frozen boneless salted chicken cuts for tariff treatment.[2]

2. Brazil and Thailand claimed before the Panel that Commission Regulation (EC) No. 1223/2002 ("EC Regulation 1223/2002") and Commission Decision No. 2003/97/EC ("EC Decision 2003/97/EC") resulted in tariff treatment for frozen boneless salted chicken cuts that is less favourable than that provided for in the European Communities' Schedule LXXX (the "EC Schedule"), in violation of Article II:1(a) and/or Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").[3] More particularly, Brazil and Thailand alleged that, through the challenged 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 0207.41.10 and are

[1] *Complaint by Brazil*, WT/DS269/R, 30 May 2005; *Complaint by Thailand*, WT/DS286/R, 30 May 2005. At the request of the European Communities, pursuant to Article 9.2 of the DSU, the Panel issued two separate reports. These two reports have the same descriptive part and findings; the only "material difference" between these separate reports is the cover page and the conclusions. (Panel Reports, para. 6.21)

[2] Panel Reports, para. 2.1.

[3] *Ibid.*, paras. 2.1 and 7.60.

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."[4]

3. Brazil and Thailand also claimed before the Panel that, although Commission Regulation (EC) No. 1871/2003 ("EC Regulation 1871/2003") and Commission Regulation (EC) No. 2344/2003 ("EC Regulation 2344/2003") were not mentioned specifically in their requests for the establishment of a panel[5], these Regulations must be considered as part of the challenged measures because they are "closely related" to and based on the same principle of long-term preservation, as set out in the challenged measures.[6] Brazil and Thailand also alleged that the specific products at issue were "frozen boneless salted chicken cuts that have been deeply and homogeneously impregnated with salt in all parts with a total salt content of not less than 1.2% by weight", and that the terms of reference are not limited to products with a salt content between 1.2 and 3 per cent.[7]

4. In the Panel Reports, circulated to Members of the World Trade Organization (the "WTO") on 30 May 2005, the Panel determined that EC Regulations 1871/2003 and 2344/2003 were outside the Panel's terms of reference.[8] The Panel further concluded that the specific products at issue in this dispute were "frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% – 3%" as provided for in the measures under the terms of reference.[9]

5. The Panel then proceeded to examine whether the measures at issue—EC Regulation 1223/2002 and EC Decision 2003/97/EC—resulted in the imposition of duties and conditions on the products at issue in excess of those provided for in the EC Schedule. The Parties agreed that the import duties levied on the products at issue, when classified under heading 02.07, exceeded 15.4 per cent *ad valorem*, which is the bound duty rate for products covered by heading 02.10. In view of this agreement, the Panel concluded that, if it were to determine 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."[10]

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[4]Panel Reports, para. 7.3.

[5]WT/DS269/3 (Brazil), 22 September 2003; WT/DS286/5 (Thailand), 28 October 2003.

[6]Panel Reports, paras. 7.21-7.22.

[7]EC Regulation 1223/2002 and EC Decision 2003/97/EC refer to frozen boneless salted chicken cuts impregnated with salt, with a salt content of 1.2 to 3 pr cent.

[8]Panel Reports, para. 7.32.

[9]*Ibid.*, para. 7.36.

[10]*Ibid.*, para. 7.75.

6. Before the Panel, Brazil and Thailand claimed that the products at issue were not covered by heading 02.07, but rather by heading 02.10, while the European Communities alleged the reverse. Both Brazil and Thailand based their positions on the meaning of the term "salted" in heading 02.10 and submitted that the notion of "long-term preservation" is not included in the meaning of "salted" under that heading. On the contrary, the European Communities claimed that the products at issue were not "salted" because, in order to qualify under heading 02.10 (through salting), the product must have been "deeply and homogenously impregnated with a level of salt sufficient to ensure long-term preservation".[11] The Panel found that the critical question in interpreting the EC Schedule is "whether the term 'salted' in the concession contained in heading 02.10 covers the products at issue which, in turn, will entail a determination of whether that concession includes the requirement that salting is for preservation and, more particularly, is for long-term preservation."[12]

7. Following an analysis under Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")[13] of the term "salted" in the concession contained in heading 02.10 of the EC Schedule, the Panel concluded 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.[14] Therefore, 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[15];

(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.[16] Therefore, the ordinary meaning of the term "salted" in heading 02.10 is not dispositive regarding the question whether the products at issue are covered by this concession[17];

(c) the "context" of the term "salted"—namely, the terms of heading 02.10, the structure and the other parts of the EC Schedule, as well as the terms, structure, the Explanatory Notes and the General Rules for the Interpretation of the Harmonized

[11]Panel Reports, para. 7.81.

[12]*Ibid.*, para. 7.86. (footnote omitted)

[13]Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

[14]Panel Reports, para. 7.331.

[15]*Ibid.*, para. 7.151.

[16]*Ibid.*, para. 7.331.

[17]*Ibid.*, para. 7.151.

System (the "General Rules")—do not clarify the "ordinary meaning" of the term "salted" in the concession contained in heading 02.10 of the EC Schedule, although the context does tend to indicate that the heading is not characterized necessarily by the notion of long-term preservation[18];

(d) the European Communities' consistent practice of classifying the products at issue under heading 02.10 during the period between 1996 and 2000 amounts to "subsequent practice"[19], and it indicates that "the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule"[20];

(e) given the lack of certainty associated with the application of the criterion of long-term preservation, an interpretation of the term "salted" in the concession contained in heading 02.10 that includes this criterion could undermine the "object and purpose" of security and predictability in trade relations, which lie at the heart of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") and the GATT 1994[21]; and

(f) the relevant aspects of "supplementary means of interpretation", most particularly Commission Regulation (EC) No. 535/94 ("EC Regulation 535/94"), indicate that meat that has been deeply and homogeneously impregnated with salt and has a minimum salt content of 1.2 per cent by weight would qualify as "salted" meat under the concession contained in heading 02.10 of the EC Schedule.[22] The supplementary means of interpretation under Article 32 of the *Vienna Convention* confirm the preliminary conclusions reached by the Panel under Article 31 of the *Vienna Convention*.[23]

8. After evaluating the claims of the Parties and interpreting the term "salted" according to the interpretation rules codified in the *Vienna Convention*, the Panel found, in the light of its above-referenced conclusions, that:

[18]Panel Reports, para. 7.331.

[19]*Ibid.*, para. 7.303.

[20]*Ibid.*, para. 7.331.

[21]*Ibid.*

[22]*Ibid.*, para. 7.423.

[23]*Ibid*.

(a) frozen boneless chicken cuts that have been impregnated with salt, with a salt content of 1.2 to 3 per cent (the products at issue), are covered by the concession contained in heading 02.10 of the EC Schedule;

(b) EC Regulation 1223/2002 and EC Decision 2003/97/EC result in the imposition of customs duties on the products at issue that are in excess of the duties provided for in respect of the concession contained in heading 02.10 of the EC Schedule; and

(c) accordingly, the European Communities has acted inconsistently with the requirements of Articles II:1(a) and II:1(b) of the GATT 1994 and, thus, nullified or impaired benefits accruing to Brazil and Thailand.[24]

9. The Panel therefore recommended that the Dispute Settlement Body (the "DSB") request the European Communities to bring EC Regulation 1223/2002 and EC Decision 2003/97/EC into conformity with its obligations under the GATT 1994.[25]

10. On 13 June 2005, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and filed a Notice of Appeal[26] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[27] On 20 June 2005, the European Communities filed an appellant's submission.[28] On 27 June 2005, both Brazil and Thailand notified the DSB of their intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and each filed a Notice of Other Appeal[29] pursuant to Rule 23(1) of the *Working Procedures*. On 28 June 2005, Brazil and Thailand each filed an other appellant's submission.[30] On

[24]Panel Reports, para. 8.1.

[25]*Ibid.*, para. 8.2.

[26]WT/DS269/6, WT/DS286/8 (attached as Annex I to this Report).

[27]WT/AB/WP/5, 4 January 2005.

[28]Pursuant to Rule 21(1) of the *Working Procedures*.

[29]WT/DS269/7 (Brazil) (attached as Annex II to this Report); WT/DS286/9 (Thailand) (attached as Annex III to this Report).

[30]Pursuant to Rule 23(3) of the *Working Procedures.*

8 July 2005, the European Communities, Brazil, and Thailand each filed an appellee's submission.[31] On the same day, China and the United States each filed a third participant's submission.[32]

11. By letter dated 30 June 2005, Thailand requested authorization from the Appellate Body Division hearing the appeal (the "Division"), pursuant to Rule 18(5) of the *Working Procedures*, to correct three "clerical errors" in its other appellant's submission. On 4 July 2005, the Division, pursuant to Rule 18(5) of the *Working Procedures*, invited all participants and third participants to comment on Thailand's request. None of the participants or third participants commented on Thailand's request. On 6 July 2005, the Division authorized Thailand to correct the three clerical errors in its other appellant's submission.

12. On 13 July 2005, the Division hearing the appeal received an *amicus curiae* brief from the Association of Poultry Processors and Poultry Trade in the European Union Countries (***avec***).[33] The Division does not find it necessary to take the brief into account in resolving the issues raised in this appeal.

13. The oral hearing in this appeal was held on 25 and 26 July 2005. The participants and third participants presented oral arguments and responded to questions posed by the Members of the Division hearing the appeal.

II. Appeal by the European Communities

A. *Claims of Error by the European Communities – Appellant*

1. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention*

14. The European Communities submits that the Panel erred in its interpretation of heading 02.10 of the EC Schedule in respect of various elements of Article 31 of the *Vienna Convention*. Specifically, the European Communities alleges that the Panel erred in its consideration of the following: the "ordinary meaning" of the term "salted" found in heading 02.10; the "context" of that term; the "object and purpose" of the *WTO Agreement* and the GATT 1994; and the alleged "subsequent practice" of the parties concerning classification under heading 02.10.

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[31]Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

[32]Pursuant to Rule 24(1) of the *Working Procedures*.

[33]In a letter dated 18 July 2005, Brazil requested the Appellate Body to "disregard" ***avec***'s *amicus curiae* brief. In a letter dated 21 July 2005, and at the oral hearing, Thailand requested that the Appellate Body "not take [this brief] into account". In its closing statement at the oral hearing, Brazil contested the arguments made by ***avec***.

(a) Ordinary Meaning

15. The European Communities agrees with the Panel that the dictionary definitions of the term "salted" include, but are not confined to, the notion of preservation. The European Communities also contends that it is from "the rest of heading 02.10, and the structure of chapter 2"[34] of the Harmonized Commodity Description and Coding System of the World Customs Organization ("WCO") (the "Harmonized System") that the term "salted" in that heading derives its meaning as referring to a process of preservation.

16. The European Communities takes issue with the Panel's examination of what the Panel referred to as the "[f]actual context for the consideration of the ordinary meaning".[35] The European Communities submits that the analysis of such "factual context" is not relevant to the legal question of the meaning of the term "salted", and that such an analysis is neither supported by the *Vienna Convention* nor by the academic sources to which the Panel referred.[36] Furthermore, several of the Panel's conclusions as to the "factual context" are rendered erroneous as a matter of law in the light of an analysis of the context of the term "salted".

17. The European Communities further claims that certain of the Panel's conclusions in its analysis of the "ordinary meaning" of the term "salted" amount to "an egregious distortion of the facts" and are therefore inconsistent with the Panel's obligations under Article 11 of the DSU.[37] First, the European Communities refers to the Panel's finding that "it appears that even small quantities of salt may have a preservative effect".[38] In making this statement, the Panel "seriously misrepresent[ed] the technical evidence supplied" by the European Communities' expert.[39] The Panel stated that "3% salt may prevent spoilage, albeit for a period of only a few days", whereas what the European Communities' expert had stated was that a level of salt of 3 per cent in *a raw and chilled product* is too low to prevent spoilage for more than a few days.[40]

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[34]Chapter 2 of the Harmonized Commodity Description and Coding System is attached as Annex IV to this Report.

[35]European Communities' appellant's submission, para. 62 (referring to Panel Reports, paras. 7.117-7.149).

[36]*Ibid.* (referring to the Panel's reference to Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn (Manchester University Press, 1984), p. 121, quoted at Panel Reports, footnote 153 to para. 7.105).

[37]*Ibid.*, para. 62.

[38]*Ibid.*, para. 63 (referring to Panel Reports, para. 7.146).

[39]*Ibid.*, para. 63.

[40]*Ibid.*, paras. 63-64 (referring to Panel Reports, footnote 249 to para. 7.146).

18. Secondly, the European Communities challenges the Panel's finding that certain products under heading 02.10 such as Parma ham, prosciutto, and jamón serrano require further preservation after salting. The European Communities argues that it is not the salt content of these products that makes additional means of preservation necessary and that these additional means of preservation are not *required*. In support of its contention, the European Communities refers to certain statements made by its expert.[41] Thirdly, the European Communities challenges the Panel's finding according to which the European Communities acknowledged that products covered by heading 02.10 of the EC Schedule "may require means of preservation in addition to [salting]" and that this acknowledgement "support[s] ... the view that a product preserved by salt for relatively short periods of time is not necessarily precluded" from falling under heading 02.10.[42] The European Communities argues that it did not make such an acknowledgement, but rather that it only pointed out that preservation by salting did not imply that meat could not be "further preserved by other means".[43] In the European Communities' view, there is no logical connection between this observation of the European Communities and the Panel's conclusion from it.

(b) Context

19. The European Communities submits that the Panel erred in interpreting the term "salted" when considering the term in its context. First, as regards the terms "salted, in brine, dried, smoked" in heading 02.10, the Panel wrongly found that the term "in brine" excludes the notion of preservation. The Panel found that "brine" is "water containing salt".[44] In the European Communities' view, the words "to salt" and "salted"—which the Panel had previously cited correctly—"make it quite clear" that the action of putting a product in brine is intended to preserve the product.[45] In support of its argument, the European Communities also refers to heading 08.12 of the Harmonized System, which states that brine is a "preservative solution".[46]

20. Secondly, the European Communities submits that the Panel erred in failing to take into account what, according to the European Communities, are the "exclusive distinguishing characteristics" of the terms "salted, in brine, dried, smoked" in heading 02.10. The Panel provided no explanation for its conclusion that the dictionary meanings of these terms "are broader than just

[41]European Communities' appellant's submission, paras. 66-67.

[42]*Ibid.*, para. 69 (quoting Panel Reports, para. 7.149).

[43]*Ibid.*, para. 70.

[44]*Ibid.*, para. 77.

[45]*Ibid.*

[46]*Ibid.*, para. 79.

pertaining to preservation".[47] The terms "dried" and "smoked" may have different meanings in different contexts, but, with respect to meat and food, the dictionary definitions point to means of *preservation*. The Panel failed to identify the "intrinsic notion common to all terms" in heading 02.10[48]; all four terms in heading 02.10 include the concept of preservation, while only two of them involve the concept of preparation. Moreover, the Panel also disregarded the fact that the four processes referred to in heading 02.10 are the only ones commonly applied to the preservation of meat, and that the group of meats covered by heading 02.10 are the only meats to have this feature in common.[49] The European Communities' further points out that meat that has been "subjected to processes" (that is, "prepared") is "generally classified" under Chapter 16 of the Harmonized System; this shows that, there must be "something special" about the products falling under heading 02.10. This special feature, the European Communities submits, relates to the processes applied under heading 02.10, namely, processes resulting in preservation of the meat.

21. Thirdly, the European Communities challenges what it considers to be the Panel's "failure to take account of [the] distinguishing features of heading 02.10 in Chapter 2".[50] According to the European Communities, the headings in that Chapter form two categories, based on whether or not the meat has been subjected to the processes listed in heading 02.10. If those processes have been applied, the products fall under heading 02.10, which alone comprises the second category within Chapter 2. If those processes have *not* been applied, the products fall under one of headings 02.01 through 02.08, which make up the first category within Chapter 2. The European Communities also notes that headings 02.01 through 02.08 refer to the refrigeration of meat, and that heading 02.10 contains no reference to refrigeration. According to the European Communities, this implies that, for the products listed in heading 02.10, "the issue of refrigeration is not a significant consideration".[51]

22. The European Communities also refers to the Explanatory Note to Chapter 2[52], which speaks of "fresh" meat, "packed with salt as a temporary preservative during transport". According to the European Communities, the use of the word "temporary" in the Explanatory Note is "implicitly opposed" to permanent salting, with the result that heading 02.10 does not cover meats that are

[47]European Communities' appellant's submission, para. 81 (quoting Panel Reports, para. 7.162).

[48]*Ibid.*, para. 82 (quoting Panel Reports, para. 7.161).

[49]*Ibid.*, para. 83.

[50]*Ibid.*, heading III.C.4.

[51]*Ibid.*, para. 89.

[52]In its appellant's submission, the European Communities referred to this Note as "Chapter Note". (*Ibid.*, para. 92) Subsequently, the European Communities clarified that this Note is properly characterized as "Explanatory Note to Chapter". (European Communities' appellee's submission, footnote 50 to para. 71)

temporarily preserved by salt during transport.[53] The Note also makes it clear that the mere presence of some salt does not make a product "salted" for the purposes of heading 02.10. The Note further suggests that not every change in the characteristics of a product, brought about by salting, means that a product falls under heading 02.10[54]; rather, heading 02.10 refers to the result achieved by preservation. The European Communities also argues that the Panel's finding that the term "salted" does not necessarily require that salting be sufficient for preservation is "legally irrelevant"[55]; this is so because the Explanatory Note makes it clear that the fact that a preservation technique other than those listed in heading 02.10 might be applied does not alter the classification of that product.

23. In addition, the European Communities argues that the Panel failed to take proper account of the "historical basis" of heading 02.10.[56] At the outset, the European Communities considers the Panel's approach to be flawed because the Panel started with the negotiating history of the Harmonized System, rather than with the terms of that instrument. The Panel also "overlooked important elements" of the history of the Harmonized System that "clearly support the notion of preservation as the basis for heading 02.10."[57]

24. The European Communities disagrees with the Panel that the Geneva Draft Nomenclature of 1937[58] and the Brussels Nomenclature of 1959[59] are of "limited relevance" because of the changes in trade patterns and technology since their conclusions.[60] The Panel failed to consider the introduction of refrigeration in developed countries as a major technological change. Given the absence of refrigeration in the past, trade in items such as salted, dried, or smoked meat "would not have been possible unless [these products] had been preserved".[61] Furthermore, when the Brussels Nomenclature was introduced, the words "[c]ooked or otherwise simply prepared" were moved from the relevant heading of the Geneva Draft Nomenclature to Chapter 16 of the Brussels Nomenclature, suggesting that "there must have been a positive decision to keep the salted ... meats in a distinct category", namely a category characterized by preservation.[62] According to the European

[53]European Communities' appellant's submission, para. 93.

[54]*Ibid.*, para. 96.

[55]*Ibid.*, para. 98.

[56]*Ibid.*, heading III.C.5.

[57]*Ibid.*, para. 100.

[58]1937 Draft Customs Nomenclature of the League of Nations.

[59]1959 Brussels Convention on Nomenclature for the Classification of Goods in Customs Tariffs.

[60]European Communities' appellant's submission, para. 101 (quoting Panel Reports, para. 7.198).

[61]*Ibid.*, para. 103.

[62]*Ibid.*, para. 106.

Communities, when the Harmonized System was introduced, there was no indication that the drafters intended to change the scope of the heading pertaining to "salted, dried or smoked meat".

(c) Subsequent Practice

25. The European Communities claims that the Panel erred in interpreting and applying the concept of "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*. The Panel erroneously "consider[ed] that the unilateral 'practice' of one party could have a bearing on [the interpretation of] a multilaterally agreed text and ... wrongly analyz[ed] the existence of 'practice' at the EC and multilateral level."[63] The European Communities appeals the Panel's conclusion that the individual classification decisions of certain port authorities within the European Communities between 1996 and 2002 constitute "subsequent practice" within the meaning of Article 31(3)(b) for the purpose of interpreting heading 02.10 of the EC Schedule.

(i) *"Concordant" and "Common" Practice*

26. The European Communities challenges the Panel's application of relevant Appellate Body jurisprudence regarding Article 31(3)(b). That jurisprudence emphasizes that, in order to establish the common intentions of the parties, subsequent practice must entail a "concordant, common and consistent" sequence of acts or pronouncements that establishes a discernible pattern, implying the agreement of the parties regarding the interpretation of the treaty.[64] The European Communities submits that a key legal issue before the Appellate Body in this proceeding is whether unilateral acts of one WTO Member that have been met with silence by other WTO Members can qualify as "subsequent practice" within the meaning of Article 31(3)(b), for purposes of interpreting WTO law. Such acts, in the European Communities' view, do not represent a concordant and common expression of the parties' understanding of the law.[65]

27. In this regard, the European Communities submits that a commentary of the International Law Commission (the "ILC"), relied on by the Panel, supports, in fact, the European Communities' point of view. The relevant statement of the ILC indicates that not all signatories must have engaged in a particular practice so as to show that all Members have accepted that practice.[66] The European

[63]European Communities' Notice of Appeal (attached as Annex I to this Report), paragraph 2(c). (footnote omitted)

[64]European Communities' appellant's submission, paras. 111-112 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:I, 97, at 106; Appellate Body Report, *Chile – Price Band System*, para. 214; and Appellate Body Report, *US – Gambling*, paras. 191-192).

[65]*Ibid.*, para. 116.

[66]*Ibid.*, para. 118 (referring to the quotation of the ILC Commentary in Panel Reports, para. 7.252).

Communities argues that this statement implies that Article 31(3)(b) does not necessarily require, in all circumstances, that *all* parties to a treaty must have actively engaged in a practice; however, the statement does *not* support the "directly opposite" view that the practice of *one* party alone will suffice.[67] Under public international law, the type and degree of practice required to establish the "agreement of the parties [to a treaty] regarding its interpretation" must be ascertained on a case-by-case basis.[68] To this end, the European Communities relies on the ILC commentary that "the value of subsequent practice varies according[ly] as it shows the common understanding of the parties as to the meaning of the terms"[69], a view also reflected by other commentators.[70]

28. The European Communities refers to the Appellate Body Report in *US – Gambling* to demonstrate the importance placed by the Appellate Body on the subsequent practice being "concordant" and "common".[71] It notes that WTO Members have agreed upon a specific procedure for adopting interpretations of WTO law, namely Article IX:2 of the *WTO Agreement*. According to the European Communities, this provision warrants a narrow application of Article 31(3)(b) of the *Vienna Convention*, as exemplified by the Appellate Body finding in *Japan – Alcoholic Beverages II*; in that dispute, the Appellate Body found that adopted GATT panel reports and WTO panel reports cannot qualify as "subsequent practice".[72] Article IX:2 of the *WTO Agreement* also implies that any practice that is considered for the interpretation of the multilateral trade agreements must take the form of *overt* acts that are *explicitly* submitted for the consideration of all WTO Members and *adopted* by a large majority of the WTO Membership.[73] In support of its position, the European Communities notes that the Appellate Body and panels have so far consistently denied the status of "subsequent practice" to *all* examples of both multilateral and unilateral acts invoked by parties as subsequent practice.[74]

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[67]European Communities' appellant's submission, para. 118.

[68]*Ibid.*, para. 120 (quoting Article 31(3)(b) of the *Vienna Convention*).

[69]*Ibid.*, para. 119 (quoting *Yearbook of the International Law Commission* (1966), Vol. II, p. 222, para. 15).

[70]*Ibid.*, footnote 68 to para. 119 (quoting M. Yasseen, "L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités", in *Recueil des Cours de l'Académie de Droit International* (1976), Vol. III, p. 48, para. 16).

[71]*Ibid.*, paras. 118-128 (quoting Appellate Body Report, *US – Gambling*, para. 192).

[72]*Ibid.*, para. 123 (quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14, DSR 1996:I, 97, at 108).

[73]*Ibid.*, para. 124.

[74]*Ibid.*, paras. 125-126 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 10-12, DSR 1996:I, 97, at 106-107; Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (EC) (Article 22.6)*, footnote 57 to para. 3.42; Panel Report, *US – FSC*, para. 7.75; Appellate Body Report, *US – Gambling*, paras. 192-194; Appellate Body Report, *Chile – Price Band System*, para. 232; and Panel Report, *Canada – Patent Term*, para. 5.5 and footnote 48 to para 6.89).

29. Moreover, the European Communities alleges that the Panel, in its interpretation and application of Article 31(3)(b), failed to take into account the specific context of WTO Members' Schedules and the Harmonized System. The European Communities disagrees with the Panel that, because Schedules are particular to each Member, a Schedule should be interpreted exclusively in accordance with a specific Member's subsequent practice (unless objected to by the other parties). This argument runs contrary to Members' intention that Schedules follow the Harmonized System, absent any clear indication to the contrary. The term "salted" appears in heading 02.10 of the Schedule of all WTO Members and thus should not be defined unilaterally. The European Communities submits that the Panel's finding would undermine the predictability and stability of the multilateral Schedules and the application of the Harmonized System because the Harmonized System confers exclusive authority for interpreting the nomenclature to the Harmonized System Committee and Council.[75] The European Communities emphasizes that WTO Members' Schedules form an "integral part" of the GATT 1994, that they reflect rights and obligations of both importing and exporting Members, and that there is no difference between Schedules and other WTO obligations.[76] Therefore, no individual Member's practice should be preferred over that of any other Member.

30. The European Communities also notes that the Appellate Body rejected, in *EC – Computer Equipment*, the notion of "legitimate expectations" in the context of customs classification, as well as the argument that unilateral acts of WTO Members, and lack of reaction thereto, are relevant for purposes of interpreting WTO law.[77]

(ii) *"Consistency" of Practice*

31. The European Communities submits that the Panel misapplied the concept of "consistency" of the alleged subsequent practice; the Panel's finding that the alleged practice is "consistent" is based on errors in respect of the object and the "geographic" and "systemic" scope of this practice, as well as its duration.[78] The European Communities argues that the Panel interpreted the term "salted" in two multilateral treaties (namely, the Schedules attached to the *WTO Agreement* and the Harmonized System) on the basis of the "subsequent practice" of only *one* Member, even though that Member itself had already "disavowed" that practice.[79]

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[75]European Communities' appellant's submission, para. 136 (referring to Articles 7 and 8 of the Harmonized System Convention).

[76]*Ibid.*, para. 131 (quoting Appellate Body Report, *EC – Computer Equipment*, para. 109).

[77]*Ibid.*, para. 143.

[78]*Ibid.*, para. 148.

[79]*Ibid.*, para. 170.

32. The European Communities submits that the Panel failed to examine the "totality" of the European Communities' legal system in its interpretation of heading 02.10.[80] The European Communities notes that the Appellate Body has emphasized the need to consider implementing legislation on customs classification as well as classification practice during the Uruguay Round negotiations, and asserts that a series of contradicting acts would not permit a finding of "consistent practice".[81] Accordingly, the Panel should have taken into account relevant jurisprudence of the European Court of Justice (the "ECJ") regarding the scope of heading 02.10 of the European Communities' Combined Nomenclature, a number of Explanatory Notes, and Binding Tariff Information ("BTI") notices relating to heading 02.10, all of which emphasize the notion of preservation under the European Communities' regime for classification of products under heading 02.10. Although the Panel referred to minutes of European Communities' customs committee meetings in 2002, it failed to consider the legislative measures that eventually resulted from those meetings.[82]

33. The European Communities argues that the Panel should not have limited its examination of the consistency of practice to the treatment of frozen salted chicken cuts with a salt content of between 1.2 and 3 per cent alone. Given that the interpretative issue to be resolved in this dispute is the meaning of the term "salted" in the concession contained in heading 02.10, relevant practice with respect to *all* kinds of salted meat subject to that heading should have been examined by the Panel.

34. The European Communities also challenges what it considers to be the Panel's failure to take into account relevant export classification practice of Brazil and Thailand. The European Communities contends that the definition in the Harmonized System of "customs tariff nomenclature" is not limited to the purpose of "levying duties of Customs on imported goods" as suggested by the Panel, and that the use of the Harmonized System is required for trade statistics for both imports and exports.[83] According to the European Communities, neither Brazil nor Thailand argued that they used a classification system for exports different from the Harmonized System, and the export statistics of Brazil and Thailand, as well as of the United States, demonstrate that these countries accepted that such salted meats fell under heading 02.07.[84]

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[80]European Communities' appellant's submission, para. 273.

[81]*Ibid.*, para. 159 (referring to Appellate Body Report, *EC – Computer Equipment*, para. 94).

[82]*Ibid.*, para. 146 (referring to Panel Reports, paras. 7.269-7.270). See also European Communities' appellant's submission, para. 164.

[83]Article 1(c) of the Harmonized System Convention; European Communities' appellant's submission, para. 154 (quoting Panel Reports, para. 7.284).

[84]European Communities' appellant's submission, para. 157.

35. In addition, the European Communities argues that the jurisprudence of the International Court of Justice demonstrates that subsequent practice is established on the basis of the actions of high-level governmental representatives who have "international obligations" in mind, rather than on the basis of the daily activities of customs officers.[85] The European Communities is of the view that the Panel "confused" Article 31(3)(b) with the concept of State responsibility, under which countries may be liable for acts of their officials.[86]

36. The European Communities also challenges the Panel for basing its finding of "consistency" on classification decisions by European Communities' port authorities during a limited period, namely between 1996 and 2002. The European Communities submits that the Panel failed to examine "consistency over time" and that it should not have relied on customs classification practice that had been corrected and thereby modified.[87] If the Appellate Body considers that the classification practice of WTO Members is relevant for the interpretation of heading 02.10, the European Communities concludes that such practice would support its own position with respect to the meaning of the term "salted", namely, as requiring salting for preservation.[88]

(d) Object and Purpose

37. The European Communities submits that the Panel incorrectly distinguished between the object and purpose of the treaty and that of individual provisions of the treaty. The European Communities asserts that the Panel should have ascertained the object and purpose of Article II of the GATT 1994, read in conjunction with heading 02.10 of the EC Schedule.[89]

38. The European Communities also argues that the Panel erred in holding 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".[90] The Panel failed to adequately consider that the true object and purpose of Article II of the GATT 1994 is the security and predictability of

[85]European Communities' appellant's submission, para. 165 and footnote 94 thereto.

[86]*Ibid.*, para. 167.

[87]*Ibid.*, paras. 168-170.

[88]*Ibid.*, paras. 171-174. See also para. 219.

[89]*Ibid.*, paras. 180-181. The European Communities relies, in support of its argument, on Appellate Body Report, *US – Line Pipe*, para. 81 (on the object and purpose of Article XIX of the GATT 1994); Appellate Body Report, *Chile – Price Band System*, para. 234 (on the object and purpose of Annex 4 of the *Agreement on Agriculture*); and Appellate Body Report, *EC – Computer Equipment*, para. 84 (stating that concessions provided for in a GATT Schedule are, by virtue of Article II:7 of the GATT 1994, part of the terms of the treaty).

[90]Panel Reports, para. 7.320 (quoted in European Communities' appellant's submission, para. 183).

reciprocal market access arrangements.[91] This goal would be undermined if panels were allowed to accord a "bias" towards a reduction in tariffs, and if the concessions in Members' Schedules were to be interpreted on the basis of the subjective views of certain exporting Members alone.[92] In the European Communities' view, such a "bias" would be inconsistent with Article 3.2 of the DSU.

39. In addition, the European Communities challenges the Panel's finding that the notion of "long-term preservation" is "uncertain" and thus inconsistent with the objective of security and predictability of tariff concessions.[93] The European Communities considers that the terms "long-term preservation" and "preservation" are not intrinsically uncertain, given their use under other headings of the Harmonized System. The European Communities disputes that a customs official will face uncertainty in applying the criterion of long-term preservation; in particular for a customs official with access to tools of analysis, the "highly traditional" products classifiable under heading 02.10 are "recognizable" and "well-known".[94] Moreover, the Panel's finding of uncertainty in the notion of "long-term preservation" is vitiated by its failure to apply the same test to the alternative criterion of "preparation", as proposed by Brazil and Thailand.

40. Finally, the European Communities argues that the Panel's own interpretation of heading 02.10 undermines the objective of protecting and preventing circumvention of tariff concessions negotiated and settled in trade negotiations. The Panel ignored the European Communities' argument that heading 02.10 does not have the object and purpose of securing market access arrangements for frozen poultry, and that negotiating parties knew that a product would need to be salted so as to ensure its preservation in order to qualify under heading 02.10.[95]

2. Interpretation of the EC Schedule in the Light of Article 32 of the *Vienna Convention*

(a) Circumstances of Conclusion

41. The European Communities submits that the notion of "circumstances of [a treaty's] conclusion" within the meaning of Article 32 of the *Vienna Convention* should be interpreted narrowly. Drawing on academic commentators[96], the European Communities argues that

[91]European Communities' appellant's submission, paras. 184-188 (referring to Appellate Body Report, *EC – Computer Equipment*, para. 82; and Appellate Body Report, *US – Gambling*, para. 189).

[92]*Ibid.*, para. 189.

[93]*Ibid.*, para. 190 (referring to Panel Reports, para. 7.323).

[94]*Ibid.*, para. 207.

[95]*Ibid.*, paras. 212-218.

[96]Yasseen, *supra*, footnote 70, p. 93.

circumstances of a treaty's conclusion must have directly influenced the common intentions of *all* parties to the treaty.[97] The "multilateral aspect" of the circumstances of a treaty's conclusion has also been emphasized by the Appellate Body, suggesting a "stringent" threshold for using "practice" of Members as supplementary means for interpretation of WTO law.[98] In this respect, the European Communities also considers relevant its arguments relating to "subsequent practice", including the need for deference to the formal procedure under Article IX:2 of the *WTO Agreement* and the need for such practice to demonstrate a high degree of consistency.[99]

42. The European Communities does not dispute that customs classification law and practice prior to and during negotiations of a treaty may qualify as "circumstances of [a treaty's] conclusion". However, the European Communities asserts that the Panel contravened the explicit guidance of the Appellate Body in *EC – Computer Equipment* to the effect that the classification practice of the European Communities must not be considered separately from its customs legislation; that classification practice of other WTO Members must also be taken into account; that practice regarding a tariff heading must include the interpretation of that heading "in all circumstances"; and that such practice "must have endured".[100]

43. The European Communities also challenges the Panel's observations on the timing of the "circumstances". According to the European Communities, a "circumstance" in the form of a "condition relating to a negotiating party" must have been an objective fact, evident to all negotiators at the time, and must be analyzed on a case-by-case basis.[101]

44. Finally, the European Communities challenges the Panel's concept of "constructive knowledge", whereby all negotiating parties are deemed to have knowledge of a particular act or instrument of a WTO Member once it has been published.[102] The European Communities also disagrees with the Panel that an event that is deemed to be known by the participants in the negotiations could have influenced the negotiators and is relevant for the interpretation of a treaty under Article 32. The European Communities argues that "deemed knowledge" cannot substitute the

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[97]European Communities' appellant's submission, paras. 228-230.

[98]*Ibid.*, para. 233 (referring, *inter alia*, to Appellate Body Report, *EC – Computer Equipment*, para. 93).

[99]*Ibid.*, paras. 234-235.

[100]*Ibid.*, para. 240.

[101]*Ibid.*, paras. 245-253. The European Communities relies on Appellate Body Report, *US – Gambling*, footnote 244 to para 196; Panel Report, *Mexico – Telecoms*, para. 7.44; Appellate Body Report, *Canada – Dairy*, para. 139; Appellate Body Report, *EC – Computer Equipment*, para. 92; and Yasseen, *supra*, footnote 70, p. 90.

[102]European Communities' appellant's submission, para. 254 (referring to Panel Reports, para. 7.346).

need to demonstrate a "direct link" between a circumstance and the common intentions of the parties.[103]

(b) Characterization of Relevant Law of the European Communities

45. The European Communities submits that the Panel mischaracterized the law and practice of the European Communities, in particular EC Regulation 535/94, and that this mischaracterization amounts to a distortion of facts contrary to Article 11 of the DSU.[104] The European Communities challenges the Panel's use of this law and classification practice on the grounds that there was no trade in the products at issue at the time of the negotiations. The Panel should have considered the "totality" of the European Communities' legal system, including Section Notes, Chapter Notes, relevant Subheading Notes, and Explanatory Notes of the Combined Nomenclature, as well as the classification opinions of the European Communities and judgments of the ECJ.[105]

46. The European Communities challenges the Panel's interpretation of the ECJ's *Gausepohl* judgment[106] as not being necessarily governed by the principle of "long-term preservation".[107] According to the European Communities, the Panel erred in finding that EC Regulation 535/94 "superseded" the long-term preservation criterion in heading 02.10 of the Combined Nomenclature as recognized in the *Gausepohl* judgment.[108] A Commission Regulation cannot override an interpretation given by the ECJ to the Combined Nomenclature, where that Nomenclature is implementing the Harmonized System. The European Communities argues that the Panel also incorrectly "dismissed" relevant Explanatory Notes to the Combined Nomenclature, although these Notes remained relevant for assessing classification practice even after the insertion of the Additional Note to the Combined Nomenclature through EC Regulation 535/94.[109]

47. The European Communities submits that, if the practice of all participating treaty parties must be taken into account when considering "circumstances of conclusion", this should extend to practice regarding all meat that is "salted, in brine, dried or smoked".[110] In this respect, the Panel erred in

[103]European Communities' appellant's submission, para. 262.

[104]*Ibid.*, para. 288.

[105]*Ibid.*, para. 273.

[106]European Court of Justice, Judgment, *Gausepohl-Fleisch GmbH v. Oberfinanzdirektion Hamburg*, Case C-33/92, ECR [1993] I-3047.

[107]European Communities' appellant's submission, paras. 275-276 (referring to Panel Reports, paras. 7.398-7.400).

[108]*Ibid.*, para. 278 (referring to Panel Reports, para. 7.402).

[109]*Ibid.*, para. 286.

[110]*Ibid.*, para. 294.

rejecting a United States' customs classification ruling of 1993 regarding salted beef as evidence that heading 02.10 covers meat salted for preservation.

48. The European Communities is of the view that the Panel failed to determine properly the scope of relevant "circumstances" within the meaning of Article 32 as being those circumstances that could have influenced the common intentions of the parties with respect to heading 02.10 of the EC Schedule.[111] The Panel failed to consider that the principle of preservation (as reflected in a United States classification ruling of 1993, and in European Communities' judgments and Explanatory Notes since the early 1980s) "prevailed" throughout the entire duration of the Uruguay Round negotiations in the minds of the negotiators with respect to heading 02.10.[112] This practice was "confirmed through trade statistics which showed that only limited trade entered under heading 02.10, whereas the contentious issue was fresh, chilled and frozen [poultry] meat".[113]

49. The European Communities also argues that the results of tariff negotiations between 1986 and 15 December 1993 could not be altered by unilateral measures of one WTO Member.[114] An act taken during the so-called verification period prior to the final adoption of the *WTO Agreement* could be of relevance, but compelling evidence would be required to prove that the negotiators had taken note of such act. No such evidence exists with respect to EC Regulation 535/94, in particular, because of its complex legal relationship with pre-existing ECJ case-law and Explanatory Notes to the Combined Nomenclature, as well as the absence of any discussion of this Regulation, or the scope of heading 02.10, at any point during the negotiations, the verification period, or thereafter.

50. The European Communities further challenges the Panel's finding that tariff classification laws and practice that do not amount to "subsequent practice" under Article 31(3)(b) may nonetheless be relevant as supplementary means of interpretation under Article 32.[115] In the European Communities' view, a "high standard of consistency" would have to be demonstrated for such practice also to be relevant under Article 32.[116] In any event, no exporter or Member State of the European Communities has challenged in the European Communities' legal system the measures that "rectified"

[111]European Communities' appellant's submission, para. 295.

[112]*Ibid.*, para. 306.

[113]*Ibid.*, para. 307.

[114]*Ibid.*, para. 304.

[115]*Ibid.*, paras. 312-314 (referring to Panel Reports, para. 7.422).

[116]*Ibid.*, para. 313.

the "temporary circumvention" of the application of heading 02.10.[117] Moreover, neither Brazil nor Thailand has sought a classification ruling from the WCO.

51. Finally, the European Communities disagrees with the Panel that the Panel's conclusions under Article 32 were a "confirmation" of the meaning of heading 02.10 that it had derived from the application of Article 31.[118] According to the European Communities, the Panel's conclusions under Article 32 are formally different and have a different scope than those under Article 31, and the Panel used Article 32 not to confirm, but to alter the meaning it had derived from its application of Article 31 of the *Vienna Convention*.

B. *Arguments of Brazil – Appellee*

1. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention*

(a) Ordinary Meaning

52. Brazil argues that the "factual context" of the term "salted", as identified by the Panel, is not only relevant, but must be taken into account in interpreting the term "salted" in heading 02.10 of the EC Schedule. In the light of the European Communities' arguments about the nature of "salted" meat products, the Panel had to determine whether the facts involving salted meat in this dispute corresponded to what the Panel had concluded was the ordinary meaning of the term "salted". Although "factual context" is not referred to explicitly in the rules of treaty interpretation as codified in the *Vienna Convention*, such an analysis is included within a panel's functions as set out in Article 11 of the DSU. Brazil contends that a treaty interpreter must know the facts of a case in order to properly apply the law to that case.

53. Brazil also rejects the European Communities' allegations that the Panel violated Article 11 of the DSU by distorting the available evidence on the record. With respect to the Panel's finding that even small quantities of salt have a preservative effect on meat, Brazil argues that this conclusion was primarily based on technical literature presented by Brazil, rather than on the evidence of the European Communities' expert. According to Brazil, the European Communities is, in effect, questioning the Panel's factual findings, in particular the Panel's appreciation of a given piece of evidence. In any event, the Panel did not misrepresent the statement of the European Communities' expert.

[117]European Communities' appellant's submission, para. 314.

[118]*Ibid.*, paras. 315-318 (referring to Panel Reports, paras. 7.332 and 7.423).

54. With respect to the Panel's finding that certain types of meat falling under heading 02.10 may require additional means of preservation, Brazil maintains that the reasons that such meats require preservation are of "no relevance to the point at issue"[119]; regardless of whether spoilage is due to the effect of slicing (growth of moulds and yeast), as argued by the European Communities, or due to rancidity, the fact remains that further preservation is required to prevent such spoilage. Finally, contrary to the European Communities' arguments, Brazil asserts that the evidence on the record supports the Panel's finding 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. Brazil submits that it "seems a fair assessment [of the Panel] that sliced non-refrigerated meat is preserved by salt for a shorter period of time than sliced refrigerated meat".[120]

(b) Context

55. Brazil rejects all of the European Communities' arguments challenging the Panel's findings regarding the "context" of the term "salted". Brazil argues that the term "in brine" is broader than "preservation", such that, even if "preservation" may be "one of the possible meanings ascribed to the term" "in brine", it is not the exclusive meaning.[121] According to Brazil, the fact that heading 08.12 refers to "brine" as a "preservative solution" does not lend support to the European Communities' argument that the term "in brine" exclusively relates to preservation. Brazil refers to the WCO Secretariat's letter to the Panel, which stated that, in the absence of an explicit provision that the term "preserved" has a "certain influence" on heading 02.10, that term has no relevance for the classification of salted meat under heading 02.10.[122]

56. Brazil furthermore argues that preparation, and not preservation, is the "exclusive distinguishing characteristic common to all terms in heading 02.10".[123] Brazil alleges that the terms in heading 02.10 have ordinary meanings other than preservation and that the terms "dried" and "smoked" in relation to food and meat do not exclusively deal with preservation.

57. Next, Brazil argues that the structure of Chapter 2 of the Harmonized System supports Brazil's interpretation that heading 02.10 refers to preparation, rather than preservation. Brazil disagrees with the proposition that refrigeration is the distinguishing feature of headings 02.01 to 02.08. Rather, heading 02.10 is an exception that covers all types of meat that have been salted, put

[119]Brazil's appellee's submission, para. 70.

[120]*Ibid.*, para. 75.

[121]*Ibid.*, para. 83.

[122]*Ibid.*, para. 86; Panel Reports, p. C-143, para. 12.

[123]*Ibid.*, heading II.B.2.

in brine, dried, or smoked. The European Communities is also wrong, according to Brazil, in suggesting that the absence of a reference to refrigeration under heading 02.10 implies that refrigeration is not significant for that heading. Brazil argues that the reason refrigeration is not referred to in heading 02.10 is "because what gives the product its character ... is simply that [this product] has been salted, brined, dried or smoked".[124] Brazil also refers to the Explanatory Note to Chapter 2 of the Harmonized System and argues that the reference there to fresh meat "packed with salt as a temporary preservative during transport" does not support the European Communities' position because *preparing* with salt is different from *packing* with salt.[125] "Preparing" with salt, according to Brazil, entails a process that leaves meat in a state different from its natural state.

58. Finally, Brazil takes issue with the European Communities' arguments regarding the historical basis of heading 02.10. Brazil argues that refrigeration existed, and was provided for, in the 1937 Geneva Draft Nomenclature. Brazil also contends that the European Communities misrepresents the subject of Item 18 of the Geneva Draft Nomenclature. Contrary to the European Communities' arguments, Item 18 does not refer to slightly salted, dried, and smoked meat, but rather to meat that has been "simply prepared". Brazil also disagrees with the European Communities' contention that the phrase "otherwise simply prepared" in Item 18 is of no significance. The fact that cooked meats were included under Item 18—together with salting, putting in brine, drying, and smoking—demonstrates that all such meats were simple preparations, and that Item 18 was not intended for the purpose of preservation. Brazil also contends that the fact that the term "cooked or otherwise simply prepared" was moved from Chapter 2 to Chapter 16 in the Brussels Nomenclature "does not change the fact that [the Harmonized System] Notes to Chapter 16 and [the Harmonized System] Explanatory Notes to Chapter 2 expressly refer to the processes listed in Chapter 2 as 'prepared or preserved'".[126]

(c) Subsequent Practice

59. Brazil agrees with the Panel's finding that, in the present case, the relevant subsequent practice is the concordant, common and consistent sequence of acts by European Communities' customs authorities, occurring subsequent to the entry into force of the EC Schedule, which establishes the agreement of WTO Members regarding the interpretation of the concession contained in heading 02.10 of the EC Schedule.

[124]Brazil's appellee's submission, para. 100.

[125]*Ibid.*, para. 102 (referring to the Explanatory Note to Chapter 2 of the Harmonized System).

[126]*Ibid.*, para. 116.

(i) *"Concordant" and "Common" Practice*

60. Brazil submits that the European Communities is incorrect in suggesting that the relevant question before the Appellate Body in this appeal is whether acts of one WTO Member that are met with silence by other WTO Members can qualify as "subsequent practice". Brazil acknowledges that the classification practice of other Members *may* be relevant in the interpretation of tariff concessions of a certain Member's Schedule; however, given that the European Communities was the only Member that imported frozen salted chicken cuts and had a specific criterion for "salted meat" under heading 02.10 of its Combined Nomenclature, the classification practice of the European Communities is the only relevant practice in this case.[127] Brazil also argues that the relevant acts were not objected to because the temporal proximity between the publication of EC Regulation 535/94 and the conclusion of the Uruguay Round resulted in "constructive knowledge".[128]

61. Brazil submits that the European Communities has confused the requirement that parties be in agreement on the interpretation of a treaty with the subsequent practice that consolidates that agreement. According to Brazil, Article 31(3)(b) of the *Vienna Convention* does not specify the number of parties that must engage in the relevant practice; rather, the requirement is that the subsequent practice must establish the *agreement* of the parties, which, in this case, is established as a fact.

62. Brazil submits that the European Communities' understanding of the term "salted" was known to all WTO Members when tariff concessions were negotiated, and was accepted by them when they signed the *WTO Agreement*; the authority of the Ministerial Conference and the General Council under Article IX:2 of the *WTO Agreement* to adopt interpretations of that Agreement must be distinguished from the authority of adopted panel reports as considered by the Appellate Body in *Japan – Alcoholic Beverages II*.[129] Brazil finds support in the Appellate Body Report in *Chile – Price Band System* for its view that a Member's Schedule imposes obligations on the Member who made the concession and not on all Members.[130] According to Brazil, the scheduling practice of only one Member may be considered relevant in the interpretation of its tariff concession, as long as that practice amounts to subsequent practice.[131]

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[127]Brazil's appellee's submission, para. 123.

[128]*Ibid.*, para. 125 (referring to Panel Reports, para. 7.361).

[129]*Ibid.*, para. 130.

[130]*Ibid.*, paras. 133-134 (referring to Appellate Body Report, *Chile – Price Band System*, para. 272).

[131]*Ibid.*, para. 135.

63. Brazil also disputes the European Communities' argument that there is no difference between a WTO Member's Schedule and other WTO obligations. Brazil refers to the Appellate Body Report in *EC – Computer Equipment* as support for the proposition that, although *all* Members must agree on the scope of a tariff concession made by one Member, that tariff concession applies *only* to that *one* Member that made the concession. Tariff concessions may be identical in some cases, but the obligation under a concession is different from other WTO obligations, because it is unique to the Member that made it.[132] In Brazil's view, the European Communities, through EC Regulation 535/94 and the inclusion of Additional Note 7 in the Combined Nomenclature, announced to its negotiating partners in the Uruguay Round the definition and scope of its tariff concession under heading 02.10 of its Schedule.

64. In addition, Brazil disagrees with the European Communities that the Panel's approach to establishing "subsequent practice" is contrary to the WTO Members' intention that Schedules should follow the Harmonized System. Although Schedules should be based on the Harmonized System, they are not identical to it, because the Harmonized System was the starting point, but not necessarily the end result, of the negotiation. Brazil argues that parts of the EC Schedule are based on the Combined Nomenclature, which is, in turn, partly based on the Harmonized System and partly based on the subheadings of the Combined Nomenclature and other provisions. One such provision is Additional Note 7 to the Combined Nomenclature, which provides for a definition of "salted meat" that is unique to the EC Schedule and that does not exist in the Schedule of any other Member.[133] According to Brazil, that definition is "aligned with the terms and structure" of the Harmonized System.[134] In contrast, the subsequent introduction through the challenged measures of the concept of "preservation" into heading 02.10 modifies and limits the Harmonized System. Brazil submits that the predictability and stability of the multilateral Schedules would be undermined if the term "salted" in heading 02.10 of the EC Schedule were found to relate exclusively to a process that ensures "long-term preservation".[135]

[132]Brazil's appellee's submission, para. 141.

[133]*Ibid.*, para. 147.

[134]*Ibid.*, para. 149.

[135]*Ibid.*, para. 150.

(ii) *"Consistency" of Practice*

65. Brazil agrees with the Panel's assessment of "consistency" of the relevant practice.[136] Contrary to the European Communities' assertion, the Panel did not fail to consider the European Communities' practice concerning products falling under heading 02.10 other than salted frozen chicken cuts as well as the practice of Brazil, Thailand, China, and the United States relating to heading 02.10. In this regard, Brazil points to the Panel's consideration of a BTI relating to dried salted ham.[137] Brazil also asserts that the European Communities failed to provide any other evidence in support of its contention that some customs offices did not classify the products at issue under heading 02.10.

66. Brazil disagrees with the European Communities' submission that "subsequent practice" generally involves government representatives of a higher status than customs officials. The Panel treated correctly the European Communities' classification practice in the light of the Appellate Body's finding in *EC – Computer Equipment* that it is the *customs* classification practice of the importing Member that is important in the interpretation of tariff concessions.[138]

67. Brazil further submits that the Panel did not fail to examine the totality of the European Communities' law and jurisprudence surrounding the interpretation of heading 02.10. Brazil argues that the instruments upon which the European Communities would have the Panel rely largely *predate* the EC Schedule and cannot be considered as "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*.[139] Brazil further notes that minutes of European Communities' customs committee meetings in 2002 indicate that the European Communities deliberately did not include a reference to "long-term preservation" in EC Regulation 535/94. As to consistency over time, Brazil argues that no BTI or any type of supporting material or documentation was produced by the European Communities in support of its argument that classification by its customs authorities was not consistent. Brazil also agrees with the Panel that post-2002 practice does

[136]Brazil's appellee's submission, paras. 151-169.

[137]*Ibid*., para. 153 (referring to European Communities' response to Question 53 posed by the Panel, Panel Reports, p. C-92).

[138]*Ibid*., paras. 165-166 (referring to Appellate Body Report, *EC – Computer Equipment*, paras. 93 and 95-96).

[139]*Ibid*., paras. 160 and 162-164 (referring to European Communities' appellant's submission, paras. 159-162; and Panel Reports, para. 7.393). These instruments include the ECJ's *Dinter* and *Gausepohl* judgments and the Explanatory Notes to the Combined Nomenclature.

not undermine the Panel's finding that the classification practice by the European Communities between 1996 and 2002 was consistent.[140]

68. Brazil agrees with the Panel's treatment of the export and import classification practice of Brazil and Thailand.[141] Brazil states that *export* classification practice is less rigorous than *import* classification practice because, usually, export duties are not assessed and traders, rather than authorities, often undertake the actual classification. Moreover, Brazil has never *imported* the products at issue and, even if it had done so, it is the practice in the application of heading 02.10 in the EC Schedule that is at issue.[142] Brazil also supports the Panel's treatment of the alleged "practice" of other WTO Members relating to heading 02.10. Because the evidence before the Panel was limited and concerned products that are not the same or identical to the products at issue, the Panel could draw no conclusions from that information.[143]

(d) Object and Purpose

69. Brazil submits that the Panel did not incorrectly distinguish between the object and purpose of the *WTO Agreement* and the GATT 1994, on the one hand, and that of the specific heading in the EC Schedule, on the other hand. Brazil argues that the object and purpose of the *treaty* is the relevant inquiry, and that the tariff concession contained in heading 02.10 of the EC Schedule is *part of the terms* of that Schedule, which is, in turn, an integral part of the GATT 1994, pursuant to Article II of the GATT 1994.

70. Brazil also submits that the European Communities misconstrues the Panel's finding by arguing that the Panel's interpretation was "bias[ed]" toward the reduction of tariffs, instead of being based on the security and predictability of tariff concessions.[144] Brazil points out that the wording of the Panel's reasoning flows from the language in the respective preambles to the *WTO Agreement* and the GATT 1994.

71. Brazil argues that the notion of "long-term preservation", used by the European Communities to define the meat classifiable under heading 02.10, would introduce a "great deal" of uncertainty, especially if the test to be applied at customs is whether the products are "well-known" or "instantly

[140]Brazil's appellee's submission, para. 169 (referring to Panel Reports, para. 7.256).

[141]*Ibid.*, para. 155 (referring to Panel Reports, para. 7.284).

[142]*Ibid.*, para. 155.

[143]*Ibid.*, paras. 157-158 (referring to Panel Reports, para. 7.288).

[144]*Ibid.*, para. 179 (referring to European Communities' appellant's submission, para. 189).

recognizable".[145] Brazil submits that the European Communities presented no binding law or act to the Panel with a clear definition for the notion of "long-term preservation"[146], and that the European Communities also failed to indicate where in the Harmonized System the notion of "long-term preservation" in relation to meat was to be found. Brazil also disagrees with the European Communities that negotiating parties knew that a meat product had to be salted for preservation to qualify under heading 02.10; rather, the knowledge of the parties was that heading 02.10 of the EC Schedule related to meat deeply and homogeneously impregnated with a salt content of not less than 1.2 per cent by weight.

2. Interpretation of the EC Schedule in the Light of Article 32 of the *Vienna Convention*

72. Brazil proposes that, if the Appellate Body finds that the European Communities' classification practice of the products at issue under heading 02.10 does not amount to "subsequent practice" under Article 31(3)(b), it should consider the classification practice as supplementary means of interpretation under Article 32. Brazil argues that supplementary means of interpretation are not limited to the "preparatory work" of the treaty and the "circumstances of its conclusion", but can include evidence of subsequent practice.[147]

(a) Circumstances of Conclusion

73. Brazil disagrees with the European Communities that, for "circumstances of [a treaty's] conclusion" to be relevant, they must have directly influenced the common intention of *all* the parties to the treaty. Brazil refers to the Appellate Body statement in *EC – Computer Equipment* that customs classification practice of one of the parties may be of relevance and that the importing Member's practice is of "great importance".[148] Even though the Appellate Body considered the classification practice of exporting Members to be relevant in that case, the present case is different in this respect because there was no customs classification practice of Brazil, Thailand, or European Communities' customs authorities regarding the products at issue during the Uruguay Round. Furthermore, in the dispute in *EC – Computer Equipment*, the relevant part of the Combined Nomenclature did not contain a special criterion to define the product at issue; by contrast, in the present case, EC Regulation 535/94 inserted Additional Note 7 in the Combined Nomenclature with a

[145]Brazil's appellee's submission, para. 202 (referring to European Communities' appellant's submission, para. 207).

[146]*Ibid.*, para. 194.

[147]*Ibid.*, paras. 207-209 (referring to Sinclair, *supra*, footnote 36, p. 138).

[148]*Ibid.*, para. 216 (referring to Appellate Body Report, *EC – Computer Equipment*, para. 93).

special definition for "salted meat" found in heading 02.10.[149] Thus, according to Brazil, in the present case, the classification practice of the importing Member is the most, if not the only, relevant practice.

74. With respect to the Panel's concept of "constructive knowledge", Brazil argues that a "circumstance" need not be evident to all the negotiators at the time of conclusion and finds support for its view in Appellate Body case-law and public international law literature.[150] Brazil submits that the BTIs that were found by the Appellate Body to be "circumstances of conclusion" in *EC – Computer Equipment* could not have been evident to all the negotiators.

(b) Characterization of Relevant Law of the European Communities

75. Brazil submits that the Appellate Body should not, as requested by the European Communities, disregard the customs legislation enacted by the European Communities at the time of the conclusion of the Uruguay Round on the grounds that there was no trade in frozen salted chicken cuts at that time. Brazil contends that legislation defining the products at issue for the purpose of the European Communities' Combined Nomenclature is a relevant "circumstance".

76. In Brazil's view, the Panel correctly interpreted the *Dinter* and *Gausepohl* judgments of the ECJ.[151] Brazil argues that the *Dinter* judgment did not deal specifically with the scope of heading 02.10 and provides only general comments regarding Chapter 2 of the Combined Nomenclature, without any direct relevance to this case. Brazil also submits that the Panel adequately dealt with the *Gausepohl* judgment. In Brazil's view, the ECJ found no support in the Harmonized System for the conclusion that "salting", under heading 02.10, is a process for preserving meat.[152] In contrast, EC Regulation 535/94 introduced an objective criterion (deep salt impregnation of 1.2 per cent) for salted meat, and did not refer to "long-term preservation". As to the European Communities' argument that EC Regulation 535/94 cannot change the ECJ's interpretation of a Harmonized System definition, Brazil submits that the ECJ does not have the authority to determine the meaning of the Harmonized System.[153] Even if the European Commission took the ECJ's *Gausepohl* judgment into

[149]Brazil's appellee's submission, para. 223.

[150]*Ibid.*, paras. 224-227 (referring to European Communities' appellant's submission, para. 252; Appellate Body Report, *US – Gambling*, footnote 244 to para. 196; Appellate Body Report, *EC – Computer Equipment*, paras. 92 and 94; and Panel Report, *Mexico – Telecoms*, para. 7.68).

[151]European Court of Justice, Judgment, *Dinter v Hauptzollamt Köln-Deutz*, Case C-175/82, ECR [1983] 969; ECJ Judgment *Gausepohl*, *supra*, footnote 106.

[152]Brazil's appellee's submission, para. 250.

[153]*Ibid.*, para. 257.

account in EC Regulation 535/94, that judgment suggests that deep impregnation with 1.2 per cent of salt meets the ECJ's understanding of "long-term preservation".[154]

77. Brazil disagrees with the European Communities that EC Regulation 535/94 is not relevant as "circumstance" of conclusion because the negotiations on the EC Schedule were concluded prior to the period of verification of the Schedules.[155] According to Brazil, the European Communities acknowledges that not all negotiators need to have *actual* knowledge of an act. Brazil submits that acceptance of the definition of "salted meat" in EC Regulation 535/94 during the process of verification of the Schedules can be deduced from the lack of objections.[156]

78. Finally, Brazil disagrees with the European Communities that the Panel used Article 32 to alter its conclusion concerning the meaning of the term "salted" that it had arrived at in applying Article 31. According to Brazil, the Panel concluded under Article 31 that the term "salted" in heading 02.10 is a broad term that is not *limited* to the notion of "long-term preservation"; under Article 32, the Panel confirmed that EC Regulation 535/94 did not provide that salting must be for "long-term preservation".

C. *Arguments of Thailand – Appellee*

1. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention*

(a) Ordinary Meaning

79. Thailand submits that the Panel properly examined the factual context for the consideration of the ordinary meaning of the term "salted". Thailand refers to the principle under Article 31(1) of the *Vienna Convention* that "a treaty shall be interpreted in good faith", and claims that, under "factual context", the Panel took into account consequences that "*normally*" and "*reasonably*" flow from the text.[157] In Thailand's view, if the Panel's analysis of the "ordinary meaning" had eschewed "factual context" and instead had included only dictionary definitions, the result would have been too

[154]Brazil's appellee's submission, para. 258.

[155]*Ibid.*, paras. 263-276 (referring to European Communities' appellant's submission, paras. 301).

[156]*Ibid.*, para. 276.

[157]Thailand's appellee's submission, paras. 13-14 (quoting Sinclair, *supra*, footnote 36, p. 121). (emphasis added by Thailand)

restrictive and also inconsistent with prior Appellate Body rejections of a mechanical reliance on dictionaries.[158]

80. Thailand also challenges the European Communities' claim that the Panel failed to make an objective assessment of the facts in accordance with Article 11 of the DSU. Thailand argues that an appellant faces a high hurdle to establish that a panel has committed an "egregious error" in the appreciation of evidence, particularly with respect to scientific evidence.[159] Contrary to the allegation of the European Communities, the Panel's conclusions with respect to the ordinary meaning of "salted" were not *based on* the Panel's appreciation of the European Communities' expert's opinions. Thailand further submits that the European Communities has not established that the Panel failed to make an objective assessment of the scientific evidence. With respect to the Panel's finding that a 3 per cent salt content may prevent spoilage in meat, Thailand argues that the Panel did not make reference to a product with a 3 per cent salt content that is not chilled; rather, the Panel was discussing a meat product that was "raw and chilled".

81. With respect to the European Communities' claim that it is the slicing of the preserved product, and not the salt content, as the Panel found, that makes necessary the use of additional means of preservation under heading 02.10, Thailand submits that the basis for this claim of error is "unclear".[160] This is because, before the Panel, the European Communities did not contest the fact that meats such as Parma ham, prosciutto, and jamón serrano require further means of preservation. Thailand further argues that, in making the finding that "a product preserved by salt for relatively short periods of time is not necessarily precluded from qualifying under heading 02.10", the Panel did not rely on evidence by the European Communities' expert alone, but also relied on the European Communities' statements acknowledging this fact.[161] Finally, Thailand submits that, even if the Appellate Body were to find that the Panel did not conduct an objective assessment of the facts contested by the European Communities, this would not affect the overall conclusions of the Panel with respect to the ordinary meaning of the term "salted".

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[158]Thailand's appellee's submission, paras. 16-17 (referring to Appellate Body Report, *US – Gambling*, para. 166; and Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248).

[159]*Ibid.*, paras. 21-23 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 499; and Appellate Body Report, *EC – Hormones*, paras. 133 and 138).

[160]*Ibid.*, para. 27.

[161]*Ibid.*, para. 28 (quoting Panel Reports, para. 7.149).

(b) Context

82. Thailand argues that the European Communities has failed to establish that the term "in brine" refers exclusively to preservation. The European Communities' argument that the term "in brine" refers to preservation is based solely on its definition of the verb "to salt", and, as such, the argument does not concern the ordinary meaning of the term "in brine". Moreover, in Thailand's view, heading 08.12, which refers to brine as a "preservative solution", makes it clear that all the processes listed in that heading are "for the purpose of provisionally preserving the products".[162]

83. Thailand also submits that the Panel did not fail to take into account the distinguishing characteristics of the terms "salted, in brine, dried or smoked" in heading 02.10. The dictionary definitions of these terms include, but are not limited to, the concept of preservation. The ordinary meaning of these terms for meat products, in "today's context", is related to the taste and unique characteristics of the products, rather than the length of time for which the products are preserved.[163] Thailand also rejects the argument that the special nature of the meats subject to heading 02.10 finds support in the nature of the meats covered by Chapter 16; rather, the Chapter Note to Chapter 16 makes it clear that the processes specified in Chapter 2 are for preparation or preservation.[164]

84. Thailand agrees with the European Communities that, for heading 02.10, the issue of refrigeration is of little or no importance, but submits that this is because preservation is not a determinative element for the classification of products under this heading. Instead, according to Thailand, the structure of the headings indicates that products may be divided into either fresh or preserved by a process (chilled or frozen) or prepared (salted, in brine, etc); the determinative element of heading 02.10, in Thailand's view, is preparation. Heading 02.10 covers all types of meat and offal, as long as that meat and offal is salted, in brine, dried, or smoked. All such meat is classified under heading 02.10, regardless of the state in which it is presented—for instance, fresh, chilled, or frozen. Thailand also rejects the European Communities' argument based on the words "temporary preservative" in the Explanatory Note to Chapter 2; according to Thailand, the European Communities provides no evidence to support its assertion that packing fresh meat with salt inevitably affects the product's characteristics.

[162]Thailand's appellee's submission, para. 36.

[163]*Ibid.*, para. 39.

[164]*Ibid.*, para. 41.

(c) Subsequent Practice

85. Thailand submits that the Panel properly considered the classification practice of the European Communities from 1996 to 2002 as "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention.*

(i) *"Common" and "Concordant" Practice*

86. Thailand considers that the position of the European Communities with respect to the "common" and "concordant" nature of subsequent practice contradicts the approach of the Appellate Body in *EC – Computer Equipment* and in *EC – Export Subsidies on Sugar*, where the Appellate Body attached importance to the practice of the European Communities when interpreting the EC Schedule.[165] According to Thailand, in any event, the weight given to subsequent practice by the Panel was not dispositive for its findings that the products at issue were covered by the concession in heading 02.10.

87. Thailand submits that the Panel's findings are not inconsistent with the commentary of the ILC regarding subsequent practice.[166] According to the ILC, it is not necessary for *all* signatories to a treaty to have *engaged* in a particular practice for it to qualify as subsequent practice; rather it is sufficient that the parties have *accepted* the practice. Therefore, Thailand submits that the practice of even one Member may qualify as "subsequent practice". On this basis, it was reasonable for the Panel to conclude that the classification practice of the European Communities alone with respect to the products at issue could be considered as subsequent practice. In addition, Thailand states that in public international law, acceptance may be deduced from a party's reaction or lack of reaction to the practice at issue.[167]

88. Thailand rejects the European Communities' argument that "subsequent practice" within the meaning of Article 31(3)(b) requires "overt acts" that are explicitly "adopted" by a "large majority" of the WTO Membership.[168] In Thailand's view, the European Communities misunderstands the distinction that the *Vienna Convention* draws between a "subsequent agreement" in Article 31(3)(a)

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[165]Thailand's appellee's submission, paras. 60-62 (referring to Appellate Body Report, *EC – Computer Equipment*, para 93; and Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 187).

[166]*Ibid.*, paras. 65-70 (referring to European Communities' appellant's submission, para. 117).

[167]*Ibid.*, para. 69 (referring to Yasseen, *supra*, footnote 70, p. 49, para. 18; and A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), pp. 191-193).

[168]*Ibid.*, para. 71 (referring to the European Communities' argument that such acts are "interpretations under Article IX:2 of the *WTO Agreement*, Decisions by the [Harmonized System] Committee or Council relating to the interpretation of the [Harmonized System] nomenclature, or acts that result from an equally rigorous procedure". (European Communities' appellant's submission, para. 144))

and "subsequent practice" in Article 31(3)(b). Thailand also refers to instances where the Appellate Body and panels found that certain acts and practices did not amount to "subsequent practice" within the meaning of Article 31(3)(b), and submits that those cases may be distinguished from the present case on their facts.[169]

89. Thailand agrees with the Panel that it makes "practical sense especially in the context of GATT schedules that are particular to each WTO Member" to attach "importance [to] the classification practice of the importing Member whose schedule is being interpreted".[170] According to Thailand, the Appellate Body Report in *EC – Computer Equipment* supports the view that a Member's Schedule is not the same as a generally applicable treaty provision of the GATT 1994 or other WTO agreements.[171] In this regard, Thailand notes the Panel's factual finding that "the European Communities is apparently the only importing WTO Member with any practice of classifying the products at issue."[172] Thailand also challenges the European Communities' reliance on the Harmonized System, and submits that there is no legal basis to equate the interpretation of the EC Schedule with an interpretation of the Harmonized System. The Panel's analysis of the EC Schedule does not purport to provide a definitive interpretation of the Harmonized System, nor does it undermine the interpretative role to be played by the Harmonized System Committee and Council.[173]

(ii) *"Consistency" of Practice*

90. Thailand argues that the Panel correctly applied the concept of "consistency" in finding that the European Communities' classification practice amounted to "subsequent practice" within the meaning of Article 31(3)(b). Thailand asserts that the present case can be distinguished from *EC – Computer Equipment* on the basis that the classification practice of the European Communities in the present case was consistent over a period of six years; this is different from the "clearly inconsistent classification practice among EC Member States" in the earlier case.[174] Thailand further recalls the observation of the Panel that the European Communities presented no evidence

[169]Thailand's appellee's submission, paras. 72-74 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 13-14, DSR 1996:I, 97, at 106-107; Appellate Body Report, *US – Gambling*, para. 193; Panel Report, *US – FSC*, para. 7.75; and Panel Report, *Canada – Patent Term*, footnote 48 to para. 6.89).

[170]Panel Reports, paras. 7.253-7.254; Thailand's appellee's submission, para. 76 (referring to European Communities' appellant's submission, para. 129).

[171]Thailand's appellee's submission, para. 76 (referring to European Communities' appellant's submission, para. 131; and Appellate Body Report, *EC – Computer Equipment*, para. 109).

[172]*Ibid.*, para. 84 (quoting Panel Reports, para. 7.289).

[173]*Ibid.*, para. 90.

[174]*Ibid.*, para. 95 (referring to Appellate Body Report, *EC – Computer Equipment*, para. 95).

demonstrating that the products at issue had been classified under heading 02.07 of the EC Schedule. According to Thailand, the Panel was not required to examine classification practice with respect to all kinds of salted meat subject to heading 02.10; only salted chicken cuts are relevant, but, in any event, the Panel analyzed a broader range of products falling under heading 02.10.

91. Thailand submits that the Panel did not "deliberate[ly] exclu[de]", as suggested by the European Communities, the export classification practice of Thailand and Brazil.[175] Indeed, the Panel did consider the classification practice of Brazil, Thailand, the United States, and China in its analysis, and made the factual conclusion that the evidence on their practices was too limited. Thailand asserts that the European Communities, in this respect, asks the Appellate Body to go beyond an examination of *legal* questions. In addition, as Thailand does not have a tariff concession on frozen boneless chicken cuts for export, and does not impose export duties on this product, the Panel properly concluded that Thailand's export classification practice was not relevant for interpreting heading 02.10.[176]

92. In Thailand's view, the Panel did not fail to examine the "totality" of the relevant law and practice of the European Communities.[177] Therefore, the Panel's consideration of relevant material from the European Communities' legislative system, including an Explanatory Note to the Combined Nomenclature of December 1994 and a BTI relating to salted ham from Spain, *cannot* be disturbed.[178] According to Thailand, the Panel explicitly considered the *Dinter* and *Gausepohl* judgments of the ECJ in its interpretative exercise under Article 32 of the *Vienna Convention*, rather than under Article 31(2)(b), as directed by the Appellate Body in *EC – Computer Equipment.*[179]

93. Thailand disagrees with the European Communities that practice of low-level customs officials cannot amount to "subsequent practice". Thailand refers to the Appellate Body Report in *EC – Computer Equipment* as well as international law literature suggesting that there is no such limitation of the types of practice that may be relevant for purposes of Article 31(3)(b).[180] What may

[175]Thailand's appellee's submission, para. 98 (referring to European Communities' appellant's submission, para. 151).

[176]*Ibid.*, para. 104.

[177]*Ibid.*, para. 160.

[178]*Ibid.*, para. 105 (referring to Panel Reports, paras. 7.302 and 7.270).

[179]*Ibid.*, para. 106.

[180]Thailand also refers to I. Brownlie, *Principles of Public International Law*, 6th edn (2003), p. 6.

constitute subsequent practice depends on the type and nature of the treaty provision in question, which, in this case, is applied by customs officials.[181]

94. According to Thailand, the European Communities' contention that the Panel failed to consider certain evidence in its interpretative exercise is "factually incorrect".[182] For Thailand, it is "unclear" whether the European Communities claims that the Panel failed to make an objective assessment of the evidence before it; if the European Communities does make such a claim, the European Communities has not sufficiently substantiated why the Panel acted inconsistently with Article 11 of the DSU.[183]

(d) Object and Purpose

95. Thailand submits that Article 31(1) does not refer to the "object and purpose" of a particular provision (in this case, Article II of GATT 1994 read in conjunction with the specific tariff heading of the EC Schedule at issue) but, rather, to the object and purpose of the treaty.[184] A treaty interpreter must determine the ordinary meaning of the terms of the treaty (that is, the concession in heading 02.10) in the light of the object and purpose of the treaty (that is, the GATT 1994).

96. Thailand disagrees with the European Communities that the Panel's interpretation of the object and purpose was based on a "bias" towards trade expansion.[185] The Panel was "merely paraphrasing" the Appellate Body Report in *EC – Computer Equipment* when referring to the security and predictability of the reciprocal arrangements "directed to the substantial reduction of tariffs and other barriers to trade".[186]

97. Thailand agrees with the Panel that the criterion of "long-term preservation" is "not ... predictable".[187] For purposes of customs classification, the objective physical characteristics of the products are the "paramount consideration", rather than any purpose underlying those characteristics.[188] In response to the European Communities' concern that the Panel took no account of the uncertainty of the alternative criterion of "preparation", Thailand submits that the burden of

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[181]Thailand's appellee's submission, para. 112.

[182]*Ibid.*, para. 107.

[183]*Ibid.*, para. 109 (referring to the standard for such a claim, as set out in Appellate Body Report, *US – Steel Safeguards*, paras. 498-499).

[184]*Ibid.*, para. 121 (referring to Appellate Body Report, *EC – Computer Equipment*, paras. 13 and 85).

[185]*Ibid.*, para. 126 (referring to the European Communities' appellant's submission, para. 189).

[186]*Ibid.*, para. 125 (quoting Panel Reports, para. 7.320).

[187]*Ibid.*, heading II.D.2.

[188]*Ibid.*, para. 129.

proving that the term "salted" in heading 02.10 of the EC Schedule was intended to be limited to the notion of "preservation" rested on the European Communities; given that the European Communities did not meet this burden, it was not incumbent on the Panel to assess any "alternative" criteria.[189]

98. For Thailand, there is no legal basis for the submission that heading 02.10 "did not have the overall object and purpose of securing mutually advantageous market access arrangements on frozen poultry".[190] According to Thailand, this argument implies that the Panel should have taken into account the unilateral trade policy considerations of the European Communities' negotiators; the European Communities may not use its tariff classification to respond to changes in trade patterns.[191]

2. Interpretation of the EC Schedule in the Light of Article 32 of the *Vienna Convention*

99. Thailand submits that the Panel acted correctly in seeking recourse to supplementary means of interpretation under Article 32 of the *Vienna Convention* in order to confirm the interpretative result obtained through the application of Article 31. Thailand submits that Article 32 provides a non-exhaustive list of available supplementary means of interpretation, and that the European Communities' classification practice, if found by the Appellate Body not to be "subsequent practice" within the meaning of Article 31(3)(b), should be considered under Article 32.

(a) Circumstances of Conclusion

100. Thailand does not agree with the European Communities that previous findings of the Appellate Body and public international law literature suggest that the events, acts, and instruments to be taken into account as part of the circumstances of a treaty's conclusion "must have directly influenced the common intentions of parties".[192] Thailand submits that the Appellate Body has not suggested that the documents considered by a panel as "circumstances of conclusion" must have influenced parties in the drafting of the treaty text. Regarding the European Communities' rejection of the Panel's concept of "constructive knowledge", Thailand notes the Appellate Body's statement in *EC – Computer Equipment* that the panel, in that case, should have considered relevant BTIs as supplementary means of interpretation; in Thailand's view, it is unlikely that all negotiating parties in the Uruguay Round were aware of these BTIs.

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[189]Thailand's appellee's submission, para. 132.

[190]*Ibid.*, para. 134 (quoting European Communities' appellant's submission, para. 212).

[191]*Ibid.*, para. 139.

[192]*Ibid.*, para. 144 (referring to European Communities' appellant's submission, para. 229; and quoting Appellate Body Report, *EC – Computer Equipment*, para. 86; and Sinclair, *supra*, footnote 36, p. 141).

(b) Characterization of Relevant Law of the European Communities

101. Thailand submits that the Panel appropriately considered relevant law and practice of the European Communities during the Uruguay Round negotiations, in accordance with the Appellate Body's guidance in *EC – Computer Equipment*. Thailand disagrees with the European Communities that there was no relevant customs classification practice prior to the conclusion of the Uruguay Round, and points to the *Dinter* and *Gausepohl* judgments of the ECJ. Thailand argues that the criterion established for heading 02.10 by EC Regulation 535/94 implemented and clarified the long-term preservation criterion recognized in the ECJ's *Gausepohl* judgment.[193]

102. Thailand further submits that Additional Note 7 to the Combined Nomenclature, enacted through EC Regulation 535/94, did not alter the scope of heading 02.10 of the Combined Nomenclature; rather, Additional Note 7 merely specified the criteria to be taken into account for classifying certain goods under that heading. Thailand also rejects the European Communities' argument that the establishment of criteria other than long-term preservation for the term "salted" in heading 02.10 would alter the scope of that heading. In Thailand's view, this argument is rebutted by the WCO's response to the Panel's questions, according to which the term "salted" in heading 02.10 is not limited to "preservation", and must be defined on the basis of the objective characteristics of the product.

103. Thailand agrees with the Panel that the Explanatory Notes to the Combined Nomenclature are not relevant because these Notes relate to swine meat and not to poultry meat, and cannot be applied by analogy to poultry meat in the absence of an explicit reference. Finally, Thailand asserts that the Panel properly declined to consider as relevant the practice of other Members, including a United States' customs ruling of 1993 relating to fresh or frozen beef sprinkled with salt, and a United States' customs ruling of 1996 relating to frozen salted bacon.[194]

[193]Thailand's appellee's submission, para. 161.

[194]*Ibid.*, paras. 172-176.

III. Other Appeals by Brazil and Thailand

A. *Claims of Error by Brazil – Other Appellant*

1. Terms of Reference

(a) Measures within the Terms of Reference

104. Brazil appeals the Panel's conclusion that EC Regulations 1871/2003 and 2344/2003 (the "subsequent measures") are outside the Panel's terms of reference. Brazil recalls that a panel request is required to identify the "specific measures at issue"; identification of specific measures "does not occur by mere reference to the label or number given to a legal instrument", but, rather, "by the description of acts or omissions attributable to a WTO Member".[195] The measures identified by Brazil in its panel request were "clearly identified as [measures] that changed the classification and tariff treatment of frozen salted chicken cuts".[196] The violation alleged was the treatment less favourable than that provided for the product under heading 02.10 of the EC Schedule. According to Brazil, the subsequent measures that the Panel found to be outside its terms of reference are "in essence the same" as the two measures found to be within the Panel's terms of reference; these subsequent measures also produce the same violation identified in Brazil's panel request, namely, treatment less favourable than that provided for in the EC Schedule.[197]

105. Brazil argues that the Panel should have examined its panel request as a whole. Brazil's "depiction" in its panel request of the two explicitly referenced measures "as measures that reclassify and change the tariff treatment of frozen salted chicken cuts is broad enough to include legal instruments subsequent to [these two measures] that also reclassify and change the tariff treatment of frozen salted chicken cuts".[198] Brazil acknowledges that the present case is "somewhat different" from the dispute in *Chile – Price Band System*, because "it does not technically deal with an *amendment* to a measure"[199]; however, Brazil submits that the general principles and the reasoning applied in that case should be applied here as well. The two subsequent measures "are equivalent to amendments" of the two measures explicitly mentioned in Brazil's panel request, in that they confirm and clarify the reclassification and tariff change brought about by the two earlier measures. The two subsequent measures "also produce the same effect", namely, the violation of the European

[195]Brazil's other appellant's submission, para. 17.

[196]*Ibid.*, para. 21.

[197]*Ibid*.

[198]*Ibid.*, para. 27.

[199]*Ibid.*, para. 28. (original emphasis)

Communities' obligations "under heading 02.10 of the EC Schedule".[200] The reclassification and change in tariff treatment of frozen salted chicken cuts by the European Communities "*remained essentially the same*" after the enactment of the two subsequent measures.[201]

106. Brazil also expresses the concern that a failure to include the subsequent measures in the Panel's terms of reference would not secure a prompt and positive solution to the dispute. Brazil furthermore contends that, contrary to the Panel's reasoning, it should not have had to draft its panel request with "broad, generic and/or inclusive language so as to cover specific legal instruments that it reasonably did not expect or anticipate" at the time it filed its request.[202] Such reasoning would "give rise to a surge of vaguely worded Panel requests", contrary to Article 6.2 of the DSU that requires that measures be specifically identified.[203] Moreover, the Panel did not provide an explanation of how and why the due process objective would have been compromised if the subsequent measures had been included in the Panel's terms of reference. In Brazil's view, the measures specifically identified gave adequate notice of the scope and claim of violation asserted by Brazil in its panel request, and the European Communities was made aware of the content and relevance of EC Regulation 1871/2003 to this dispute "many times throughout the Panel proceeding".[204]

(b) Products within the Terms of Reference

107. Brazil appeals from the Panel's conclusion that the products at issue are "frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2 %-3%" and not "frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% or more". According to Brazil, the Panel failed to represent correctly the products covered by EC Regulation 1223/2002 and EC Decision 2003/97/EC, which led to the "flawed understanding" that the products under those instruments are determined by the salt content of these products, and not by the notion of long-term preservation.[205] Although the salt percentages provided for in those measures—1.2 to 1.9 per cent, and 1.9 to 3 per cent, respectively—appear to describe the products affected by those measures, the "rationale" provided within each of those legal instruments for classification under heading 02.07 is that of long-term preservation.[206] This is also apparent from EC Decision 2003/97/EC, according to which chicken cuts with a salt content of 1.9 to 3 per cent are similar to boneless chicken cuts with a

[200]Brazil's other appellant's submission, para. 27.

[201]*Ibid.*, para. 31. (emphasis added)

[202]*Ibid.*, para. 36.

[203]*Ibid.*, para. 37.

[204]*Ibid.*, para. 42.

[205]*Ibid.*, para. 45.

[206]*Ibid.*, para. 49.

salt content of 1.2 to 1.9 per cent. According to Brazil, this suggests that it is not the salt content that defines the products under that measure.

108. Brazil also argues that the products within the Panel's terms of reference are the products described in Brazil's panel request. Brazil takes issue with the Panel's statement that the products at issue are determined by the measures considered to be within the Panel's terms of reference. Although Article 6.2 of the DSU does not explicitly require that the products at issue be identified in the panel request, the Appellate Body has, in the past, relied on the description contained in the panel request to determine the scope of the measure at issue. Moreover, if the product at issue is in fact described in the panel request, then it is that product that constitutes the product within the panel's terms of reference, because, pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the panel request. Brazil also refers to the Appellate Body's finding in *EC – Computer Equipment* that, "with respect to certain WTO obligations, in order to identify 'the specific measures at issue', it may also be necessary to identify the products subject to the measures in dispute."[207] Brazil contends that, for certain WTO obligations such as tariff concessions, the identity of the product in the panel request "becomes vital" in the fulfilment of the requirements under Article 6.2.[208]

2. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention*

109. Brazil appeals the Panel's conclusion that the evolution of Chapter 2 of the Harmonized System does not indicate definitely that the predecessor to heading 02.10 of the Harmonized System was characterized by the notion of "preparation". According to Brazil, the terms of Items 13 and 18 of the Geneva Draft Nomenclature, as well as the Explanatory Notes to these Items, indicate that the processes within Item 18 exclude the concept of "preservation", because, within the structure of Chapter 2 of the Geneva Draft Nomenclature, preservation categories were deliberately placed as subdivisions within an Item.

110. Next, Brazil appeals the Panel's finding that the Explanatory Notes to heading 02.10 of the EC Schedule and to Chapter 2 of the Harmonized System are not helpful in determining the meaning of the tariff concession in heading 02.10. Brazil takes issue in particular with the Panel's finding that the notions of "preparation" and "preservation" may not be mutually exclusive in the context of heading 02.10. Contrary to the Panel's conclusion, the Explanatory Note to heading 02.10 does not merely "suggest", but actually "asserts" that the processes referred to in heading 02.10 are preparation

[207]Brazil's other appellant's submission, para. 63 (quoting Appellate Body Report, *EC – Computer Equipment*, para. 67).

[208]*Ibid.*, para. 64.

processes.[209] Brazil's also argues that the Panel gave "unjustified significance" to the overlap in the definitions of the terms "preparation" and "preservation".[210] Brazil argues that "preparation" determines classification under heading 02.10, even if the processes of preparation may, in some cases and to some degree, also preserve meat.

111. Brazil furthermore argues that the Panel committed a legal error by concluding that Rule 3 of the General Rules for the Interpretation of the Harmonized System ("General Rule 3") was not applicable to the case before it. Brazil contends that the Panel's reliance on, and acceptance of, the parties' alleged position that the products at issue did not fall under two or more headings, such that the condition for applicability of General Rule 3 was not fulfilled, was "a grave legal error".[211] The parties held "separate and distinct" understandings that led to different conclusions[212]; this should have signalled to the Panel that the products at issue were "*prima facie* classifiable" under two headings.[213] Moreover, the Panel assumed that the products at issue were not "*prima facie* classifiable" under two or more headings, despite the fact that it had not, after a textual and contextual analysis, decided whether the products at issue fell under heading 02.10. Finally, the Panel "utterly ignored" Brazil's objection to its decision to not apply General Rule 3, expressed in Brazil's comments on the Panel's Interim Report.[214]

112. Should the Appellate Body find that the Panel erred in not applying General Rule 3, Brazil requests that the Appellate Body complete the Panel's legal analysis and find that General Rule 3 leads to classification of the products at issue under heading 02.10. Brazil argues that the factual findings of the Panel imply that, under General Rule 3, the products at issue are different from unsalted products and that these differences make the products at issue "more specific".[215] The term "salted" in heading 02.10 describes the products at issue more specifically than the term "poultry" in heading 02.07. This is because heading 02.10 does not cover "other" meat that has not been specifically provided for under other headings but, rather, all kinds of meat, "as long as that meat has been prepared by salting, drying or smoking".[216] Brazil also refers to the letter of the WCO to the Panel in support of its argument that "salting" is more specific than "freezing". According to Brazil,

[209]Brazil's other appellant's submission, para. 80. (original emphasis omitted)

[210]*Ibid.*, para. 81.

[211]*Ibid.*, para. 93.

[212]*Ibid.*, para. 94.

[213]Rule 3 of the General Rules for the Interpretation of the Harmonized System.

[214]Brazil's other appellant's submission, para. 101.

[215]*Ibid.*, para. 104.

[216]*Ibid*.

even if heading 02.10 were not "more specific" within the meaning of General Rule 3(a), General Rule 3(c) would be applicable, leading to a classification of the products at issue under heading 02.10.

B. *Claims of Error by Thailand – Other Appellant*

1. Terms of Reference

(a) Measures within the Terms of Reference

113. Thailand submits that the Panel erred in its conclusion that EC Regulations 1871/2003 and 2344/2003 (the "subsequent measures") were outside the Panel's terms of reference. Thailand's panel request was broad enough to include the two subsequent measures within the Panel's terms of reference, because the panel request referred to the "classification" of the product at issue, which is "a broader concept" than the two regulations listed in the panel request.[217] Similar to the two measures explicitly included in the panel request, the subsequent measures have the effect of classifying the product at issue under heading 02.07, rather than heading 02.10, and, thereby, result in less favourable treatment for the product than that provided for in the EC Schedule.[218] According to Thailand, had the Panel properly applied the standards applicable under Article 6.2 of the DSU, it should have concluded that Thailand's panel request was "broad" enough to cover the subsequent measures as well.[219]

114. Thailand rejects the Panel's argument that Thailand's panel request was not broad enough because it did not include the phrase "as amended", as used in the dispute in *Chile – Price Band System*[220]; applying such a "mechanical test" of whether a panel request contains generic or expansive language would provide WTO Members "with counterproductive incentives to be vague in their panel requests".[221] Thailand argues that EC Regulations 1871/2003 and 2344/2003 have the same effect as the instruments specifically referred to in Thailand's panel request. Thailand refers to the Appellate Body's finding in *Chile – Price Band System*, where the Appellate Body considered relevant that the regulatory changes at issue "did not change the essence of the measure".[222]

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[217]Thailand's other appellant's submission, para. 24.

[218]*Ibid*., para. 26.

[219]*Ibid*., para. 28.

[220]*Ibid*., para. 29.

[221]*Ibid*.

[222]*Ibid*. (referring to Appellate Body Report, *Chile – Price Band System*, para. 136, in turn quoting Appellate Body Report, *Brazil – Aircraft*, para. 132). Thailand also refers to the Appellate Body and panel findings in *Argentina – Footwear (EC)* and *Dominican Republic – Import and Sale of Cigarettes* in support of its argument. (*Ibid*., paras. 30-38)

115. Thailand contends that the inclusion of the two subsequent European Communities' measures would not frustrate the due process objective of Article 6.2 of the DSU. The European Communities was provided adequate notice of the nature of Thailand's case and of the measures being challenged, such that the European Communities was not impaired in its ability to defend itself on the measures at issue. The third parties were also aware of the nature of Thailand's case, such that their interests equally were not prejudiced. Moreover, Thailand argues that the Panel should have included EC Regulations 1871/2003 and 2344/2003 in its terms of reference to enable a prompt and positive solution to the present dispute because treating the two measures as separate from the original measures could have a negative impact on the European Communities' implementation of the Panel's ruling.

(b) Products within the Terms of Reference

116. Thailand submits that the Panel erred in finding that the products at issue were limited to chicken cuts with a salt content of 1.2 to 3 per cent. According to Thailand, the Panel erred in holding that Article 6.2 does not require a definition of the products within the terms of reference. Pursuant to Article 7.1 of the DSU, a panel's terms of reference contain the requirement to "examine the matter referred to the DSB" by a complainant; as a result, in the past, the Appellate Body "has generally followed the description of the product contained in the [panel] request".[223] Thailand contends that, to the extent the Panel believed that it was not required to consider all of the products referred to in the panel request, the Panel erred as a matter of law.

117. Furthermore, in Thailand's view, the Panel erred in its definition of the products at issue. Thailand's panel request did not describe any upper-limit for the salt content of the chicken cuts for which classification was at issue. According to Thailand, the Panel's ruling leads to the "anomalous situation" where the Panel has found that chicken cuts with a salt content of between 1.2 and 3 per cent are to be classified as "salted" meat under heading 02.10, but has not found that chicken cuts with a salt content greater than 3 per cent must be similarly classified.[224] According to Thailand, the Panel erroneously held that the scope of the measures at issue defined the scope of the products at issue. The Appellate Body's findings in *EC – Computer Equipment* suggest that the Panel should have looked first to the products at issue and then used that definition to identify the measures at issue.

[223]Thailand's other appellant's submission, para. 56.

[224]*Ibid.*, para. 59.

2. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention*

118. Thailand submits that the Panel erred in interpreting certain relevant aspects of the Harmonized System. First, according to Thailand, the Panel assumed that all Harmonized System Notes—Section Notes, Chapter Notes, Heading and Subheading Notes—referred to by the parties are Explanatory Notes and, therefore, are not part of the Harmonized System and are non-binding. Thailand considers that the Panel erred in its legal characterization of the Chapter Note to Chapter 16 as an Explanatory Note and, therefore, in its conclusion that the Chapter Note to Chapter 16 does not form part of the Harmonized System and is non-binding. The Panel's conclusion is "clearly incorrect" and results in undermining the weight to be given to the content of the Chapter Note to Chapter 16 for the interpretation of the term "salted" in heading 02.10.[225]

119. Secondly, in Thailand's view, the Explanatory Notes to Chapter 2 and to heading 02.10, when read together with the Chapter Note to Chapter 16, "clearly indicate" that preparation determines classification under heading 02.10.[226] The Panel erred in not drawing a clear conclusion that these Notes confirm that the processes listed in heading 02.10 refer to preparation. Chapter 2 covers meat that is fresh, chilled, frozen, and salted, in brine, dried, or smoked, and, as such, is prepared or preserved. Fresh meat is not prepared or preserved; meat that is chilled or frozen is preserved. This implies that meat that is salted, in brine, dried, or smoked must be prepared. Thailand disagrees with the Panel that the terms "preparation" and "preservation" are not "mutually exclusive"[227] because this finding fails to give proper meaning to all the terms of the treaty and renders the term "prepared" in the Chapter Note to Chapter 16 "inutile".[228] Even if there were a degree of overlap between the notions of "preparation" and "preservation", it would still be correct to say that it is "preparation" that characterizes heading 02.10.

120. Thirdly, Thailand argues that the Panel erred in its consideration of General Rule 3. Thailand disagrees with the Panel's finding that the parties to the dispute "concur[red] that the condition for [the] application [of General Rule 3] has not been fulfilled".[229] Thailand submits that the reason it did not consider that the products at issue could be *prima facie* classifiable under two headings was that it considered the products at issue to fall under heading 02.10 only; the European Communities, in contrast, considered that the products fell under heading 02.07 only. According to Thailand, "[t]he

[225]Thailand's other appellant's submission, para. 71.

[226]*Ibid.*, heading III.C.2.

[227]*Ibid.*, para. 77 (referring to Panel Reports, para. 7.223).

[228]*Ibid.*, para. 81.

[229]*Ibid.*, para. 87 (referring to Panel Reports, para. 7.227).

fact that opposing parties put forward different views about the correct classification of the products at issue indicates that the product at issue was *prima facie* classifiable under two headings".[230] Furthermore, the fact that the European Communities itself, at various periods, classified the products at issue under both heading 02.07 and heading 02.10, and that the European Communities' Customs Code Committee also indicated that the products were classifiable under each of these two headings, should have indicated to the Panel that it had sufficient grounds for resorting to the application of General Rule 3.

C. *Arguments of the European Communities – Appellee*

1. Terms of Reference

(a) Measures within the Terms of Reference

121. The European Communities requests that the Appellate Body reject Brazil's and Thailand's appeals regarding the Panel's terms of reference. The European Communities argues that the approach used by Brazil and Thailand, permitting the addition of measures on the condition that the general effect of those measures is similar to the ones identified in the panel requests, is "clearly at odds with the DSU and WTO jurisprudence", and would "lead to the Panel's terms of reference waxing and waning throughout a dispute settlement proceeding".[231] Terms of reference are limited to measures that existed at the time of the establishment of a panel, and Article 7.1 of the DSU assumes that the specific measures will have been identified in the panel request. The exceptions to this principle include amendments of an identified measure, under the conditions that the measure is "essentially the same" after the amendment and the terms of reference are sufficiently broad to cover the issue.[232] The reliance of Brazil and Thailand on Articles 3.4 and 3.7 of the DSU suggests that broad objectives of the DSU would override the specific rules of Article 6.2 of the DSU, an approach with which the European Communities disagrees. In any event, the inclusion of all legal measures that are considered to have a similar effect is not indispensable to securing a positive solution to the dispute.

[230]Thailand's other appellant's submission, para. 87.

[231]European Communities' appellee's submission, para. 14.

[232]*Ibid.*, para. 20 (referring to Appellate Body Report, *Chile – Price Band System*, para. 136, in turn quoting Appellate Body Report, *Brazil – Aircraft*, para. 132).

122. In the European Communities' view, the "'essence' test" refers to modifications of the same measure, rather than to measures that are different but have broadly the same effect as measures identified in the panel request.[233] Moreover, the European Communities argues that the subsequent measures are "different in nature" from the measures identified in the panel requests and are "not 'in essence the same'".[234] The subsequent measures have a broader scope than the measures identified in the panel requests, because the subsequent measures refer not only to chicken cuts, but to any kind of meat. Furthermore, the measures identified in the panel requests have not been amended by the subsequent measures and "remain valid".[235] Finally, the measures differ in their legal implications; the two measures identified in the panel requests "simply designate the appropriate classification for a particular product"; in contrast, EC Regulation 1871/2003 "reconfirms a basic criterion—long-term preservation—on which to interpret heading 02.10".[236]

123. In addition, the European Communities argues that, to extend the scope of a panel's jurisdiction, a set of "stringent conditions" must be fulfilled.[237] It is not sufficient to establish that the due process rights of the defendant have not been prejudiced. The European Communities points out that, due to the "dilatory way" in which Brazil and Thailand made their claim concerning the terms of reference, namely, at a time when the panel proceedings were more than half completed, the European Communities' due process rights were not respected. [238] Also, third parties were denied their due process rights, because it was only after the last opportunity for third parties to express their views that Brazil and Thailand first made claims concerning the Panel's terms of reference.

(b) Products within the Terms of Reference

124. The European Communities contends that Brazil's and Thailand's allegations of error concerning the products at issue are "closely intertwined" with their allegations of error concerning the measures at issue.[239] The European Communities also fails to see how the question of the products at issue affects, and is relevant for, the questions of legal interpretation before the Panel and the Appellate Body, as a matter independent of the measures that were identified. The European Communities agrees with the Panel that its terms of reference are defined by the measures identified in the panel requests; it is, however, "unclear" to the European Communities as to why the Panel

[233]European Communities' appellee's submission, para. 28.

[234]*Ibid.*, para. 36.

[235]*Ibid.*, para. 41.

[236]*Ibid.*, para. 42.

[237]*Ibid.*, para. 45.

[238]*Ibid.*

[239]*Ibid.*, para. 52.

decided nevertheless to define the products at issue.[240] The Panel's statement that the products at issue "are the specific products affected by the findings and recommendations" made by the Panel in its Reports is erroneous, because the Panel incorrectly interpreted heading 02.10 of the EC Schedule, which, in the European Communities' view, applies to all meats falling under Chapter 2. As a result, the Panel's findings and recommendations "inevitably affect a far larger range of products" than those mentioned in the specific measures at issue.[241]

125. The European Communities further submits that the Appellate Body made its finding in *EC – Computer Equipment*—that it may be necessary to identify the product in order to identify the specific measures at issue—in a context where actions of individual customs offices were challenged; thus, in that dispute, the identification of the product was "key to identifying the measures at issue".[242] According to the European Communities, the product at issue is not relevant "in and of itself" under Article 6.2; rather, it may be relevant only to help identify the "specific measures at issue".[243]

2. Interpretation of the EC Schedule in the Light of Articles 31 and 32 of the *Vienna Convention*

126. The European Communities agrees with the Panel's conclusions that the Explanatory Notes to the Harmonized System are not conclusive with respect to whether the notion of "preparation" or the notion of "preservation" characterizes heading 02.10. The European Communities agrees with Thailand that the Panel did not "explicitly recogniz[e]" that the Chapter Note to Chapter 16 of the Harmonized System is binding, but argues that the Panel made no comment on the weight it attached to the various Notes.[244] As a result, it is not obvious how attaching more weight to the Note could have led the Panel to a different conclusion.

127. The European Communities also cautions that the Notes to the Harmonized System should be used "only to attempt to elucidate the text which is being interpreted [and not be] treated as though they are the terms of the treaty being interpreted".[245] Furthermore, the European Communities submits that there are several meats falling under Chapter 2 other than those that are "salted, in brine, dried or smoked" to which the word "prepared" can be applied. An analysis of the Harmonized

[240]European Communities' appellee's submission, para. 54.

[241]*Ibid.*

[242]*Ibid.*, para. 61.

[243]*Ibid*.

[244]*Ibid.*, para. 72.

[245]*Ibid.*, para. 76.

System reveals "numerous examples" of the word "preparation" being used as a broad term in relation to various food products.[246]

128. With respect to General Rule 3, the European Communities contends that the processes of interpretation set out in Articles 31 and 32 of the *Vienna Convention* lead to the conclusion that the term "salted" in heading 02.10 does not cover products that have not been salted for preservation. Nevertheless, even if this were not the case, it is "far from clear" that the General Rules can be applied to interpret the scope of the term "salted".[247] The European Communities rejects the argument that products are *prima facie* classifiable under two or more headings whenever there is a dispute about classification; it also contests that it considered the products at issue to be classifiable under two headings. Whether the condition for the application of General Rule 3 is fulfilled cannot depend on the views of one party, but must be assessed objectively.

129. In the European Communities' view, application of General Rule 3(a) leads to a resolution of the matter. Heading 02.07 contains the "most specific description" because it refers to "poultry", which is more specific than the term "meat" in heading 02.10. The European Communities disagrees with the alternative argument, presented in the letter of the WCO Secretariat to the Panel, that it may be the processing (that is, freezing and salting) that determines the classification in the present case. According to the European Communities, there is no reason why "salting" should be regarded as more specific than "freezing".[248] The only "clear indication" that can be deduced from General Rule 3(a) is that "poultry" is more specific than "meat".[249] Consequently, it is unnecessary to apply General Rule 3(c). In any case, General Rule 3(c) raises an "important issue of principle", because the European Communities questions whether a finding that a product falls under two or more headings "can be made after a correct application of the Vienna Convention".[250] Should either the Panel or the Appellate Body make such a finding of "non *liquet*", this would imply that Brazil and Thailand have failed to make their case, such that a finding against them would have to be made. The European Communities adds that General Rule 3(c) should be seen as "a rule intended for classification of particular consignments", rather than for the interpretation of a tariff concession as required in the present dispute.[251]

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[246]European Communities' appellee's submission, para. 84.

[247]*Ibid.*, para. 90.

[248]*Ibid.*, para. 99.

[249]*Ibid.*, para. 100.

[250]*Ibid.*, para. 93.

[251]*Ibid*.

130. With respect to the Geneva Draft Nomenclature of 1937, the European Communities argues that this document may be relevant to the interpretation of the Harmonized System only as "supplementary means" under Article 32 of the *Vienna Convention*, and not as "context" under Article 31. The European Communities also agrees with the Panel's finding that "the evolution of the terms and structure of Chapter 2 of the [Harmonized System] does not definitively indicate whether or not the predecessor to heading 02.10 of the [Harmonized System] was characterized by the notion of 'preparation' and/or 'preservation'".[252] According to the European Communities, the distinction between fresh/chilled meat and frozen meat under that Draft Nomenclature was made at the low "tertiary level"[253] and was introduced only by those countries that wished to apply this distinction, while other countries chose not to do so.[254] The "real lesson" from the Geneva Draft Nomenclature is that "meats that have been subjected to traditional preserving methods should be brought together and given common treatment".[255] In the transition from the Brussels Nomenclature to the Harmonized System, these products were "kept together", while "cooked and otherwise prepared" meats were taken out of this category and placed elsewhere.[256]

IV. Arguments of the Third Participants

A. *China*

131. China disagrees with the argument of the European Communities that "the provision at issue, the object and purpose of which must be ascertained, is Article II of the GATT 1994 read in conjunction with the specific concession at issue, here, heading 02.10 of the EC Schedule."[257] China notes that Article 31(1) of the *Vienna Convention* requires interpretation of a treaty "in the light of *its* object and purpose"[258]; this implies determining the object and purpose of the treaty *as a whole* rather than its individual provisions.

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[252]Panel Reports, para. 7.205.

[253]The European Communities argues that the Geneva Draft Nomenclature divided products at three levels, the lowest of which was called the "tertiary level". (European Communities' appellee's submission, para. 108)

[254]*Ibid.*, para. 108.

[255]*Ibid.*, para. 114.

[256]*Ibid*.

[257]China's third participant's submission, para. 5 (quoting European Communities' appellant's submission, para. 182).

[258]*Ibid.*, para. 6. (emphasis added by China)

132. China accepts that an interpretation of heading 02.10 of the EC Schedule would include considering the meaning of the relevant terms in the light of their object and purpose. According to China, the concessions contained in the EC Schedule are treaty terms of the *WTO Agreement* and the GATT 1994, and these treaties are the relevant sources for ascertaining the object and purpose. China agrees with the Panel that the relevant object and purpose is the security and predictability of the reciprocal and mutually advantageous arrangements manifested in the form of concessions.[259]

133. Moreover, China supports the Panel's finding that the inclusion of a "long-term preservation" criterion in the interpretation of the term "salted", in the concession contained in heading 02.10 of the EC Schedule, could undermine the object and purpose of the security and predictability of the *WTO Agreement* and the GATT 1994.[260] China disagrees with the European Communities' argument that "preservation" is a predictable criterion and considers it inconsistent with the European Communities' acknowledgment that EC Regulation 1223/2002 and EC Decision 2003/97/EC do not apply a criterion of "long-term preservation".[261] In this regard, China notes that the European Communities stated that if a product has been "frozen" within the meaning of heading 02.07, it will still be classifiable under heading 02.10 of the EC Schedule as a "salted" product, provided that the salting is for "long-term preservation" within the meaning of these measures.[262] In addition, China considers that the European Communities' reliance on the use of terms such as "long-term use" and "provisionally preserved" in other parts of the Harmonized System is misplaced, and that such terms do not assist in the interpretation of heading 02.10 in the light of the object and purpose of the *WTO Agreement* and the GATT 1994.[263]

134. China agrees with the Panel that a customs officer would have practical difficulties in applying the criterion of "long-term preservation".[264] There is no clear definition of "long-term preservation" and no specific guidelines for customs officers. China illustrates the uncertainty of the criterion with two examples. First, products that have been salted for purposes other than long-term preservation, and frozen for long-term preservation, could be attributable to both salting and freezing, because a customs officer would have difficulties in ascertaining the purpose of these processes for a particular product. Secondly, China posits that long-term preservation of certain products might only

[259]China's third participant's submission, para. 13 (referring to Panel Reports, para. 7.320).

[260]*Ibid.*, para. 27 (referring to Panel Reports, para. 7.323).

[261]*Ibid.*, para. 15 (referring to European Communities' appellant submission, para. 197).

[262]*Ibid.*, footnote 19 to para. 24 (referring to Panel Reports, para. 7.322, in turn citing European Communities' responses to Questions 49 and 70 posed by the Panel; and European Communities' statement at the second Panel meeting, paras. 9 and 14-15).

[263]*Ibid.*, paras. 18-19.

[264]Panel Reports, para. 7.322.

be possible by a *combination* of both salting and freezing, which again would cause difficulties for a customs officer to classify the product.

135. China supports the Panel's findings relating to "circumstances of conclusion" within the meaning of Article 32 of the *Vienna Convention*. China believes that the Panel did not mischaracterize the law of the European Communities in finding that EC Regulation 535/94 superseded the criterion of long-term preservation governing the scope of heading 02.10 as confirmed in the ECJ's *Gausepohl* judgment.[265] According to China, the European Communities' argument that EC Regulation 535/94 did not change the existing ECJ interpretation of the term "salted" in heading 02.10 is untenable because of the European Communities' subsequent inclusion of Additional Note 7 in the Combined Nomenclature and the European Communities' issuance of certain BTIs.[266] Moreover, China submits that the temporal proximity of the publication and entry into force of EC Regulation 535/94 to the conclusion of the Uruguay Round supports the view that EC Regulation 535/94, indeed, set forth the classification criterion relevant for the EC Schedule and established the common intentions of the negotiating parties.[267]

B. *United States*

136. The United States submits that the description of the term "salted" meat in EC Regulation 535/94 is what the European Communities had accepted, before the conclusion of its Schedule in the Uruguay Round, as being the ordinary meaning of the term according to Article 31(1) of the *Vienna Convention*.[268] This description—which was inserted into the Combined Nomenclature—provided that the term "salted" meat referred to meat "deeply and homogenously impregnated with salt in all parts, having a total salt content of not less than 1.2% by weight".[269] The United States points out that EC Regulation 535/94 was issued prior to the completion of the process of verification of the EC Schedule during the Uruguay Round.[270]

137. Alternatively, the United States agrees with the Panel's approach of considering EC Regulation 535/94 as part of the "circumstances of [the] conclusion" of the *WTO Agreement* in accordance with Article 32 of the *Vienna Convention*.[271] The United States refers to the Appellate

[265]China's third participant's submission, para. 28.

[266]*Ibid.*, para. 31.

[267]*Ibid.*, para. 35.

[268]United States' third participant submission, paras. 1(a) and 5.

[269]*Ibid.*, para. 5.

[270]*Ibid.*, para. 6.

[271]*Ibid.*, para. 1(a).

Body Report in *EC – Computer Equipment*, where the Appellate Body stated that a Member's classification practice and customs legislation at the time of tariff negotiations are relevant as "circumstances of [the] conclusion" of the *WTO Agreement*.[272] In this light, if the meaning of the term "salted" in heading 02.10 of the EC Schedule is ambiguous or obscure, EC Regulation 535/94 —issued during the Uruguay Round and relating to that term—should be used as a "circumstance" in interpreting its meaning.[273]

138. Furthermore, the United States contends that the European Communities' reference to a single ruling by United States' customs authorities cannot amount to United States' "practice" on customs classification of the products at issue.[274] The United States emphasizes that the product at issue in the United States' customs ruling of November 1993 was fresh and frozen meat to which 3 per cent of salt had been added "similar to fresh beef sprinkled and packed in salt", whereas the products at issue in this case are described as "deeply and evenly impregnated with salt".[275] These descriptions demonstrate that the two products are not similar. Therefore, the United States disagrees with the European Communities that these products are "identical in all material respects", and that the United States has a practice of classifying under heading 02.10 only products that are preserved by salt.[276]

139. The United States agrees with the Panel that a provision in a treaty must be interpreted in the light of the treaty's "object and purpose", not in the light of the "object and purpose" of that particular provision.[277] The word "its" before "object and purpose" in Article 31(1) of the *Vienna Convention* refers to the singular "treaty" rather than to the plural "terms" of the treaty.[278] Furthermore, according to the United States, the Appellate Body reports referred to by the European Communities do not support the European Communities' position.[279] The United States asserts that the European Communities may have confused the meaning of the term "object and purpose" under Article 31(1) with the question of what is a particular treaty provision's purpose.[280] The United States explains that any provision has a "purpose", but such "purpose" can be found only by determining the meaning of

[272]United States' third participant submission, para. 6 (quoting Appellate Body Report, *EC – Computer Equipment*, paras. 92 and 94).

[273]*Ibid.*, para. 6.

[274]*Ibid.*, para. 1(b).

[275]*Ibid.*, para. 9.

[276]*Ibid*.

[277]*Ibid.*, para. 1(c).

[278]*Ibid.*, para. 12.

[279]*Ibid.*, para. 13 (referring to the European Communities' reliance on the Appellate Body Reports in *Chile – Price Band System* and (arguably) *US – Line Pipe* (not *EC – Tube or Pipe Fittings*) in European Communities' appellant's submission, para. 180).

[280]*Ibid.*, para. 14.

the provision, which in turn is determined by interpreting the provision based on the customary rules of interpretation found in Articles 31 and 32.[281] The United States argues that identifying *a priori* some "purpose" of a provision and then interpreting the text on the basis of that "purpose" would not be in accordance with customary international law and would give parties to a dispute the possibility of ascertaining "purposes" that suit their particular policy objectives.[282]

140. Finally, the United States agrees with the European Communities description of the general analytical approach that a WTO panel should take to municipal law. WTO panels may need to determine the meaning of municipal law in order to decide whether a Member is complying with its WTO obligations.[283] In order to determine the meaning of a particular municipal law of a Member it is necessary to examine the status and meaning of that measure within the municipal legal system itself.[284] In *US – Carbon Steel*, the Appellate Body explained that, to make an objective assessment of the meaning of a municipal law, it is important to look at "the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars."[285] In this light, the United States submits that an objective assessment of the meaning of a measure requires a case-by-case analysis which looks at the rules of the municipal system in their totality and studies the operation and actual status of the measure within such legal system.[286]

V. Issues Raised in this Appeal

141. The following issues are raised in this appeal:

(a) regarding the terms of reference:

(i) with respect to the specific measures at issue in this dispute, whether the Panel erred in finding that Commission Regulation (EC) No. 1871/2003 ("EC Regulation 1871/2003") and Commission Regulation (EC) No. 2344/2003 ("EC Regulation 2344/2003") are outside the Panel's terms of reference;

[281]United States' third participant submission, para. 14.

[282]*Ibid.*

[283]*Ibid.*, para. 17.

[284]*Ibid.*, para. 1(b).

[285]*Ibid.*, para. 18 (quoting Appellate Body Report, *US – Carbon Steel*, para. 157).

[286]*Ibid.*, paras. 17 and 19.

(ii) with respect to the specific products at issue in this dispute, whether the Panel erred in finding that the Panel' terms of reference were limited to frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2 to 3 per cent;

(b) whether the Panel erred in finding that frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2 to 3 per cent (the specific products at issue), are covered by the tariff commitment under heading 02.10 of the European Communities' Schedule LXXX (the "EC Schedule");

(c) whether, in coming to the conclusion under (b), the Panel erred in interpreting the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule, and more specifically, in applying the rules of treaty interpretation codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"), the Panel erred:

(i) by taking into account what the Panel referred to as the "factual context for the consideration of the ordinary meaning" of the term "salted";

(ii) in respect of context:

- by finding that an examination of the terms contained in heading 02.10 of the EC Schedule other than "salted" does not clarify the ordinary meaning of the term "salted";

- by finding that the terms and structure of Chapter 2 [287] and their evolution, the Explanatory Note to heading 02.10 and that to Chapter 2, and the Note to Chapter 16 of the Harmonized Commodity Description and Coding System of the World Customs Organization ("WCO") (the "Harmonized System"), do not clarify the meaning of the term "salted" in heading 02.10 of the EC Schedule;

- by characterizing the Note to Chapter 16 of the Harmonized System as an Explanatory Note that is not binding, rather than as a Chapter

[287]Chapter 2 of the Harmonized Commodity Description and Coding System is attached as Annex IV to this Report.

Note that forms part of the Harmonized System and is therefore binding; and

- by finding that General Rule 3 of the World Customs Organization's General Rules for the Interpretation of the Harmonized System (the "General Rules") is not applicable in this case because the products at issue are not *prima facie* classifiable under two or more headings of the Harmonized System[288];

(iii) in respect of "object and purpose":

- by finding that an interpretation of the term "salted" in heading 02.10 of the EC Schedule, as including the criterion of preservation, could undermine the object and purpose of security and predictability in market access arrangements, which underlie both the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement* ") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994");

(iv) in respect of "subsequent practice":

- in its interpretation of the concept of "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*;

- by finding that the European Communities' practice of classifying the products at issue under heading 02.10 of the EC Schedule between 1996 and 2002 amounts to "subsequent practice" within the meaning of Article 31(3)(b); and

- in its analysis of "consistency" of practice at the European Communities and multilateral levels; and

[288]In the event that the Appellate Body reverses the Panel's decision not to apply General Rule 3, Brazil requests the Appellate Body to complete the legal analysis and to conclude that the application of General Rule 3 leads to the classification of the products at issue under heading 02.10 of the EC Schedule. (Brazil's Notice of Other Appeal (attached as Annex II to this Report), penultimate paragraph)

(v) in respect of "circumstances of the conclusion of a treaty":

- in its interpretation of the concept of "circumstances of conclusion" within the meaning of Article 32 of the *Vienna Convention*;
- by limiting the analysis of "circumstances" to the "prevailing situation in the European Communities" and failing to consider the prevailing situation internationally;
- by developing and applying the notion of "constructive knowledge"; and
- by misinterpreting relevant customs classification practice, legislation and jurisprudence of the European Communities; and

(d) whether the Panel complied with its obligations under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") in making its conclusions under Article 31 with respect to "factual context" and under Article 32 of the *Vienna Convention* with respect to "circumstances of the conclusion of a treaty".

VI. Introduction

142. The present dispute concerns the question whether certain European Communities' measures pertaining to the classification of imported frozen and salted chicken cuts result in treatment for those chicken cuts that is less favourable than that provided for in the EC Schedule, in violation of Article II of the GATT 1994. The EC Schedule contains two tariff commitments relevant to this dispute, namely, under heading 02.07, concerning "meat and edible offal, of the poultry of heading No. 0105, fresh, chilled or frozen"[289], and under heading 02.10, concerning "meat and edible meat offal, salted, in brine, dried or smoked". In March 1994, the European Communities adopted Commission Regulation (EC) No. 535/94 ("EC Regulation 535/94"). This Commission Regulation amended Annex I of Commission Regulation (EEC) No. 2658/87, inserting an Additional Note to the European Communities' Combined Nomenclature.[290] The effect of this Note was that 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." In 1983, the European Court of Justice (the

[289]The precise tariff commitment is contained in subheading 0207.41.10 of the EC Schedule.

[290]This was Additional Note 8, later re-numbered as Additional Note 7.

"ECJ"), in the *Dinter* judgment[291], had addressed the question whether turkey meat seasoned with salt and pepper was properly classified under Chapter 2 or, instead, Chapter 16 of the European Communities' Combined Nomenclature. In 1993, the ECJ, in the *Gausepohl* judgment[292], addressed the question under which circumstances salted bovine meat would be considered "salted" within the meaning of heading 02.10 of the European Communities' Combined Nomenclature.[293]

143. Following EC Regulation 535/94, between 1996 and 2002, various customs offices of the European Communities classified the products at issue in this dispute—namely, "frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% – 3%"[294]—as "salted" meat under heading 02.10. In 2002, by means of Commission Regulation (EC) No. 1223/2002 ("EC Regulation 1223/2002"), the Commission of the European Communities determined that frozen boneless chicken cuts with a salt content of 1.2 to 1.9 per cent were to be classified as "frozen" meat under heading 02.07 and, thus, not under heading 02.10. In 2003, by Commission Decision No. 2003/97/EC ("EC Decision 2003/97/EC"), the Commission directed the Federal Republic of Germany to withdraw certain Binding Tariff Information ("BTIs")[295], which classified frozen boneless chicken cuts with a salt content of 1.9 to 3 per cent as "salted" meat, by stating that the products covered by those BTIs were properly classified as "frozen" meat under heading 02.07. In October 2003, the European Communities enacted EC Regulation 1871/2003, according to which the term "salted", under heading 02.10, "mean[s] meat and edible meat offal deeply and homogeneously impregnated with salt in all parts and having a total salt content of not less than 1.2% by weight, *provided it is the salting which ensures long-term preservation*."[296] This provision was also reflected in EC Regulation 2344/2003 with respect to the European Communities' Combined Nomenclature. Thailand commenced exporting frozen salted chicken to the European Communities in 1996, and

[291]*Supra*, footnote 151.

[292]*Supra*, footnote 106.

[293]The European Communities has also referred to two European Communities' Explanatory Notes as relevant pieces of European Communities' legislation. In 1981, an Explanatory Note was inserted into the European Communities' Common Customs Tariff, according to which the term "salted", in relation to swine meat, referred to meat that had been "preserved, by deep dry salting or pickling in brine without any other supplementary treatment such as drying or smoking". (Exhibit EC-11 submitted by the European Communities to the Panel) Another Explanatory Note, from 1983, referring to "dried or smoked" swine meat, stated that "[h]ams, shoulders and parts thereof which have been partially dehydrated, but the actual preservation of which is ensured by freezing or deep-freezing" fell within the tariff heading relating to "frozen 'hams, shoulders or cuts thereof, with bone in'". (Exhibit EC-13 submitted by the European Communities to the Panel)

[294]Panel Reports, para. 7.36.

[295]We understand that a BTI provides advance binding information to the importer of how a given customs office will classify a particular product.

[296]Article 1 of EC Regulation 1871/2003. (emphasis added) EC Regulation 1871/2003 amended Additional Note 7 to the European Communities' Combined Nomenclature, which had been introduced by EC Regulation 535/94.

Brazil started doing so in 1998.[297] More details concerning the factual background to this dispute are provided in paragraphs 2.18-2.41 of the Panel Reports.

144. Before the Panel, Brazil and Thailand alleged that, through EC Regulation 1223/2002 and EC Decision 2003/97/EC, "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 0207.41.10 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."[298]

145. The ultimate question before us in this dispute is whether the measures at issue are consistent with the obligations of the European Communities under Article II:1(a) and Article II:1(b) of the GATT 1994. More specifically, the question is whether the measures at issue result in treatment of the products at issue—namely, "frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% – 3%"[299]—that is less favourable than that provided for under heading 02.10 of the EC Schedule, because these measures subject the products at issue to duties that are in excess of those provided for in the EC Schedule and, potentially, to special safeguard measures. Resolving this question requires us to interpret heading 02.10 of the EC Schedule, which, like all the Schedules of the Members of the World Trade Organization ("WTO"), is an integral part of the GATT 1994 as well as of the *WTO Agreement*, by virtue of Article II:7 of the GATT 1994.[300]

146. It is not in dispute in this case that, if the products at issue are covered by the tariff commitment contained in heading 02.07 of the EC Schedule, and not by the one contained in heading 02.10 of the EC Schedule, the tariff treatment accorded to the products at issue, under the European Communities' measures challenged by Brazil and Thailand, would be less favourable than that provided for in the EC Schedule and that, accordingly, such treatment would be inconsistent with the European Communities' obligations under Articles II:1(a) and II:1(b) of the GATT 1994.[301]

147. The critical issue in this dispute is the meaning of the term "salted" in heading 02.10 of the EC Schedule. Relying on the customary rules of interpretation codified in Articles 31 and 32 of the *Vienna Convention*, the Panel first examined the ordinary meaning of the term "salted", including its

[297]European Communities' appellant's submission, para. 47. Brazil and Thailand have not contested this assertion.

[298]Panel Reports, para. 7.3.

[299]*Ibid.* para. 7.36.

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

[301]Panel Reports, para. 7.75.

"factual context". Thereafter, the Panel undertook an interpretation of that term in the light of its context; relevant subsequent practice; "object and purpose" of the *WTO Agreement* and the GATT 1994; and finally, the circumstances of the conclusion of the *WTO Agreement*. The Panel concluded, in essence, that the products at issue fell under heading 02.10 of the EC Schedule and that the European Communities had provided, through the challenged measures, treatment less favourable than that provided for in the EC Schedule. The European Communities challenges the Panel's interpretative approach and all of the Panel's conclusions concerning the interpretation of the term "salted" in heading 02.10 of the EC Schedule.[302] Brazil and Thailand each appeals certain aspects of the Panel's interpretation of that term, and, furthermore, both appeal the Panel's findings concerning the measures and the products falling within the Panel's terms of reference.

148. In our analysis, we first address Brazil's and Thailand's claims concerning the Panel's terms of reference. We next examine the Panel's interpretation of the term "salted" in heading 02.10 of the EC Schedule; in so doing, first, we examine the European Communities' appeal concerning the Panel's finding on the ordinary meaning of the term "salted", including its "factual context". Secondly, we review the Panel's interpretation of that term in its context, considering the arguments raised by the European Communities as well as by Brazil and Thailand. Thirdly, we review the Panel's interpretation of the term "salted" in the light of the object and purpose of the *WTO Agreement* and the GATT 1994. Finally, we address the Panel's analysis under Article 32 of the *Vienna Convention* as to the "circumstances of [the] conclusion" of the treaty. Fourthly, we examine the Panel's findings concerning "subsequent practice".

VII. Terms of Reference

149. We begin with the appeals concerning the Panel's finding on the *measures* covered by its terms of reference.

A. *Measures Within the Terms of Reference*

150. There is no dispute in this case that the following two measures are within the Panel's terms of reference: EC Regulation 1223/2002 and EC Decision 2003/97/EC.[303] The first measure, EC Regulation 1223/2002, provides that "boneless chicken cuts, frozen and impregnated with salt in all parts [with] a salt content by weight of 1.2% to 1.9%" shall be classified under

[302]More specifically, whether this term in heading 02.10 implies that salting ensures, by itself, preservation or long-term preservation of meat.

[303]EC Regulation 1223/2002, adopted on 8 July 2002, was published in the *Official Journal of the European Communities* on 9 July 2002, and entered into force on the twentieth day following its publication. EC Decision 2003/97/EC was adopted on 31 January 2003, and was published on 12 February 2003.

subheading 0207.41.10 of the European Communities' Combined Nomenclature. The second measure, EC Decision 2003/97/EC, is a decision of the European Communities' Commission directed to the Federal Republic of Germany, requiring the withdrawal of 66 BTI notices issued by the German customs authority that classified frozen chicken cuts with a salt content between 1.9 and 3 per cent as "salted" meat under heading 02.10 of the EC Schedule. For convenience, we will refer to these two measures within the Panel's terms of reference as the "two original measures".

151. Before the Panel, Brazil and Thailand argued that two *subsequent* measures also fell within the Panel's terms of reference, namely, EC Regulations 1871/2003 and 2344/2003.[304] We will refer to these two measures as the "two subsequent measures". The first of these measures, EC Regulation 1871/2003, amends Additional Note 7 to Chapter 2 of the European Communities' Combined Nomenclature—originally introduced into the Combined Nomenclature by EC Regulation 535/94—by adding, at the end of the Note, the phrase "provided it is the salting which ensures long-term preservation". As a result, the amended Additional Note 7 reads as follows:

> For the purposes of heading 0210, the term "...salted..." mean[s] meat and edible meat offal deeply and homogenously impregnated with salt in all parts and having a total salt content of not less than 1.2% by weight, *provided it is the salting which ensures long-term preservation*.[305] (emphasis added)

152. The second measure, EC Regulation 2344/2003, states, *inter alia*, that the amendment to Additional Note 7, inserted into the *old* Combined Nomenclature, is also inserted into the *new* Combined Nomenclature, adopted by Commission Regulation (EC) No. 1789/2003.[306]

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[304]EC Regulation 1871/2003 was published on 23 October 2003 and entered into force on the twentieth day following its publication. EC Regulation 2344/2003 was published on 30 December 2003 and entered into force on 1 January 2004. Brazil's and Thailand's requests for the establishment of a panel were made on 22 September 2003 and 28 October 2003, respectively.

[305]According to the European Communities, the purpose of this Regulation was to:

> ... confirm and clarify that the correct interpretation of the term "salted" in heading 02.10 was salting in order to ensure the preservation of the product. This regulation was considered necessary to avoid customs officials or traders reading the additional note in isolation from the headings as consistently interpreted by the European Court of Justice and the Commission.

(European Communities' first written submission to the Panel, para. 99)

[306]The European Communities explained that Commission Regulation (EC) No. 1789/2003 "reproduces the complete version of the Combined Nomenclature for the year 2004". (European Communities' response to Question 33 posed by the Panel, Panel Reports, pp. C-84-C-85) This Regulation was adopted on 11 September 2003 and entered into force on 1 January 2004. EC Regulation 2344/2003—the second measure—makes certain changes to the complete version of the Combined Nomenclature for 2004 "in order to take account of changes to the Combined Nomenclature in force in 2003 which were made after 11 September 2003." (*Ibid.*)

153. The Panel rejected the claims of Brazil and Thailand, finding that the two subsequent measures did not fall within its terms of reference. The Panel relied on previous Appellate Body Reports dealing with amendments to measures identified in the panel request, indicating that, in order for a panel's terms of reference to include such amendments, the terms of reference "must be broad enough".[307] The Panel stated that Brazil's and Thailand's respective panel requests were "much more narrowly drafted" than the "broadly worded" panel requests at issue in previous cases[308], where the panels had found that measures not identified specifically in the panel requests were nevertheless within their terms of reference. As a result, the Panel concluded that both Brazil's and Thailand's panel requests were "not broad enough to include"[309] the subsequent measures.

154. On appeal, Brazil and Thailand argue that the measures challenged are not merely the measures identified in their respective panel requests but, rather, those that change in classification and tariff treatment of frozen salted chicken cuts. Thus, the violation alleged by Brazil and Thailand was that such change in classification and tariff treatment resulted in the products being accorded less favourable treatment than that provided under heading 02.10 of the EC Schedule. Relying on the Appellate Body Report in *Chile – Price Band System*, Brazil and Thailand argue that the two subsequent measures are "in essence the same"[310] as the two original measures and have the "same effect" as the two original measures in that they result in the same violation as the two original measures.[311]

155. The text of Article 6.2 of the DSU provides in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

[307]Panel Reports, paras. 7.26-7.27. The panel also referred to a second condition, namely, that inclusion of such amendments "is necessary to secure a positive resolution to the dispute" but did not rely on this condition. (*Ibid*., para. 7.27)

[308]*Ibid*., para. 7.28.

[309]*Ibid.*

[310]Brazil's other appellant's submission, paras. 21, 28, and 30-32; Thailand's other appellant's submission, paras. 30-37.

[311]Brazil's other appellant's submission, para. 34; Thailand's other appellant's submission, paras. 26 and 28, and heading III.A.3(b).

Article 6.2 of the DSU has two main requirements relevant to this dispute, namely, the identification of the *specific measures at issue* and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*).[312] Together, they constitute the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[313] The Appellate Body has observed previously that the need for precision in panel requests flows from the two essential purposes of the terms of reference, namely, to define the "scope of the dispute" and to serve the "due process objective of notifying the parties and third parties of the nature of a complainant's case."[314] In our view, the clear identification of the specific measures at the outset is central to define the scope of the dispute to be addressed by a panel.

156. The term "specific measures at issue" in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel.[315] However, measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference. Indeed, the Appellate Body addressed such a circumstance in *Chile – Price Band System*.[316] Recognizing the requirement that a panel request must identify the "specific measures at issue" under Article 6.2, the Appellate Body examined in that case the relationship between the original measure and the subsequent amendment to that measure, and found that:

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[312]The Appellate Body stated in *Korea – Dairy* that:

> When parsed into its constituent parts, Article 6.2 may be seen to impose the following requirements. The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

(Appellate Body Report, *Korea – Dairy*, para. 120)

[313]Appellate Body Report, *Guatemala – Cement I*, para. 72.

[314]Appellate Body Report, *US – Carbon Steel*, para. 126 (quoting Appellate Body Report, *Brazil – Desiccated Coconut*, DSR 1997:I, 167, at 186 (emphasis omitted); and referring to Appellate Body Report, *EC – Bananas III*, para. 142).

[315]These measures should also have been the subject of consultations prior to the establishment of the panel, although the Appellate Body has held that there is no need for a "*precise and exact identity*" between the measures addressed in consultations and the measures identified in the panel request. (Appellate Body Report, *Brazil – Aircraft*, para. 132) (original emphasis)

[316]Appellate Body Report, *Chile – Price Band System*, paras. 126-144.

> ... Chile's price band system remains essentially the same after the enactment of Law 19.772. The measure is not, in its essence, any different because of that Amendment. Therefore, we conclude that the measure before us in this appeal includes Law 19.772, because that law amends Chile's price band system without *changing its essence*.[317] (original emphasis)

157. Thus, the Appellate Body found that, where an original measure had merely been amended by a subsequent measure and the amendment did not, in any way, change the *essence of the original measure*, the measure in its amended form could constitute the "specific measure[] at issue" identified in the panel request. [318]

158. In our view, the case before us is characterized by circumstances different from those in *Chile – Price Band System*. The two subsequent measures in this dispute make no explicit reference to the two original measures, which continue to remain in force. Moreover, the two subsequent measures have legal implications different from those of the two original measures: the first of the original measures—EC Regulation 1223/2002—specifies a certain classification for a particular product—namely, frozen boneless chicken cuts with a salt content of 1.2 to 1.9 per cent—and the second—EC Decision 2003/97/EC—requires the withdrawal of BTIs providing for a different classification of a product considered to be a similar product—namely, frozen boneless chicken cuts with a salt content of 1.9 to 3 per cent. In contrast, the two subsequent measures amend the European Communities' Combined Nomenclature and cover all types of salted meat falling under heading 02.10 of the Combined Nomenclature[319], whereas the two original measures are limited to frozen boneless salted chicken cuts.

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[317]Appellate Body Report, *Chile – Price Band System*, para. 139.

In that dispute, the Appellate Body also quoted with approval the panel in *Argentina – Footwear (EC)*. That panel had decided to examine modifications made to the measure at issue during the panel proceedings on the ground that the modifications in question did:

> … not constitute entirely new safeguard measures in the sense that they were based on a different safeguard investigation, but are instead modifications of the legal form of the original definitive measure, which remains in force in substance and which is the subject of the complaint.

(Panel Report, *Argentina – Footwear (EC)*, para. 8.45)

[318]In doing so, the Appellate Body observed that it "[did] not mean to condone a practice of amending measures during dispute settlement proceedings ... with a view to shielding a measure from scrutiny by a panel or by [the Appellate Body]." At the same time, the Appellate Body made clear that it was not suggesting that this had occurred in that dispute. (Appellate Body Report, *Chile – Price Band System*, para. 144)

[319]Moreover, one of two original measures is a "Decision" directed at one individual Member State of the European Communities, namely the Federal Republic of Germany, whereas the two subsequent measures are "Regulations" that have a general application.

159. We are, therefore, not persuaded that the two subsequent measures in this case can be considered as amendments to the two original measures—as were the measures at issue in *Chile – Price Band System*—or that the two sets of measures are, in essence, the same.[320]

160. Brazil and Thailand also argue that the two subsequent measures fall within the Panel's terms of reference, because they have the "same effect" and bring about the same result as the two original measures, namely the (re)classification of the products at issue. Even assuming that Brazil and Thailand are correct that the two subsequent measures have the "same effect" as the two original measures insofar as frozen boneless chicken cuts are concerned, we fail to see a legal basis for applying such a test. In our view, the notion of measures having the "same effect" is too vague and could undermine the requirement of specificity and the due process objective enshrined in Article 6.2.[321]

161. Brazil and Thailand also refer to Articles 3.4 and 3.7 of the DSU and argue that the principle of "satisfactory settlement of the matter" and of "secur[ing] a positive solution to the dispute" supports the inclusion of the two subsequent measures in the Panel's terms of reference in this case. We agree that a positive and effective resolution of a dispute is one of the key objectives of the WTO dispute settlement system.[322] However, this objective cannot be pursued at the expense of complying with the specific requirements and obligations of Article 6.2. Moreover, in this case, we believe that the non-inclusion of the two subsequent measures in the Panel's terms of reference would not hinder a positive resolution of this dispute.

162. For these reasons, we *uphold* the Panel's finding, in paragraph 7.37 of the Panel Reports, that the Panel's terms of reference do not include EC Regulations 1871/2003 and 2344/2003.

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[320]Nor do we consider that the two subsequent measures are "modifications of the legal form of the original definitive measure", as in the dispute in *Argentina – Footwear (EC)*. See *supra*, footnote 317.

[321]Indeed, the Appellate Body has stated that:

> [t]o the extent that a Member's complaint centres on the effects of an action taken by another Member, that complaint must nevertheless be brought as a challenge to the *measure* that is the source of the alleged effects.

(Appellate Body Report, *US – Gambling*, para. 123) (original emphasis)

[322]Article 3.4 of the DSU stipulates that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter". Article 3.7 of the DSU provides that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute."

B. *Products Within the Terms of Reference*

163. As regards the question of the specific products within its terms of reference, the Panel concluded that the measures within its terms of reference "determine the products that are within [its] terms of reference", and that, therefore, the products at issue are "frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2% – 3%"[323] and are not "frozen boneless salted chicken cuts that have been deeply and homogenously impregnated with salt in all parts with a total salt content of not less than 1.2%", as claimed by Brazil and Thailand.[324]

164. Brazil and Thailand appeal from this finding and argue that, although Article 6.2 of the DSU does not explicitly require that the products at issue be identified in the panel request, in the past, the Appellate Body has relied on the product description contained in the panel request to determine the scope of the measure at issue. Moreover, if the products at issue are in fact described in the panel request, then those products constitute the products within the panel's terms of reference. Brazil and Thailand refer to the Appellate Body's finding in *EC – Computer Equipment* as support for their view that, "in order to identify 'the specific measures at issue', it may ... be necessary to identify the products subject to the measures in dispute".[325] Brazil also emphasizes that the "rationale" for the applicable tariff classification of the products at issue, explicitly set out in the two measures found by the Panel to be within its terms of reference, is not the specific salt content, but the principle of preservation.[326] Hence, the measures at issue are not limited to frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2 to 3 per cent.

165. We are not persuaded by these arguments. Article 6.2 of the DSU does not refer to the identification of the products at issue; rather, it refers to the identification of the specific measures at issue. Article 6.2 contemplates that the identification of the products at issue must flow from the specific measures identified in the panel request. Therefore, the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue. In other words, it is the *measure* at issue that generally will define the *product* at issue.

[323]Panel Reports, para. 7.36.

[324]*Ibid.*, para. 7.34.

[325]Appellate Body Report, *EC – Computer Equipment*, para. 67 (quoted in Brazil's other appellant's submission, para. 64; and in Thailand's other appellant's submission, para. 61).

[326]Brazil's other appellant's submission, para. 49.

166. At the same time, we acknowledge that the Appellate Body held, in *EC – Computer Equipment*, that, with respect to certain WTO obligations, in order to identify the specific measures at issue, it may be necessary also to identify the products at issue.[327] In that case, however, the measures at issue were individual classification decisions by customs authorities in the European Communities, rather than legislative or regulatory measures of general application as in this case. The Appellate Body held:

> ... that "measures" within the meaning of Article 6.2 of the DSU are not only measures of general application, i.e., normative rules, but also can be the application of tariffs by customs authorities. Since the request for the establishment of a panel explicitly refers to the application of tariffs on LAN equipment and PCs with multimedia capability by customs authorities in the European Communities, we agree with the Panel that the measures in dispute were properly identified in accordance with the requirements of Article 6.2 of the DSU.[328] (footnote omitted)

167. We believe that, in circumstances in which a series of decisions of customs authorities are under challenge, it may be necessary to identify the products at issue in order to distinguish the contested measures (for example, individual classification decisions by customs authorities) from other measures (different individual classification decisions by customs authorities). By contrast, in the present dispute, the contested measures are not individual classification decisions by customs authorities but, rather, (i) a generally applicable legal instrument (EC Regulation 1223/2002), as well as (ii) a decision requiring a Member State of the European Communities to withdraw a series of BTIs (EC Decision 2003/97/EC). These two measures define the products to which they apply, namely frozen boneless chicken cuts with a salt content of 1.2 to 1.9 per cent, and frozen boneless chicken cuts with a salt content of 1.9 to 3 per cent, respectively. Thus, it is evident that these products, which are explicitly mentioned in the specific measures identified in the panel requests, are the ones at issue in the present dispute.

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[327]The Appellate Body stated in *EC – Computer Equipment*:

> We note that Article 6.2 of the DSU does *not* explicitly require that the products to which the "specific measures at issue" apply be identified. However, with respect to certain WTO obligations, in order to identify "the specific measures at issue", it may also be necessary to identify the products subject to the measures in dispute.

(Appellate Body Report, *EC – Computer Equipment*, para. 67) (original emphasis)

[328]*Ibid.*, para. 65.

168. We note Brazil's argument that the criterion of "preservation" set out in the European Communities' measures applies also to frozen boneless chicken cuts with a salt content above 3 per cent.[329] This fact is not disputed by the European Communities. It cannot, therefore, be excluded in the abstract that, pursuant to the "preservation" criterion, the European Communities might classify chicken meat products with a salt content above 3 per cent in the same manner as meat products with a salt content between 1.2 and 3 per cent.[330] However, given that no measures applicable to meat products with a salt content above 3 per cent were identified in the panel requests, there is no basis for findings by the Panel or by the Appellate Body that this dispute covers also frozen boneless chicken cuts with a salt content above 3 per cent.

169. In the light of the above, we *uphold* the Panel's finding, in paragraph 7.37 of the Panel Reports, that the products covered by the Panel's terms of reference are those covered by the specific measures at issue, namely, frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2 to 3 per cent.

VIII. Interpretation of the EC Schedule in the Light of Article 31 of the *Vienna Convention*

A. *The Ordinary Meaning of the Term "Salted" in Heading 02.10 of the EC Schedule*

170. The European Communities appeals the Panel's interpretation of the term "salted" in heading 02.10 of the EC Schedule.

171. The Panel began its analysis by stating that it would seek to ascertain the ordinary meaning of the term "salted" in heading 02.10 of the EC Schedule pursuant to Article 31(1) of the *Vienna Convention*. The Panel stated that it would consider "the remaining relevant terms in that concession"—namely, "in brine", "dried", and "smoked"—as *context* under Article 31(2) of the *Vienna Convention*.[331] The Panel furthermore noted that Brazil and Thailand did 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)."[332]

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[329]The term used in the two European Communities' measures within the Panel's terms of reference is "long-term conservation".

[330]We note in this context that, according to the European Communities, boneless chicken cuts with a salt content of more than 3 per cent are not commercially traded in the European Communities. (European Communities' response to Question 27 posed by the Panel, Panel Reports, p. C-82; see also Panel Reports, footnote 206 to para. 7.133)

[331]Panel Reports, para. 7.108.

[332]*Ibid*. (footnote omitted)

172. The Panel divided its analysis of the "ordinary meaning", pursuant to Article 31(1) of the *Vienna Convention*, into two parts. First, the Panel examined the "ordinary meaning of the term 'salted' in subheading 0210.90.20 of the EC Schedule"[333]; in this part of its analysis, the Panel examined, exclusively, *dictionary definitions* of the term "to salt", finding 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".[334] Secondly, in a section entitled "Factual context for the consideration of the ordinary meaning"[335], the Panel examined three aspects, namely, the "products covered by the concession contained in heading 02.10"[336]; the "flavour, texture, [and] other physical properties"[337] of the products; and "preservation".[338]

173. The Panel concluded 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."[339] The Panel further found 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."[340] At the same time, the Panel held that the ordinary meaning of the term "salted" was not dispositive of the question whether or not the specific products at issue were covered by the concession in heading 02.10.

1. Analysis of the Ordinary Meaning and "Factual Context" of the Term "Salted"

174. On appeal, the European Communities argues that the analysis of "ordinary meaning" under the *Vienna Convention* does not contemplate an analysis of the "factual context" of a treaty term and that the "factual context", as identified by the Panel, is "not relevant" for determining the ordinary meaning of the term "salted".[341] The European Communities contends that the Panel, under the heading "factual context", took into account elements that are not to be taken into account for purposes of ascertaining the ordinary meaning of a treaty term.

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[333]Panel Reports, paras. 7.112-7.116.

[334]*Ibid.*, para. 7.116.

[335]*Ibid.*, heading VII.G.3(a)(iii) and paras. 7.140-7.149.

[336]*Ibid.*, para. 7.140.

[337]*Ibid.*, paras. 7.141-7.145.

[338]*Ibid.*, paras. 7.146-7.149.

[339]*Ibid.*, para. 7.150.

[340]*Ibid.*, para. 7.151.

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

175. We recall that Article 31(1) of the *Vienna Convention* stipulates that:

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

The Appellate Body has observed that dictionaries are a "useful starting point"[342] for the analysis of "ordinary meaning" of a treaty term, but they are not necessarily dispositive. The ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties "as expressed in the words used by them against the light of the surrounding circumstances".[343]

176. Having said this, we would agree with the European Communities that there is no reference in the *Vienna Convention* to "factual context" as a separate analytical step under Article 31. Nevertheless, we do not believe that the Panel was incorrect to consider elements such as the "products covered by the concession contained in heading 02.10", "flavour, texture, [and] other physical properties" of the products falling under heading 02.10, and "preservation" when interpreting the term "salted" as it appears in heading 02.10. The Panel's consideration of these elements under "ordinary meaning" of the term "salted" complemented its analysis of the dictionary definitions of that term. In any event, even if we were to agree with the European Communities that these elements are not to be considered under "ordinary meaning", they certainly could be considered under "context". Interpretation pursuant to the customary rules codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components. Considering particular surrounding circumstances under the rubric of "ordinary meaning" or "in the light of its context" would not, in our view, change the outcome of treaty interpretation. Therefore, we find no error in the Panel's interpretive approach.

2. The European Communities' Claim under Article 11 of the DSU

177. Having addressed the issue of "factual context", we turn to the European Communities' claims under Article 11 of the DSU. The European Communities submits that "a number of the Panel's conclusions amount to an egregious distortion of the facts before the Panel, clearly inconsistent with Article 11 [of the] DSU".[344] In this respect, the European Communities challenges three statements

[342]Appellate Body Report, *US – Softwood Lumber IV*, para. 59. See also Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248; and Appellate Body Report, *US – Gambling*, para. 166.

[343]Lord McNair, *The Law of Treaties* (Oxford Clarendon Press, 1961), p. 365.

[344]European Communities' appellant's submission, para. 62.

made by the Panel in the context of its analysis of the "factual context" of the term "salted" in heading 02.10 of the EC Schedule.

178. The first of these conclusions is the Panel's statement that "it appears that even small quantities of salt may have a preservative effect".[345] The European Communities argues that the Panel "seriously misrepresent[ed] the technical evidence supplied by [one of the experts]".[346]

179. The European Communities emphasizes that its expert referred to chicken in a "raw and *chilled* state"[347] and that his statement does not support what the European Communities views as the Panel's conclusion that "3% salt, *without chilling*, would prevent spoilage for a period of a few days".[348]

180. On a careful reading of the Panel Reports, we are of the view that the Panel did not find that "3% salt, *without chilling*, would prevent spoilage for a period of a few days." In the phrase "3% salt may prevent spoilage, albeit for a period of only a few days", the Panel does not state explicitly whether this proposition refers to chilled or unchilled meat; however, in the immediately preceding sentence, the Panel reproduces a statement by the European Communities' expert that explicitly refers to "raw and chilled" meat. As a result, we read the Panel's conclusion to refer to the same type of meat as described by the expert, that is, "raw and chilled" meat. We do not, therefore, agree with the European Communities that the Panel acted inconsistently with its obligations under Article 11 of the DSU in concluding that "it appears that even small quantities of salt may have a preservative effect".[349]

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[345]Panel Reports, para. 7.146.

[346]European Communities' appellant's submission, para. 63. The Panel explained its observation in a footnote, which reads as follows:

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

(Panel Reports, footnote 249 to para. 7.146)

[347]European Communities' appellant's submission, para. 64. (emphasis added by the European Communities)

[348]*Ibid.* (emphasis added)

[349]Panel Reports, para. 7.146.

181. The second statement of the Panel with which the European Communities takes issue is the following, concerning variable salt content and additional means of preservation:

> 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.[350]

The European Communities points out that "it is not the salt content of these products which means that additional means of preservation may be used", but that "additional means of preservation" are not required for those products.[351] The European Communities refers to certain statements by the European Communities' expert[352] and argues that, in making the above-referred factual statement, the Panel went beyond the bounds of its discretion under Article 11 of the DSU and made findings that are contradicted by the uncontested evidence before it.

182. Thirdly, the European Communities challenges the Panel's statement that the European Communities acknowledged that products under heading 02.10 may require means of preservation in addition to salting, and that this circumstance supported the view that a product preserved by salt for relatively short periods of time is not necessarily precluded from qualifying under heading 02.10.[353] The European Communities argues that, contrary to the Panel's statement, what the European Communities acknowledged was that "preservation by salting, etc., did not imply that meat could not

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[350]Panel Reports, para. 7.149.

[351]European Communities' appellant's submission, para. 66.

[352]The European Communities refers to the following statement by its expert:

> Parma ham, prosciutto and jamón serrano
>
> All these products are shelf-stable for many months at ambient temperatures. They spoil chemically by development of rancidity and not by the action of micro-organisms.

(*Ibid.*, para. 66) (footnote omitted)

[353]The Panel stated 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 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.

(Panel Reports, para. 7.149) (footnote omitted)

be further preserved by other means."[354] The European Communities recalls scientific evidence before the Panel that "preserved meat might be refrigerated or packaged because of the steps, such as slicing, which had been taken to prepare it for retail sale."[355] According to the European Communities, there is no logical connection between these observations and the Panel's conclusion 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."[356]

183. We understand the Panel to have concluded that "there is nothing to suggest that products preserved by salt for relatively short periods of time are precluded from qualifying under ... heading 02.10".[357] In order to *confirm* this conclusion, the Panel looked at certain products that the European Communities classifies under heading 02.10.[358] In doing so, the Panel stated that these products "may require means of preservation in addition to [salting]", which the European Communities acknowledged as much, and that this fact was "explain[ed]" by the "variable salt content and period of preservation".[359]

184. We observe that the Panel refers to 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"[360]; however, the European Communities expressly stated that it "*does not agree* with Thailand that [Parma ham, prosciutto, and jamón serrano] require additional means of preservation".[361] In fact, the European Communities speaks of "meat that has been preserved for the long-term (by salting, drying, etc.)" and that is, subsequently, "further preserved (by chilling or even freezing) ... so that it may be preserved *for an even longer term*".[362] Hence, we agree with the European Communities that the Panel's reasoning does not accurately reflect all of the European Communities' statements before it.

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[354]European Communities' appellant's submission, para. 70. (footnote omitted)

[355]*Ibid.*

[356]Panel Reports, para. 7.149.

[357]*Ibid.*, para. 7.148.

[358]These products include Parma ham, prosciutto, and jamón serrano.

[359]Panel Reports, para. 7.149.

[360]*Ibid.* (emphasis added; footnote omitted)

[361]European Communities' response to Question 96 posed by the Panel, Panel Reports, p. C-110, para. 17. (emphasis added)

[362]European Communities' response to Question 98 posed by the Panel, Panel Reports, p. C-111, para. 21. (emphasis added)

185. Secondly, the Panel's reasoning appears to be based on an implicit similarity between the products at issue, on the one hand—that is, frozen and salted chicken cuts—and products such as Parma ham, prosciutto, and jamón serrano, on the other hand. However, according to the evidence on the Panel record, in their unfrozen state, these two groups of products are rather different in terms of how quickly they are affected by spoilage.[363] The Panel's statements do not sufficiently explain how the issue of "additional means of preservation" supports the proposition that "product[s] preserved by salt for relatively short periods of time [are] not necessarily precluded from qualifying under heading 02.10 of the EC Schedule."[364]

186. We observe that the Panel statements challenged by the European Communities were made in *addition* to, and as *support* for, a conclusion that the Panel had reached *previously*, on the basis of distinct and separate considerations. The statements contested by the European Communities contain some inconsequential inaccuracies, which do not, in our view, undermine the remainder of the Panel's analysis of what the Panel referred to as the "factual context". Overall, we therefore do not find that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

3. Conclusion Concerning the Ordinary Meaning

187. In the light of the above considerations, we see no reason to disturb the Panel's conclusion concerning the ordinary meaning of the term "salted", in paragraph 7.150 of the Panel Reports, 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"[365]; and, in paragraph 7.151 of the Panel Reports, 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."

[363]According to the Panel's statements mentioned above, 3 per cent of salt may prevent spoilage in meat products, albeit for only a few days. (Panel Reports, footnote 249 to para. 7.146) See also *supra*, para. 178 and footnote 346 thereto. In contrast, Parma ham, prosciutto, and jamón serrano appear to have a much longer shelf-life in their unfrozen state than "only a few days". (The European Communities' expert stated that the shelf-life of these products is several months. (Exhibit EC-32 submitted by the European Communities to the Panel))

[364]Panel Reports, para. 7.149.

[365]We note, in this respect, that in para. 7.141 of the Panel Reports, the Panel stated that "factual context indicates that, in order for a product to be 'salted' within the meaning of the concession contained in heading 02.10 of the EC Schedule, the character of that product must have been altered through the addition of salt *as compared to that product's fresh state prior to the addition of salt.*" (emphasis added)

B. *"Context"*

188. Having considered the Panel's interpretation of the ordinary meaning of the term "salted" in heading 02.10 of the EC Schedule, we now turn to the Panel's interpretation of that term in its context. We will first recapitulate the Panel's findings and the arguments on appeal before providing our analysis of the relevant issues.

189. In interpreting the term "salted" in its context, pursuant to Article 31(2) of the *Vienna Convention*, the Panel considered "the terms of relevant aspects of the EC Schedule", namely, the "other terms" contained in heading 02.10 of the EC Schedule, the structure of Chapter 2 of the EC Schedule, as well as "other parts of the EC Schedule".[366] The Panel then proceeded to consider whether there are any other agreements or instruments that qualify as "context" under Article 31(2) of the *Vienna Convention*; in that category, the Panel examined the Harmonized System[367] as well as the Schedules of WTO Members other than the European Communities. The Panel concluded, overall, that its analysis of the "context" of the term "salted" did not "add[] to [the] conclusions that [it had already drawn] regarding the ordinary meaning of the term 'salted'", and that the context of that term did not "indicate that [the] concession [in heading 02.10 of the EC Schedule] is necessarily characterized by the notion of long-term preservation".[368]

190. The European Communities, on the one hand, and Brazil and Thailand, on the other hand, appeal from this finding, as well as aspects of the Panel's reasoning concerning the context of the term "salted". In essence, the European Communities argues that various elements of the context of the term "salted" indicate that the term is characterized by the notion of "preservation".[369] The European Communities also argues that, contrary to the Panel's finding, the structure of Chapter 2 of the Harmonized System "makes it clear" that the term "salted" refers to "preservation".[370] In contrast,

[366]Panel Reports, paras. 7.155, 7.157, 7.164, and 7.174.

[367]The Panel decided to treat the Harmonized System "as if it qualifies as 'context' under Article 31(2) [of the *Vienna Convention*]". (*Ibid.*, para. 7.189) See also *infra*, para. 194.

[368]*Ibid.*, para. 7.245. The Panel then turned to an analysis of the "[m]atters to be taken into account together with the context", most notably "subsequent practice". We review this analysis in Section X of this Report.

[369]More specifically, the European Communities appeals from the Panel's finding that the term "in brine", in heading 02.10 of the EC Schedule, does not include the notion of preservation. The European Communities also challenges the Panel's finding that the dictionary meanings of the terms in heading 02.10 ("salted, in brine, dried, and smoked") are "broader than just pertaining to preservation", contending that all the terms in heading 02.10 "have in common that they refer to preservation". (European Communities' appellant's submission, para. 74 (referring to Panel Reports, para. 7.162))

[370]*Ibid.*, para. 74.

Brazil and Thailand argue that these same contextual elements show clearly that the term "salted" is characterized by the notion of "preparation".[371]

191. In addressing these arguments, we will first define what constitutes "context". Subsequently, we will analyze the meaning of the term "salted" in its context.

1. What Constitutes Context for Interpreting the Term "Salted" in Heading 02.10 of the EC Schedule?

192. At the outset, we recall the customary rules of treaty interpretation codified in Articles 31(1), 31(2), and 31(3) of the *Vienna Convention*:

> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose.
>
> 2. *The context* for the purpose of the interpretation of a treaty *shall comprise*, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the *context*:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

[371]Brazil and Thailand contend, in their respective other appellant's submissions, that the Explanatory Notes to Chapter 2 of the Harmonized System and heading 02.10 of the Harmonized System, read together with the Chapter Note to Chapter 16 thereof, show that the concept of "preparation" determines the classification under heading 02.10. (Brazil's other appellant's submission, paras. 79-88; Thailand's other appellant's submission, paras. 72-84) In this context, Thailand argues that the Panel incorrectly assumed that all Notes to the Harmonized System were Explanatory Notes and, as such, were non-binding. (Thailand's other appellant's submission, para. 71) Brazil furthermore argues that the evolution of the terms and structure of Chapter 2 indicate that the predecessor to heading 02.10 was also characterized by the notion of "preparation". (Brazil's other appellant's submission, para. 78)

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

193. It is clear from these provisions that the context of the term "salted" in heading 02.10 consists of the immediate, as well as the broader, context of that term. The immediate context is the other terms of the product description contained in heading 02.10 of the EC Schedule. The broader context includes the other headings in Chapter 2 of the EC Schedule, as well as other WTO Member Schedules.

194. The Panel addressed the question whether the Harmonized System[372] constituted "context" for interpreting the term "salted" in heading 02.10 of the EC Schedule. In that respect, Brazil argued that the Harmonized System constituted "context" within the meaning of Article 31(2)(b) of the *Vienna Convention*; Thailand contended that the Harmonized System qualified as context under Article 31(1) or under Article 31(3)(c); the European Communities held the view that the Harmonized System was a "relevant rule of international law", within the meaning of Article 31(3)(c).[373] The Panel did not definitively decide which position was correct, opining that "the outcome of the interpretative exercise [would not] depend[ ] upon whether [the Panel] classif[ies] the [Harmonized System] as 'context'" under Articles 31(1), 31(2)(b), or 31(3)(c) of the *Vienna Convention*. The Panel decided to treat the Harmonized System "as if it qualifies as 'context' under Article 31(2)".[374] Before the Appellate Body, in response to questioning at the oral hearing, all participants, and the United States, as third participant, agreed that the Harmonized System was relevant for interpretation of the terms of the EC Schedule. The participants took the view that the Harmonized System was context for purposes of interpreting the terms of the EC Schedule or a "relevant rule[] of international law applicable in the relations between the parties" that should be "taken into account, together with the context", pursuant to Article 31(3)(c) of the *Vienna Convention*.[375] The United States, as third participant, was of the view that the Harmonized System was a "supplementary means of interpretation", within the meaning of Article 32 of the *Vienna Convention*.[376]

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[372]The Harmonized System Convention entered into force in 1988. The Harmonized System is administered by the Harmonized System Committee (the "HS Committee"), which was established under the auspices of the WCO. The HS Committee is composed of representatives from each of the contracting parties to the Harmonized System. The HS Committee may propose amendments to the Harmonized System and may prepare explanatory notes, classification opinions, or provide other advice to be used as guidance in the interpretation of the Harmonized System. (Panel Reports, paras. 2.9 and 2.11)

[373]*Ibid.*, para. 7.189.

[374]*Ibid.*

[375]Responses of the participants to questioning at the oral hearing.

[376]United States' response to questioning at the oral hearing. China, the other third participant, did not express a view on this point.

195. The Harmonized System is not, formally, part of the *WTO Agreement*, as it has not been incorporated, in whole or in part, into that Agreement. Nevertheless, the concept of "context", under Article 31, is not limited to the treaty text—namely, the *WTO Agreement*—but may also extend to "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty", within the meaning of Article 31(2)(a) of the *Vienna Convention*, and to "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", within the meaning of Article 31(2)(b) of the *Vienna Convention*. Moreover, should the criteria in Article 31(3)(c) be fulfilled, the Harmonized System may qualify as a "relevant rule[] of international law applicable in the relations between the parties".

196. The Panel noted that the membership of the Harmonized System is "extremely broad" and includes the "vast majority of WTO Members".[377] The Panel also pointed out, and no participant to this proceeding contested, that "the [Harmonized System] was used as a basis for the preparation of the Uruguay Round GATT schedules".[378] The Appellate Body made a similar observation in *EC – Computer Equipment*, a report on which the Panel relied.[379]

197. We note that, in 1983, the GATT Contracting Parties took a Decision setting out guidelines and "special procedures" to facilitate the "wide adoption of the Harmonized System"[380]; later, in 1991, they took a Decision on Procedures to Implement Changes in the Harmonized System.[381] The

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[377]Panel Reports, para. 7.187. The European Communities became a Contracting Party to the Harmonized System Convention in September 1987; Brazil in November 1988; and Thailand in December 1992. The Harmonized System Convention entered into force for the European Communities in January 1988, for Brazil in January 1989, and for Thailand in January 1993.

[378]*Ibid.*, para. 7.187.

[379]See *ibid.*, para. 7.188, where the Panel referred to the Appellate Body's statement that the panel in *EC – Computer Equipment* should have considered the Harmonized System and its Explanatory Notes when interpreting the terms of the EC Schedule, which was also at issue in that case. The Appellate Body further stated:

> We are puzzled by the fact that the Panel, in its effort to interpret the terms of [the EC Schedule], did not consider the *Harmonized System* and its *Explanatory Notes*. We note that during the Uruguay Round negotiations, both the European Communities and the United States were parties to the *Harmonized System*. Furthermore, it appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the *Harmonized System's* nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature.

(Appellate Body Report, *EC – Computer Equipment*, para. 89) (original italics)

[380]GATT Concessions under the Harmonized Commodity Description and Coding System, Decision of 12 July 1983, L/5470/Rev.1, BISD 30S/17.

[381]GATT Concessions under the Harmonized Commodity Description and Coding System, Procedures to Implement Changes in the Harmonized System, Decision of 8 October 1991, L/6905, BISD 39S/300.

close link between the Harmonized System and the WTO agreements is also clear. A number of WTO agreements that resulted from the Uruguay Round negotiations use the Harmonized System for specific purposes; the *Agreement on Rules of Origin* (in Article 9), the *Agreement on Subsidies and Countervailing Measures* (in Article 27), and the *Agreement on Textiles and Clothing* (in Article 2 and the Annex thereto) refer to the Harmonized System for purposes of defining product coverage of the agreement or the products subject to particular provisions of the agreement.

198. This close link to the Harmonized System is particularly true for agricultural products.[382] Annex 1 to the *Agreement on Agriculture*, which forms an integral part of that Agreement[383], defines the product coverage of that Agreement by reference to headings of the Harmonized System, both at the level of whole chapters and at the four-digit level in respect of specific products. Moreover, it is undisputed that the Uruguay Round tariff negotiations for agricultural products were held on the basis of the Harmonized System and that all WTO Members have followed the Harmonized System in their Schedules to the GATT 1994 with respect to agricultural products.

199. The above circumstances confirm that, prior to, during, as well as after the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to *use* the Harmonized System as the basis for their WTO Schedules, notably with respect to agricultural products. In our view, this consensus constitutes an "agreement" between WTO Members "relating to" the *WTO Agreement* that was "made in connection with the conclusion of" that Agreement, within the meaning of Article 31(2)(a) of the *Vienna Convention*. As such, this agreement is "context" under Article 31(2)(a) for the purpose of interpreting the WTO agreements, of which the EC Schedule is an integral part. In this light, we consider that the Harmonized System is relevant for purposes of interpreting tariff commitments in the WTO Members' Schedules.[384]

200. We now turn to determine the meaning of the term "salted" in the light of the context provided by WTO law and the Harmonized System.

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[382]In response to questioning at the oral hearing, the participants noted that the so-called Modalities Paper provides that market access commitments relating to agricultural products had to be based on the Harmonized System. (Articles 3(3)(i) and 3(3)(ii) of the Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme, MTN.GNG/MA/W/24, 20 December 1993)

[383]Article 21.2 of the *Agreement on Agriculture* states:

> The Annexes to this Agreement are hereby made an integral part of this Agreement.

[384]In view of this conclusion, we do not find it necessary to determine whether the Harmonized System could constitute a "relevant rule[] of international law", within the meaning of Article 31(3)(c) of the *Vienna Convention*.

2. The Meaning of the Term "Salted" in Heading 02.10 of the EC Schedule, Considered in its Context

201. We recall that, in considering the meaning of the term "salted" in heading 02.10 of the EC Schedule in its context, the Panel first looked at the "other terms contained in heading 02.10 of the EC Schedule", namely "in brine", "dried", and "smoked". The Panel found it "difficult to identify a notion [—either preparation or preservation—] that characterizes all the terms in the concession contained in heading 02.10 of the EC Schedule".[385] The Panel also stated that the structure of Chapter 2 of the EC Schedule "does not provide any insights regarding the question of whether 'preservation' and/or 'preparation', if either, characterize Chapter 2 and, more particularly, the concession contained in heading 02.10 of the EC Schedule".[386] The Panel referred as well to certain aspects of the Harmonized System and found that "inferences cannot be drawn from [the use of the word 'preservation' in] headings 08.12 and 08.14 with respect to the meaning of the term 'salted'".[387] In regard to the General Rules for the Interpretation of the Harmonized System, the Panel assumed that General Rule 3—applicable to situations in which "goods are, *prima facie*, classifiable under two or more headings"—was not applicable to the dispute before it.[388] Nor could the Panel find useful guidance from a consideration of other WTO Members' Schedules.

202. Before commencing our analysis, we observe that the participants to the present dispute put forward two competing concepts as being "intrinsic" and "central" to all the processes mentioned in heading 02.10, namely, on the one hand, that of "preparation" of meat and, on the other hand, that of "preservation" of meat.[389] The European Communities argues that the four processes in heading 02.10 ("salted", "in brine", "dried", and "smoked") are characterized, and have always been characterized, by the notion of "preservation", while Brazil and Thailand argue that these processes are characterized solely by the notion of "preparation".

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[385]Panel Reports, para. 7.162.

[386]*Ibid.*, para. 7.173.

[387]*Ibid.*, para. 7.179.

[388]*Ibid.*, paras. 7.237-7.238. The Panel also assumed that all parties to the dispute agreed that the conditions for the application of General Rule 3 were not fulfilled. On appeal, Brazil and Thailand argue that the Panel erred in making this assumption. We address this issue *infra* in paras. 231-234.

[389]See, for instance, European Communities' appellant's submission, para. 82; Brazil's appellee's submission, para. 93; Brazil's other appellant's submission, para. 87; Thailand's appellee's submission, para. 45; and Thailand's other appellant's submission, para. 75.

203. No participant provides a clear-cut definition of "preparation" or "preservation", or of the demarcation between the two concepts.[390] The European Communities uses both the terms "preservation" and "long-term preservation". The Panel understood the European Communities to mean by the term "preservation" or "long-term preservation" that it is preservation of meat for "many or several months".[391] In response to questioning at the oral hearing, the European Communities stated that these two terms are to be understood as referring to one and the same concept, and that they are interchangeable. The European Communities argues that "preparation ... is something lesser than preservation"[392], that "preservation is ... a kind of preparation"[393], and that "preservation" is for a much longer period than temporary preservation for the purposes of transport[394]; however, the European Communities has not indicated for what specific period of time a product would have to be preserved in order to satisfy the criterion of "preservation".[395]

204. In turn, Brazil and Thailand have not provided a clear definition of "preparation" and how "preparation" is to be distinguished from "preservation". According to Brazil, "some types and degrees of preparation may preserve some products" and "preparation" and "preservation" may "overlap"[396]; for Thailand, the two concepts are mutually exclusive for the purposes of heading 02.10. Thailand submits, in the alternative, that "the fact that some types of preparation may incidentally also result in the preservation of [a] product does not undermine the notion that it is the preparation of that product that determines its essential character".[397]

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[390]The Panel found that the concepts of preparation and preservation can overlap. (Panel Reports, paras. 7.114 and 7.162)

[391]*Ibid.*, para. 7.147.

[392]European Communities' appellant's submission, para. 82.

[393]*Ibid.*, para. 104.

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

[395]In response to questions posed by the Panel, the European Communities argued that the time required for purposes of "preservation" would be "many or several months". (Panel Reports, footnote 251 to para. 7.147 (referring to European Communities' responses to Questions 49 and 96 posed by the Panel, Panel Reports, pp. C-91 and C-110))

Furthermore, the European Communities referred to "preservation" as preservation that would keep the meat much longer than temporary preservation until its arrival, although it did not provide further specification of the time period. (European Communities' response to questioning at the oral hearing)

[396]Brazil's other appellant's submission, para. 86.

[397]Thailand's other appellant's submission, paras. 77 and 83.

205. Thus, the central question before us, as it was before the Panel[398], is whether a product must have been "preserved" by one of the processes referred to in heading 02.10 in order to fall within the scope of that heading. The concept of "preservation", as advanced by the European Communities, implies that the application of the processes in heading 02.10, *by itself*, must have the effect of placing the meat in a state of "preservation" for a certain period of time—not specified precisely by the European Communities—but, in any event, for a period exceeding the time of transportation.[399] The European Communities also stated that "[w]hether the meat is salted for the purpose of preservation depends in particular on the level of salt content"[400] and that, for the products at issue, the salt content must be "much higher" than 3 per cent.[401]

206. In contrast, the concept of "preparation", as proposed by Brazil and Thailand, suggests that meat must only have been subject to one or more of the processes listed in heading 02.10, such that its character has been altered from its natural state, and that the notion of "preservation" by one of these processes is not a requirement under that heading.[402]

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[398]The Panel defined that the "critical question" before it was "whether the term 'salted' in the concession contained in heading 02.10 covers the products at issue which, in turn, will entail a determination of whether that concession includes the requirement that salting is for preservation and, more particularly, is for long-term preservation." (Panel Reports, para. 7.86 (footnote omitted))

[399]European Communities' appellant's submission, para. 94; European Communities' responses to questioning at the oral hearing.

[400]European Communities' response to Question 88 posed by the Panel, Panel Reports, p. C-106, para. 4. The European Communities also stated that "[i]mpregnation with salt is a necessary, but not sufficient condition" for preservation, and that "[i]n order to be preserved with salt, meat should be deeply and homogenously impregnated with a level of salt sufficient to ensure long-term preservation". (*Ibid*. (original underlining))

[401]With respect to the criterion of "preservation" or "long-term preservation", we note that the criterion advocated by the European Communities for the meaning of "salted", in heading 02.10 of the EC Schedule, is that "salting", by itself, must "ensure long-term preservation, i.e., much higher than 3%". (European Communities' response to Question 88 posed by the Panel, Panel Reports, p. C-106, para. 4) The European Communities' expert's opinion before the Panel was that a minimum salt content of 7 per cent is necessary to preserve meat. (Panel Reports, para. 7.132) The European Communities stated before the Panel that the European Communities is not aware that boneless chicken cuts with a salt content of more than 3 per cent "has been traded" under heading 02.10. (*Ibid.*, para. 7.133 (referring to European Communities' response to Question 27 posed by the Panel, Panel Reports, p. C-82)) The technical evidence on record shows that, although salt was "first used with the purpose to preserve meats, ... today its main purpose is to provide a product characterized by its aroma and flavor" (J. Andrade Silva, *Topics on Food Technology* (Varela Editora, São Paulo, 2000), p. 181 (Exhibit BRA-16 submitted by Brazil to the Panel)), and that "regarding food preservation[,][salt] is now less used solely as a preservative than in combination with other preservatives and preservation methods". (E. Lück and M. Jager, *Chemical Food Preservation: Characteristics, Uses, Effects* (Acribia, Zaragoza, 2000), p. 77 (Exhibit BRA-16 submitted by Brazil to the Panel)) See also *infra*, footnote 411.

[402]Brazil's other appellant's submission, para. 86; Thailand's other appellant's submission, para. 83.

207. We recall that the Panel concluded that "in essence, the ordinary meaning of the term 'salted' ... indicates that the character of a product has been altered through the addition of salt".[403] We agree with this conclusion of the Panel, which is not in appeal.

208. Thus, the question before us can be subdivided into the following two questions: (i) does the term "salted" in heading 02.10, when considered in its context, indicate that meat to which salt has been added (such that the character of the product has been altered) is to be considered as "salted", even if such salting does *not* place such meat in a state of "preservation"? or (ii) must the salting be such as to place the meat in a state of "preservation"? In our view, a positive answer to the first question would mean that heading 02.10 is found to *include* "salted" meat that *has not* been "salted" sufficiently to be placed in a state of "preservation", *as well as* meat that *has* been "salted" to place it in a state of "preservation". In contrast, a positive answer to the second question suggests a reading of heading 02.10 that includes *only* meat that has been placed in a state of "preservation" by salting, and excludes other "salted" meat.[404]

209. Therefore, we need to determine whether the context of the term "salted"—or other elements of the customary rules of treaty interpretation—require or permit a reading of the term "salted" in heading 02.10 of the EC Schedule more narrowly than the ordinary meaning of that term suggests; that is to say, that the customary rules of treaty interpretation other than "ordinary meaning" indicate that "salting" under heading 02.10 contemplates exclusively the notion of "preservation".

(a) The Terms of Heading 02.10 Other than "Salted"

210. With these considerations in mind, we turn to the terms other than "salted" in heading 02.10 of the EC Schedule.

[403]Panel Reports, para. 7.150.

[404]We recall that, according to the Panel, the ordinary meaning of the term "salted" does *not* suggest that only meat that has been "salted" for purposes of "preservation" will be covered by heading 02.10. The Panel has also stated 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". (*Ibid.*, para. 7.140) In footnote 227 thereto, the Panel also observed that "there is nothing in the WCO response ... to indicate that ... products [to which salt has been added] would be excluded from coverage under heading 02.10 of the [Harmonized System]."

We also note that the European Communities explicitly agrees that "the dictionary definitions of the term 'salted' include, but are not confined to the notion of preservation." (European Communities' appellant's submission, para. 60) The European Communities argues however, that "it is apparent from the rest of heading 02.10, and the structure of Chapter 2 (that is the context) that 'salted' is used in heading 02.10 to signify a process of preservation." (*Ibid.*, para. 61)

211. We share the European Communities' disagreement with the Panel's interpretation of the term "in brine". The Panel held that the notion of "preservation" does not appear in the dictionary definitions of "in brine". However, we note that the dictionary definition of the term "brine" is "water saturated or strongly impregnated with salt; salt water".[405] Given that the concept "preservation", as stated by the Panel, appears in the dictionary definition for the term "salted"[406], the term "brine" must include the concept of preservation. We, therefore, are of the view that the term "in brine" does contemplate "preservation".

212. At the same time, we are not convinced that the terms "dried, in brine and smoked" refer *exclusively* to the concept of "preservation". We note that the dictionary meaning of the term "to dry" is, in relevant part, "to remove the moisture from by wiping, evaporation, draining; preserve (food, etc.) by the removal of its natural moisture"[407]; in turn, the dictionary meaning of the term "to smoke" is to "dry or cure (meat, fish, etc.) by exposure to smoke".[408] The ordinary meanings of these terms suggest that the relevant processes can be applied to meat in various ways and degrees of intensity, thereby producing different effects on the meat, effects that may or may not place the meat in a state of "preservation".[409] Nor are we persuaded by the European Communities' argument that the terms "dried" and "smoked", in the present context, "concern [exclusively] means to preserve".[410] It is clear from the evidence on the record that, while the processes mentioned in heading 02.10—"salted, dried, in brine and smoked"—may include the notion of "preservation", these processes are also used extensively to confer special characteristics on meat products.[411] Similar reasoning may also be valid with respect to the term "smoked".

213. We, therefore, do not agree with the European Communities that the terms of heading 02.10 of the EC Schedule other than "salted", considered alone or together, suggest that the term "salted"

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[405]*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 290.

[406]Panel Reports, para. 7.112.

[407]*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 766.

[408]*Ibid.*, Vol. 2, p. 2889.

[409]For instance, the Panel discussed the effects on meat of different levels of salt content and stated that "the amount of salt needed to preserve a product will differ depending upon for how long a particular product must be preserved." (Panel Reports, paras. 7.146-7.147)

[410]European Communities' appellant's submission, para. 81.

[411]We note that one of the scientific publications submitted by Brazil to the Panel states that "[s]alting is a food preservation process that has been known since ancient times, but is ... used today ... also to confer special organoleptic characteristics to food". (Andrade Silva, *supra*, footnote 401, p. 181) Another scientific publication submitted by Brazil to the Panel states that "salt ... is used as [a flavour enhancer] rather than as a preservative ingredient". (Lück and Jager, *supra*, footnote 401, p. 77)

must be read as referring *exclusively* to products that have a level of salt content sufficient to ensure "preservation" by salting.

(b) The Structure of Chapter 2 of the EC Schedule and the Harmonized System and the Relevant Notes Thereto

214. We now turn to consider whether the *structure* of Chapter 2 of the EC Schedule and the Harmonized System support a reading of heading 02.10 as referring *exclusively* to processes of "preservation". We note that, among the headings of Chapter 2 other than heading 02.10, heading 02.07[412] is of particular relevance, given that the European Communities argues that the products at issue are properly classified under that heading. We recall that, pursuant to the principle of effective treaty interpretation, it is the task of the treaty interpreter to give meaning to all the terms of the treaty.[413] We will examine whether such a reading can be derived from the relevant Notes to the Harmonized System; the Notes of relevance in this context are the Chapter Note to Chapter 16[414], the Explanatory Note to Chapter 2[415], and the Explanatory Note to heading 02.10.[416]

[412]Heading 02.07 refers to "meat and edible offal, of the poultry of heading No. 0105, fresh, chilled, or frozen".

[413]Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1997:1, p. 97 at 106; Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; Appellate Body Report, *US – Gasoline*, p. 23, DSR:1996:1, 3, at 21.

[414]Chapter Note to Chapter 16 states:

> This Chapter does not cover meat, meat offal, fish, crustaceans, molluscs or other aquatic invertebrates, *prepared* or *preserved* by the processes specified in Chapter 2 or 3 or heading 05.04. (emphasis added)

[415]The Explanatory Note to Chapter 2 provides:

> This Chapter covers meat and meat offal in the following states only, whether or not they have been previously scalded or similarly treated but not cooked :
>
> (1) Fresh (including meat and meat offal, *packed with salt as a temporary preservative during transport*).
>
> (2) Chilled, that is, reduced in temperature generally to around 0 °C, without being frozen.
>
> (3) Frozen, that is, cooled to below the product's freezing point until it is frozen throughout.
>
> (4) Salted, in brine, dried or smoked. (emphasis added)

[416]The Explanatory Note to heading 02.10 provides:

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

With respect to the Notes to the Harmonized System, we recall that the Panel found that Chapter Notes were binding and that Explanatory Notes were "non-binding". (Panel Reports, para. 7.220)

215. The European Communities argues that the headings of Chapter 2 fall into two categories that are distinguished by whether the meat has or has not been subjected to the processes listed in heading 02.10. If these processes have been applied, the products fall into the first category, namely, heading 02.10; if these processes have not been applied, the products fall under one of headings 02.01 through 02.08, all of which fall into the other category.[417]

216. The Panel found that "there may be a host of reasons that, individually and/or in combination, could explain the unique formulation used in heading 02.10."[418] The Panel concluded that the structure of Chapter 2 did not provide "any insights regarding the question of whether 'preservation' and/or 'preparation' ... characterize ... heading 02.10 of the EC Schedule".[419]

217. We note that heading 02.10 does not make reference to refrigeration. By contrast, other headings of Chapter 2—that is, headings 02.01 to 02.09—refer to freezing and chilling. The European Communities argues that (i) this circumstance implies that refrigeration is of "little or no importance" for heading 02.10, and that (ii) the reason for this is that these products are "preserved" by the processes mentioned in heading 02.10.[420] The European Communities uses this argument to support its view that heading 02.10 covers *exclusively* meats that have been "preserved" by the processes referred to in that heading.

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[417]European Communities' appellant's submission, para. 88.

[418]Panel Reports, para. 7.172.

[419]*Ibid.*, para. 7.173. The Panel stated:

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

(*Ibid.*, para. 7.172 (footnote omitted))

[420]European Communities' appellant's submission, para. 89.

218. We agree with the participants that the reason heading 02.10 does not refer to refrigeration is that refrigeration is of "little or no importance" for that heading.[421] In our view, whether a product has been frozen or not will not influence whether that product falls under heading 02.10. At the same time, we do not agree with the European Communities that the fact that heading 02.10 does not refer to refrigeration leads to the conclusion that meat falling under heading 02.10 must, *necessarily*, have been *preserved* by one of the processes referred to in that heading and that, as a result, heading 02.10 covers *exclusively* meats that have been "preserved" by the processes referred to in that heading. In other words, it does not follow from the absence of refrigeration in the text of heading 02.10 that the processes referred to in heading 02.10 must *necessarily* place the meat in a state of "preservation". Furthermore, as we explain below, the Chapter Note to Chapter 16 and the Explanatory Note to heading 02.10 confirm that Chapter 2 covers both preserved and prepared products.

219. We turn next to consider certain Chapter and Explanatory Notes to the Harmonized System that also form part of the context for purposes of interpreting terms in the EC Schedule.[422]

220. The Panel referred to the Explanatory Note to heading 02.10 of the Harmonized System, which provides:

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

221. The Panel also considered the Chapter Note to Chapter 16[423], which excludes from Chapter 16[424] products that are "prepared or preserved" by the processes specified, *inter alia*, in Chapter 2.[425]

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[421]European Communities' appellant's submission, para. 89; Thailand's appellee's submission, para. 44; see also Brazil's appellee's submission, para. 100; and Brazil's response to Panel Question 65 posed by the Panel, Panel Reports, pp. C-22-C-23.

[422]See *supra*, para. 214.

[423]We observe that this Note is not, as stated by the Panel, an Explanatory Note, but rather a Chapter Note to Chapter 16 of the Harmonized System. See *infra*, para. 224.

[424]Chapter 16 covers "Preparations of meat, of fish or of crustaceans, molluscs or other aquatic invertebrates." According to the Explanatory Note to Chapter 16, this Chapter covers products that have been, for instance, "[b]oiled, steamed, grilled, fried, roasted or otherwise cooked".

[425]The full text of that part of the Chapter Note to Chapter 16 states:

> This Chapter does not cover meat, meat offal, fish, crustaceans, molluscs or other aquatic invertebrates, prepared or preserved by the processes specified in Chapter 2 or 3 or heading 05.04.

222. The Panel then went on to find that, although the above Notes "may suggest that the processes referred to in heading 02.10 are processes for the 'preparation' of meat", the Notes were not "particularly helpful for [the Panel's] purposes".[426] Specifically, the Panel was not certain whether the concepts of "preparation" and "preservation" were "mutually exclusive" in the context of heading 02.10.[427] The Panel therefore concluded that:

> [the] Notes to the [Harmonized System] do not clarify the ordinary meaning of the term "salted" in the concession contained in heading 02.10 of the EC Schedule [and] do not indicate that that concession is necessarily characterized by the notion of long-term preservation.[428]

223. The European Communities, on the one hand, and Brazil and Thailand, on the other hand, appeal this finding. The European Communities argues that the Panel failed to consider another relevant Note—namely, the Explanatory Note to Chapter 2—and that a correct consideration of this Note supports the view that heading 02.10 is characterized by the notion of "preservation". In contrast, Brazil and Thailand argue that the Explanatory Note to Chapter 2 and that to heading 02.10, read together with the Chapter Note to Chapter 16, indicate that "preparation", instead of "preservation", determines the classification under heading 02.10. Thailand also argues that the Panel erred in its legal characterization of the Chapter Note to Chapter 16 as an Explanatory Note.[429] All of these claims concern the same Chapter Note and Explanatory Notes, and thus we will address them together.

224. At the outset, we agree with Thailand that the Panel incorrectly characterized the Note to Chapter 16 as an "Explanatory Note", rather than as a "Chapter Note".[430] We also agree with the general proposition that the Chapter Notes to the Harmonized System, which are binding, may have greater probative value than the Explanatory Notes to the Harmonized System, which are non-

[426]Panel Reports, para. 7.223.

[427]*Ibid.*

[428]*Ibid.*

[429]According to Thailand, as a result of its incorrect characterization of the Note, the Panel's conclusion concerning the Notes to the Harmonized System is "incorrect and results in the undermining of the weight to be given to the content of this Note for the interpretation of the term 'salted' in heading 02.10." (Thailand's other appellant's submission, para. 71.)

[430]*Ibid.*, paras. 66-71.

binding.[431] However, we do not believe that the inaccurate characterization of the Note "undermin[es]" the Panel's overall analysis of the Notes to the Harmonized System[432], as claimed by Thailand. Indeed, Thailand has not explained how the Panel's analysis would have been different had the Panel correctly characterized the Note at issue as a "Chapter Note".[433] Nor is it clear to us how the Panel's conclusion with respect to the term "salted" in heading 02.10 would have changed by assigning greater weight to the Chapter Note to Chapter 16.

225. We also agree with Brazil and Thailand that the Explanatory Note to heading 02.10—which refers to meat that has been "prepared", but does not mention "preserved"—suggests that heading 02.10 is characterized by the notion of "preparation". Brazil and Thailand argue that products subject to one of the processes referred to in heading 02.10, but not necessarily placed in a state of "preservation" by application of these processes, would fall under heading 02.10. Such a conclusion, therefore, would preclude a reading of the term "salted" as suggested by the European Communities, namely, as referring exclusively to meat that has been "salted" so as to place the meat in a state of "preservation". The reading suggested by Brazil and Thailand would appear to be supported by the fact that other Notes to the Harmonized System (most importantly, the Chapter Note to Chapter 16) use the terms "prepared", "preserved", and "preservation",[434] suggesting that the use of the term "prepared" alone, without reference to "preserved", in the Explanatory Note to heading 02.10, is not inadvertent.

226. At the same time, we also observe that the Notes to the Harmonized System do not provide a definition of the terms "preparation" or "preservation". Nor do the Notes suggest that the two terms could not operate in combination and that they are mutually exclusive. The terms "preparation" and "preservation" do not encompass all products falling under Chapter 2, because "fresh" meat cannot be characterized as "prepared" meat. Moreover, the Harmonized System contains, in other sections, references to "preparation" and "preservation" in the text of the headings, as opposed to only in the

[431]Thailand's other appellant's submission, para. 71. The probative value of a Note will, however, also depend on how relevant it is to the interpretative question at issue; as a result, it cannot be excluded that an Explanatory Note that directly addresses a given interpretative question will be more probative than a Chapter Note that does not relate specifically to that interpretative question.

[432]*Ibid*.

[433]Brazil and Thailand rely on the Chapter Note to Chapter 16 in order to establish that Chapter 2 "covers meat ... which is prepared or preserved". Brazil's and Thailand's subsequent argument that heading 02.10 refers to meat that is "prepared" is not based on the Chapter Note to Chapter 16, but, rather, on the Explanatory Notes to Chapter 2 and heading 02.10.

[434]The Chapter Note to Chapter 16 refers to "meat ... prepared or preserved", to "preservation", and to "[f]ood preparations". The Explanatory Note to Chapter 16 refers to "prepared foodstuffs", and "foodstuffs ... [p]repared as sausages"; and the Explanatory Note to heading 16.01 refers to "preparations".

Notes.[435] It seems to us that, where the Harmonized System considers that these terms control the definition of the scope of a heading, it will use them expressly. In our view, the terms "preparation" and "preservation", when found in the Explanatory Notes rather than in the text of the heading, need not be read as dispositive and necessarily mutually exclusive.

227. Turning to the content of the Explanatory Note to Chapter 2, we are of the view that the Panel should have taken into account explicitly this Note. We observe that the Note provides that meat that has been "packed with salt as a temporary preservative during transport" qualifies as "fresh meat" (under heading 02.07 [436]). The Note suggests that mere presence of salt does *not* imply that the meat falls under heading 02.10 as "salted" meat.[437]

228. However, the fact that, pursuant to that Note, meat "packed with salt as a temporary preservative during transport" is considered "fresh" (under heading 02.07), rather than as "salted" meat (under heading 02.10), does not lead to the conclusion suggested by the European Communities, namely, that the term "salted" refers *exclusively* to meat that has been "preserved" by salting. Hence, we are of the view that the Explanatory Note to Chapter 2 is not conclusive with respect to the question whether the term "salted", in heading 02.10, refers *exclusively* to meat that has been "preserved" by salting and does not include meat merely "prepared" by salting.

229. As a result, we conclude that the Harmonized System and the relevant Chapter and Explanatory Notes thereto do not support the view that heading 02.10 is characterised *exclusively* by the concept of preservation. Furthermore, the term "salted" in heading 02.10, when considered in its context, suggests that meat to which salt has been added, so that its character has been altered, will be "salted" within the meaning of heading 02.10, even if such salting does not place such meat in a state of "preservation". Heading 02.10 of the Harmonized System, read in its context, suggests that it is neither limited to, nor excludes, meat that is "prepared" by salting or that has been "preserved" by salting. Specifically, for resolving this dispute, heading 02.10 does not contain a *requirement* that salting must, by itself, ensure "preservation".

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[435]For instance, Chapter 16 refers to "preparations of meat", while the term "preservation" is found, for instance, in heading 08.14 ("[p]eel of citrus ... provisionally preserved") and heading 07.11 ("[v]egetables provisionally preserved").

[436]We recall that heading 02.07 refers to "meat and edible offal, of the poultry of heading No. 0105, fresh, chilled, or frozen".

[437]In this respect, we recall that the Panel found that, in order for a product to be "salted" within the meaning of heading 02.10, "the character of that product must have been altered through the addition of salt as compared to that product's fresh state prior to the addition of salt". (Panel Reports, para. 7.141)

230. Before the Panel, the question arose as to the permissibility of using the criterion of preservation in Members' Schedules. In this respect, we note that the WCO, in a letter to the Panel, stated that "[w]hen goods are classified in the Harmonized System, it is always done on the basis of the objective characteristics of the product at the time of importation."[438] We believe, therefore, that it is possible to apply the criterion of "preservation", provided that is discernible as an objective characteristic at the time of the importation of the product. In this context, we note that there are instances in the Harmonized System where the criterion of "provisional preservation" is used, suggesting that the criterion of "preservation" is not intrinsically objectionable under the Harmonized System.[439] As a result, we are of the view that the Harmonized System does not, in principle, rule out the concept of "preservation" under the term "salted" in heading 02.10.[440] The question whether the tariff commitment in heading 02.10 the EC Schedule is characterized exclusively by the concept of "preservation" is a separate question which we address below. In that respect, we observe that, within the parameters required by the Harmonized System, Members have certain flexibility to structure and negotiate further specifications in their particular tariff commitments.

3. Rule 3 of the General Rules for the Interpretation of the Harmonized System

231. We now turn to consider the General Rules for the Interpretation of the Harmonized System (the "General Rules"). We recall that the Panel found that:

> ... all the parties appear to be in agreement that a textual and contextual analysis of the relevant headings indicates that the products at issue in this dispute are not prima facie classifiable under two or more headings. Accordingly, we will proceed on the same assumption with the result that we will not apply General Rule 3. Given our conclusion that General Rule 3 is inapplicable, we do not consider it necessary to address the various arguments that have been advanced by the parties regarding that Rule.[441]

[438]WCO's response to Question 1 posed by the Panel, Panel Reports, p. C-134. See also European Communities' response to Question 90 posed by the Panel, Panel Reports, p. C-108, para. 7.

[439]For example, heading 5.10 mentions "[a]mbergris ... otherwise *provisionally* preserved"; heading 08.14 speaks of "[p]eel of citrus ... *provisionally* preserved"; and heading 07.11 concerns "[v]egetables *provisionally* preserved". (European Communities' appellant's submission, para. 201) (emphasis added)

[440]See also *infra*, para. 246.

[441]Panel Reports, para. 7.238.

232. Brazil and Thailand appeal this finding. Both argue that the Panel incorrectly found that the parties were in agreement that General Rule 3 was inapplicable in this case. Brazil also requests that the Appellate Body complete the analysis and find that the products at issue are classifiable under heading 02.10 by virtue of General Rule 3(a) or by virtue of General Rule 3(c).[442]

233. We note that the General Rules are, by their very name, rules for the *interpretation* of the Harmonized System. Specifically, General Rule 3 deals with the question of classification in circumstances in which goods are *prima facie* "classifiable" under two or more headings.

234. We recall that the task of the Panel, as well as of the Appellate Body upon appeal, is to determine whether the European Communities has acted consistently with Article II:1(a) and with Article II:1(b) of the GATT 1994 with respect to the products at issue. Therefore, in our view, the primary task of the Panel, as well as of the Appellate Body, is to determine the meaning and scope of the concession contained in heading 02.10 of the EC Schedule. In our view, it is only after properly determining the meaning and scope of the tariff commitment in heading 02.10 that the question whether the products at issue are *prima facie* classifiable under two or more headings can arise. General Rule 3 is relevant in this case only for the *second* step, namely, under which heading a

[442]General Rule 3 provides:

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

product is properly classified.[443] It is therefore not necessary for us to consider, at this stage, General Rule 3.

4. Conclusion Concerning "Context"

235. We, therefore, *uphold* the Panel's finding, in paragraphs 7.245 and 7.331(c) of the Panel Reports, that the context of the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule "indicates that that concession is not necessarily characterized by the notion of long-term preservation". In the light of our findings in paragraphs 229-230, we will continue our examination to determine whether there has been an agreement between the European Communities and the other treaty parties on the inclusion of the concept of "preservation" in heading 02.10 of the EC Schedule.

IX. Object and Purpose

236. We next discuss whether the Panel erred in finding that an interpretation of the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule, as including the criterion of long-term preservation, "could undermine the object and purpose of security and predictability", which underlie both the *WTO Agreement* and the GATT 1994.[444]

237. The European Communities appeals several aspects of the Panel's reasoning and conclusions relating to "object and purpose". The European Communities submits that the Panel relied on the "object and purpose" of the treaty (that is, the *WTO Agreement* and the GATT 1994) and failed to take into account the "object and purpose" of the relevant treaty provision (that is, Article II of the GATT 1994, read in conjunction with heading 02.10 of the EC Schedule, including its underlying criterion of

[443]We note that General Rule 3 refers to circumstances in which a product is "*prima facie*" classifiable under two or more headings. In this respect, nothing on the Panel record indicates how the term "*prima facie*" has been interpreted by the WCO's Harmonized System Committee, or the WCO itself. However, according to information provided by the WCO Secretariat to the Panel, the Harmonized System Committee has not, so far, considered classification issues related to headings 02.07 and 02.10. (WCO's response to Question 8 posed by the Panel, Panel Reports, p. C-139) Furthermore, the WCO did not provide specific guidance to the Panel as to the meaning of the term "specific", so as to determine the "most specific description" within the meaning of General Rule 3(a) for purposes of the present dispute; according to the WCO, heading 02.07 could be considered more "specific" due to the term "poultry", but, at the same time, heading 02.10 could be considered more "specific" by virtue of the term "salted". (Panel Reports, para. 7.235) We also note that the participants do not argue that General Rule 3(b) is applicable to the dispute at hand.

[444]Panel Reports, para. 7.323.

"long-term preservation").[445] The European Communities also argues that the Panel erroneously relied on the concept of the "expansion of trade" in its analysis of the "object and purpose" of maintaining the security and predictability of tariff concessions. In addition, the European Communities alleges that the Panel erred by finding that the application of the criterion of "preservation" would undermine the security and predictability of the tariff commitment. Finally, the European Communities contends that heading 02.10 of the EC Schedule was not intended to address "frozen [salted] poultry".[446]

A. *Object and Purpose of the Treaty or of a Particular Treaty Provision*

238. We begin our analysis with the question whether the Panel incorrectly distinguished between the object and purpose of the treaty and that of its individual provisions.[447] It is well accepted that the use of the singular word "its" preceding the term "object and purpose" in Article 31(1) of the *Vienna Convention* indicates that the term refers to the treaty as a whole[448]; had the term "object and purpose" been preceded by the word "their", the use of the plural would have indicated a reference to particular "treaty terms". Thus, the term "its object and purpose" makes it clear that the starting point for ascertaining "object and purpose" is the treaty itself, in its entirety.[449] At the same time, we do not believe that Article 31(1) excludes taking into account the object and purpose of particular treaty terms, if doing so assists the interpreter in determining the treaty's object and purpose on the whole. We do not see why it would be necessary to divorce a treaty's object and purpose from the object and purpose of specific treaty provisions, or *vice versa*. To the extent that one can speak of the "object and purpose of a treaty provision", it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component.[450]

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[445]European Communities' appellant's submission, paras. 180-181. According to the European Communities, a treaty interpreter should consider the object and purpose of the provision at issue first, before considering the object and purpose of the agreement. The European Communities submits that, in *US – Line Pipe*, the Appellate Body referred to the object and purpose of Article XIX of the GATT 1994 (Appellate Body Report, *US – Line Pipe*, para. 81) and in *Chile – Price Band System*, the Appellate Body relied on the object and purpose of Article 4 of the *Agreement on Agriculture*. (Appellate Body Report, *Chile – Price Band System*, para. 234)

[446]European Communities' appellant's submission, paras. 212-219.

[447]*Ibid.*, paras. 179-182 (referring to Panel Reports, para. 7.316). The European Communities asserts that the Panel should have ascertained the object and purpose of Article II of the GATT 1994, read in conjunction with heading 02.10 of the EC Schedule, and its underlying purpose of "preservation".

[448]See Sinclair, *supra*, footnote 36, pp. 130-135.

[449]Panel Report, paras. 7.316-7.317. See also Sinclair, *supra*, footnote 36, pp. 130-135.

[450]In this regard, we refer to the Appellate Body Report in *Argentina – Textiles and Apparel*, where the Appellate Body stated that "a basic object and purpose of the GATT 1994 [was] reflected in Article II". (Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47)

239. Having said this, we caution against interpreting WTO law in the light of the purported "object and purpose" of specific provisions, paragraphs or subparagraphs of the WTO agreements, or tariff headings in Schedules, in isolation from the object and purpose of the treaty on the whole. Even if, *arguendo*, one could rely on the specific "object and purpose" of heading 02.10 of the EC Schedule in isolation[451], we would share the Panel's view that "one Member's unilateral object and purpose for the conclusion of a tariff commitment cannot form the basis"[452] for an interpretation of that commitment, because interpretation in the light of Articles 31 and 32 of the *Vienna Convention* [453] must focus on ascertaining the *common* intentions of the parties.[454]

240. For these reasons, we have no difficulty with the Panel's approach in interpreting the tariff commitment at issue in this case in the light of the object and purpose of the *WTO Agreement* and the GATT 1994.

B. *Did the Panel Rely on "Expansion of Trade" as an Interpretative Principle?*

241. We note that the Panel deduced the object and purpose of the *WTO Agreement* and the GATT 1994 from the preambles and from Appellate Body statements.[455] The Panel referred to the Appellate Body statement in *Argentina – Textiles and Apparel* 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."[456] The Panel found that:

[451]The European Communities argues that the notion of "long-term preservation" characterizes the four processes mentioned in heading 02.10, that is, "salted", "in brine", "dried", and "smoked".

[452]Panel Reports, para. 7.326.

[453]The Panel relied on Appellate Body Report, *EC – Computer Equipment*, para. 84; and Sinclair, *supra*, footnote 36, pp. 130-131 (referred to in Panel Reports, footnote 536 to para. 7.326).

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

[455]The Panel relied on the Appellate Body statement in *EC – Computer Equipment* that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994." (Appellate Body Report, *EC – Computer Equipment*, para. 82)

[456]Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

> [t]aken 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*. ... 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.[457] (emphasis added)

242. The European Communities argues on appeal that the Panel erred in finding 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."[458]

243. In our view, a careful reading of the phrasing used by the Panel reveals that it did not, as the European Communities asserts, develop an "interpretative principle directing Panels to bias towards the reduction of tariff commitments".[459] We note that, in the sentence that followed, the Panel qualified the statement challenged by the European Communities by stating that "such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous."[460] This sentence underscores the Panel's view that trade liberalization is achieved through negotiations for mutual benefit. Indeed, the Panel concluded that its interpretation should be governed by the object and purpose of maintaining the security and predictability of reciprocal market access arrangements manifested in tariff concessions, an objective endorsed by the European Communities. Thus, we do not believe that the Panel relied on trade expansion and tariff reduction as an interpretative principle. In fact, the Panel focused its "object and purpose" interpretation on the principles of security and predictability of tariff concessions. Moreover, we agree with the Panel that "the security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994."[461]

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[457]Panel Reports, para. 7.320.

[458]*Ibid.* (quoted in European Communities' appellant's submission, para. 183).

[459]European Communities' appellant's submission, para. 189.

[460]Panel Reports, para. 7.320.

[461]*Ibid.*, para. 7.318 (quoting Appellate Body Report, *EC – Computer Equipment*, para. 82). We note that "security and predictability" is also mentioned in Article 3.2 of the DSU.

C. *Does a Criterion of "Preservation" Undermine the Security and Predictability of Tariff Concessions?*

244. In addition, the European Communities appeals the Panel finding that:

> ... the lack of certainty associated with the application of the criterion of long-term preservation with respect to the concession contained in heading 02.10 of the EC Schedule ... could undermine the object and purpose of security and predictability [of the reciprocal and mutually advantageous arrangements [that] must be preserved], which lie[] at the heart of the WTO Agreement and the GATT 1994.[462]

245. The European Communities contends that the Panel misrepresented the criterion of preservation, because EC Regulation 1223/2002 and EC Decision 2003/97/EC do not, in fact, apply a "criterion of long-term preservation" but, instead, treat chicken cuts with a salt content of up to 3 per cent as falling under heading 02.07 rather than heading 02.10.[463]

246. We agree with the Panel that, in characterizing a product for 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.[464] At the same time, we note that the European Communities provides examples indicating that product descriptions including a criterion of "preservation" may qualify as "objective characteristics" under the Harmonized System.[465] The European Communities considers that, accordingly, the criterion of preservation is not intrinsically uncertain, given its use in other parts of the Harmonized System.[466] In this sense, we consider that the Harmonized System does not preclude the use of a criterion of preservation, as such, provided that the conditions mentioned in paragraph 230 above are met. Therefore, the application of such a criterion would not necessarily be in conflict with the objectives of security and predictability of the *WTO Agreement* and the GATT 1994 (including Schedules of tariff commitments).

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[462]Panel Reports, para. 7.323.

[463]These measures are considered to be justified by the European Communities on the basis that the term "salted" in heading 02.10 should be read to contain a criterion of preservation, which the products at issue do not meet. (European Communities' appellant's submission, paras. 190-211)

[464]Panel Reports, para. 7.321.

[465]For example, the Harmonized System heading 05.10 mentions "[a]mbergris ... otherwise *provisionally* preserved"; heading 08.14 concerns "[p]eel of citrus ... *provisionally* preserved"; heading 07.11 concerns "[v]egetables *provisionally* preserved"; and General Rule 5(a) refers to "[c]amera cases, suitable for *long-term* use". (European Communities' appellant's submission, para. 201) (emphasis added)

[466]*Ibid.*, paras. 201-202.

247. Turning to the facts of this case, we recall the Panel's statement that the European Communities had never explained what it meant exactly, for purposes of heading 02.10, by "'long-term preservation' in practice".[467] The Panel was satisfied that it could be ascertained through laboratory analyses whether a salted and frozen product was preserved for the long-term.[468] However, it was unclear to the Panel whether preservation for the long-term had to be the result of salting, or freezing, or a combination of the two.[469] The European Communities submits on appeal that there are no such practical problems, either with respect to the products at issue (which have not been claimed to be preserved) or for a customs official with access to tools of analysis and for whom the highly traditional products under heading 02.10 are recognizable and familiar.[470] According to the European Communities, 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 ensures "preservation" within the meaning of EC Regulation 1223/2002 and EC Decision 2003/97/EC.[471]

248. Although the European Communities clarifies that, for purposes of heading 02.10 of the EC Schedule, preservation has to be the result of the processes mentioned in that heading and not of the processes listed under heading 02.07 (namely, chilling, freezing), it does not explain how, in respect of frozen and salted meat, the preservation effect of the processes listed in heading 02.10 could be distinguished from the processes listed in heading 02.07.[472] Therefore, we share the Panel's concern about the lack of certainty in the application of the preservation criterion used by the European Communities regarding the tariff commitment under heading 02.10 of the EC Schedule.

249. In the light of these considerations, we see no reason to disturb the Panel's finding, in paragraph 7.328 of the Panel Reports, that "the lack of certainty associated with the application of the criterion of long-term preservation with respect to the concession contained in heading 02.10 of the EC Schedule ... could undermine the object and purpose of security and predictability, which [underlie] both the WTO Agreement and the GATT 1994."

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[467]Panel Reports, para. 7.322.

[468]The European Communities indicated to the Panel that it conducts laboratory analyses when necessary. (*Ibid.*, footnote 534 to para. 7.321) See also Exhibit THA-23 submitted by Thailand to the Panel. The WCO also considered 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 Harmonized System. (Panel Reports, para. 7.321)

[469]*Ibid.*, para. 7.322.

[470]European Communities' appellant's submission, paras. 203-208.

[471]Panel Reports, para. 7.322.

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

D. *Was Heading 02.10 Intended to Cover Frozen (Salted) Poultry Meat?*

250. Finally, the European Communities submits that the Panel ignored its argument that heading 02.10 did not have the object and purpose, when negotiated, of securing market access arrangements on frozen salted poultry meat.[473] In this respect, the Panel ruled that it was not authorized "to consider the European Communities' unilateral object and purpose when it concluded its Schedule in interpreting the concession contained in heading 02.10 of the EC Schedule".[474] We agree with the Panel that a treaty interpreter must ascertain the common intentions of the parties and that these "*common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty."[475] In our view, the European Communities' argument pertains to the "*subjective* views as to what [was] the agreement reached during tariff negotiations"[476], because we see no indication in the Panel record showing that it was a "commonly shared view" of the parties to exclude frozen (salted) poultry meat from the product scope covered by heading 02.10 of the EC Schedule. Consequently, we find the Panel made no error in this regard.

X. Subsequent Practice

251. The European Communities appeals the Panel's finding that the European Communities' practice, between 1996 and 2002, of classifying the products at issue under heading 02.10 of the EC Schedule amounts to "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*[477], which provides:

> 3. There shall be taken into account, together with the context:
>
> ...
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]

[473]According to the European Communities, heading 02.10 was not intended to provide a means of circumventing the tariff protection agreed under heading 02.07. (European Communities' appellant's submission, paras. 212-218)

[474]Panel Reports, para. 7.327.

[475]Appellate Body Report, *EC – Computer Equipment*, para. 84. (original emphasis)

[476]*Ibid.*, para. 82. (original emphasis)

[477]Panel Reports, paras. 7.289 and 7.303.

252. In reaching its conclusion, the Panel found it "reasonable to rely upon EC classification practice *alone* in determining whether or not there is 'subsequent practice' that 'establishes the agreement' of *WTO Members* within the meaning of Article 31(3)(b)".[478] For the Panel, it made "practical sense" that the classification practice of the importing Member "whose schedule is being interpreted" is important, because WTO Schedules are "particular to each WTO Member".[479] The Panel found "a reasonable indication of consistent practice"[480] by the European Communities, between 1996 and 2002[481], of classifying imports of the products at issue under heading 02.10. In addition, the Panel examined evidence of classification practice regarding imports into and exports from Brazil and Thailand, and imports into and exports from the third parties, namely, China and the United States, but found this classification practice "inconsistent" or of "limited usefulness".[482]

253. The European Communities contests the Panel's interpretation of the concept of "subsequent practice" under Article 31(3)(b). The European Communities argues that the subsequent practice of one party alone cannot determine the interpretation of a treaty, and that the Panel erred in its analysis of whether there was consistent practice at the level of the European Communities and at the multilateral level.[483] Brazil and Thailand contend that, because the EC Schedule is at issue in this case, it is the European Communities' practice that is relevant for the identification of "subsequent practice" within the meaning of Article 31(3)(b).[484] Brazil and Thailand thus request that we uphold the Panel's finding that the European Communities' consistent practice, between 1996 and 2002, of classifying the products at issue under heading 02.10 of the EC Schedule "amounts to subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*.

254. This issue raises the following questions: (i) what may qualify as "practice"? (ii) how does one establish the agreement of the parties who have not engaged in the practice at issue? and (iii) was there "consistency" of relevant practice by the European Communities and other WTO Members?

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[478]Panel Reports, para. 7.289. (emphasis added)

[479]*Ibid.*, paras. 7.253-7.254.

[480]*Ibid.*, para. 7.267. (original emphasis omitted)

[481]EC Regulation 1223/2002, the first of the challenged measures, entered into force in 2002.

[482]Panel Reports, paras. 7.284 and 7.288-7.289. The Panel also considered WCO letters of advice from 1997 and 2003 and subsequent Explanatory Notes to the European Communities' Combined Nomenclature. (*Ibid.*, paras. 7.298-7.299 and 7.302)

[483]European Communities' appellant's submission, para. 116.

[484]Brazil's appellee's submission, para. 123; Thailand's appellee's submission, paras. 59 and 67.

A. *What May Qualify as Practice?*

255. At the outset, we observe that "subsequent practice" in the application of a treaty may be an important element in treaty interpretation because "it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty".[485]

256. The Appellate Body found, in *Japan – Alcoholic Beverages II*, that "subsequent practice" within the meaning of Article 31(3)(b) entails a:

> ... "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation.[486]

257. In *US – Gambling*, the Appellate Body clarified that establishing "subsequent practice" within the meaning of Article 31(3)(b) involves two elements:

> ... (i) there must be a common, consistent, discernible pattern of acts or pronouncements; *and* (ii) those acts or pronouncements must imply *agreement* on the interpretation of the relevant provision.[487] (original emphasis)

258. The Panel considered that the main question in the case at hand was whether "common" and "concordant" practice "necessarily means that all WTO Members must have engaged in a particular practice in order for it to qualify as 'subsequent practice' ... or whether the practice of a sub-set of the entire WTO-membership, including the practice of one Member only, may suffice."[488] The Panel noted that the International Law Commission ("ILC") had stated that:

> The [original text of Article 31(3)(b) of the *Vienna Convention*] spoke of a practice which "establishes the understanding of all the parties". By omitting the word "all" [in the final text], the Commission did not intend to change the rule. It considered that the phrase "the understanding of the parties" necessarily means the "parties as a whole". It omitted the word "all" merely to avoid any possible *misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice*.[489] (emphasis added)

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[485]*Yearbook of the International Law Commission*, *supra*, footnote 69, p. 219, para. (6).

[486]Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:1, 97, at 106; Panel Reports, para. 7.250.

[487]Appellate Body Report, *US – Gambling*, para. 192.

[488]Panel Reports, para. 7.251. (footnote omitted)

[489]*Ibid.*, para. 7.252 (quoting *Yearbook of the International Law Commission*, *supra*, footnote 69, p. 222, para. 15).

The Panel inferred from this statement that "it is not necessary to show that *all* signatories to a treaty must have engaged in a particular practice in order for it to qualify as subsequent practice under Article 31(3)(b)".[490] Rather, "it may be sufficient to show that all parties to the treaty have accepted the relevant practice."[491]

259. We share the Panel's view that not each and every party must have engaged in a particular practice for it to qualify as a "common" and "concordant" practice. Nevertheless, practice by some, but *not all* parties is obviously not of the same order as practice by only one, or very few parties. To our mind, it would be difficult to establish a "concordant, common and discernible pattern" on the basis of acts or pronouncements of one, or very few parties to a multilateral treaty, such as the *WTO Agreement*. We acknowledge, however, that, if only some WTO Members have actually traded or classified products under a given heading, this circumstance may reduce the availability of such "acts and pronouncements" for purposes of determining the existence of "subsequent practice" within the meaning of Article 31(3)(b).

260. We turn next to the question of whose practice is relevant to establish agreement on the interpretation of the relevant provision. For the Panel, the classification practice of the importing Member "whose Schedule is being interpreted" is critical for purposes of establishing "subsequent practice" regarding a tariff concession, because WTO Schedules are "particular to each WTO Member".[492] Moreover, the European Communities was the only Member that actually imported the products covered by the measures challenged in this case.[493] Therefore, the Panel found it "reasonable [in this case] to rely upon EC classification practice alone in determining whether or not there is 'subsequent practice' that 'establishes the agreement' of WTO Members within the meaning of Article 31(3)(b)".[494]

261. On appeal, the European Communities argues that the subsequent practice of one party alone cannot determine the interpretation of a treaty[495], and that, therefore, exclusive reliance on the classification practice of the Member whose Schedule is at issue is not justified. This is particularly so, according to the European Communities, when there is no reason to believe that the Schedule departs from the Harmonized System, which is used by all Members in their agricultural Schedules.[496]

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[490]Panel Reports, para. 7.253. (emphasis added)

[491]*Ibid.*, para. 7.253.

[492]*Ibid.*, paras. 7.253-7.254.

[493]*Ibid.*, para. 7.255.

[494]*Ibid.*, paras. 7.255 and 7.289.

[495]European Communities' appellant's submission, para. 118.

[496]*Ibid.*, para. 134.

Brazil and Thailand submit that a tariff concession "brings about an obligation (and is binding) only with respect to the conceding Member [and that this] is quite different from other WTO obligations that bind all Members."[497] Brazil and Thailand therefore contend that the fact that the EC Schedule is at issue in this case means that only the European Communities' classification practice is relevant for purposes of establishing subsequent practice in respect of that concession.[498]

262. We agree with Brazil and Thailand that each WTO Member has its own individual Schedule of tariff concessions and that the tariff commitments bound for specific products in those Schedules vary between different WTO Members. Nevertheless, it must be borne in mind that, during the course of the Uruguay Round, tariff commitments were negotiated on the basis of the Harmonized System.[499] As a result, Schedules of WTO Members other than the European Communities also include tariff bindings under headings 02.07 and 02.10, which are based on the structure and description of the Harmonized System. Therefore, although this dispute concerns the scope of a tariff commitment contained in the WTO Schedule specific to the European Communities, the relevant headings are common to all WTO Members.

263. Brazil further contends that, although WTO Schedules are based on the Harmonized System, they are not identical: the Uruguay Round negotiations used the Harmonized System as a starting point, but the end result of those negotiations did not need to be identical to it.[500] In Brazil's view, when, by means of EC Regulation 535/94, the European Communities included Additional Note 7 to Chapter 2 of the European Communities' Combined Nomenclature, it announced to its negotiating partners in the Uruguay Round the definition and scope of its tariff concession under heading 02.10 of its Schedule.[501]

264. In our view, these arguments do not mean that the European Communities' WTO Schedule is as unique to the European Communities as Brazil and Thailand suggest.[502] Having said that, EC Regulation 535/94 may be relevant as evidence of what might have been agreed between WTO Members for the tariff commitment under heading 02.10 of the European Communities' WTO

[497]Brazil's appellee's submission, para. 139. See also Thailand's appellee's submission, paras. 75-84.

[498]Brazil's appellee's submission, paras. 137-145; Thailand's appellee's submission, paras. 75-84.

[499]For agricultural products, Annex I of the *Agreement on Agriculture* defines the product coverage of that Agreement on the basis of the Harmonized System.

[500]Brazil's appellee's submission, para. 144.

[501]*Ibid.*, para. 142.

[502]*Ibid.*, para. 141; Thailand's appellee's submission, para. 79.

Schedule, within the flexibility conferred by the Harmonized System.[503] This, however, does not render the classification practice of other WTO Members in relation to heading 02.10, *per se*, irrelevant.

265. We acknowledge that we are concerned here with the interpretation of a tariff commitment contained in the WTO Schedule of the European Communities that, according to Article II:7 of the GATT 1994, forms an "integral part" of the *WTO Agreement*, as do all Members' WTO Schedules. In *EC – Computer Equipment*, the Appellate Body found that:

> ... the fact that Members" Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members.[504] (original emphasis)

The Appellate Body also stated in that appeal that:

> The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States was *not* relevant.[505] (original emphasis)

266. The Appellate Body made these statements in the context of an interpretation pursuant to Article 32 of the *Vienna Convention*, but, as the Panel put it, these statements "confirm[] the importance of the classification practice of the importing Member whose schedule is being interpreted [but] also indicate[] that the classification practice of other WTO Members, including the exporting Member's practice, may be relevant."[506] In our view, these statements cannot be read to justify exclusive reliance on the importing Member's classification practice. Therefore, we fail to see how the Panel's finding that it was "reasonable to rely upon EC classification practice alone in determining whether or not there is 'subsequent practice' that 'establishes the agreement' of WTO Members within

[503]We return to this question later when interpreting heading 02.10 of the EC Schedule in the light of Article 32 of the *Vienna Convention.*

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

[505]*Ibid.*, para. 93.

[506]Panel Reports, para. 7.254.

the meaning of Article 31(3)(b)" can be reconciled with these statements of the Appellate Body in *EC – Computer Equipment*.[507]

267. We now turn to another aspect of the Panel's finding on subsequent practice, namely, what product range is relevant for purposes of establishing "subsequent practice" in this case. The European Communities submits on appeal that the Panel should have analyzed practice relating to all salted products subject to heading 02.10, not just practice concerning frozen salted chicken cuts with a salt content of between 1.2 and 3 per cent (the "products at issue"). According to the European Communities, the Panel should also have examined the practice of classifying products containing salt under alternative headings of Chapter 2 and, particularly, heading 02.07.[508] Brazil and Thailand contend that practice concerning the products at issue alone is relevant for purposes of establishing "subsequent practice".[509] Alternatively, Thailand points out that the Panel did consider practice relating to salted meat products classifiable under heading 02.10 other than the "products at issue" to the extent that the European Communities complied with the Panel's requests for information, but that the Panel ultimately decided that this evidence was not persuasive.[510]

268. We have already noted that this dispute concerns the interpretation of the tariff commitment under heading 02.10 of the EC Schedule. In particular, it is the interpretation of the term "salted" in heading 02.10 that is at the heart of this dispute. Therefore, what is relevant for purposes of examining "subsequent practice" in this case is the classification practice relating to the entire range of salted meat products classifiable under heading 02.10, and not only the classification practice relating to the subset of such products covered by the measures challenged in this dispute. As the European Communities contends that the products at issue in this case are properly classified under heading 02.07, practice of classifying products containing salt under other headings of Chapter 2, especially heading 02.07, may also be relevant.

269. In this regard, we note that the Panel refers in its reasoning to classification practice under the "concession contained in heading 02.10"[511] as well as to classification practice relating to the "products at issue".[512] It is not clear from these statements whether the Panel considered relevant the classification practice in respect of the entire range of salted meat products classifiable under heading 02.10, or only in respect of the products at issue. In any event, with the exception of a BTI

[507]*Ibid.*, para. 7.289.

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

[509]Brazil's appellee's submission, para. 153; Thailand's appellee's submission, para. 97.

[510]Thailand's appellee's submission, para. 107.

[511]Panel Reports, para. 7.268.

[512]*Ibid.*, paras. 7.265 and 7.269-7.276.

from Spain relating to dried and salted ham, the Panel limited its analysis to the classification practice relating to salted chicken cuts with a salt content of between 1.2 and 3 per cent, the products covered by the measures it had determined to be within its terms of reference. However, it is undisputed that salted meat products other than chicken cuts with a salt content of 1.2 to 3 per cent are also subject to heading 02.10 of the EC Schedule. The limitation in the Panel's terms of reference to measures covering the products at issue did not justify the Panel excluding the examination of the classification practice relating to other salted meat products classifiable under heading 02.10 (or relevant alternative headings such as heading 02.07) in its analysis of "subsequent practice".

270. In our view, as the Panel examined only a subset of salted meat products classifiable under heading 02.10, and it did not examine classification practice with respect to alternative headings such as heading 02.07, it could not draw valid conclusions as to the existence of "subsequent practice" establishing the agreement of the parties within the meaning of Article 31(3)(b) with respect to all salted meat products potentially covered by the tariff commitment under heading 02.10 of the EC Schedule.

B. *How Does One Establish Agreement of Parties that Have Not Engaged in a Practice?*

271. We recall that, under Article 31(3)(b), agreement of the parties regarding interpretation of a treaty term must be established. This raises the question how to establish agreement of those parties that have not engaged in a practice. According to the Panel, acceptance "deduced from a party's reaction or lack of reaction to the practice" of another Member is sufficient to establish the agreement of treaty parties regarding the interpretation of a provision.[513] The Panel held that, as other WTO Members did not "protest" against the European Communities' classification practice from 1996 to 2002—whereby the products at issue were classified under heading 02.10—they can be presumed to have accepted it.[514]

272. We agree with the Panel that, in general, agreement may be deduced from the affirmative reaction of a treaty party. However, we have misgivings about deducing, *without further inquiry*, agreement with a practice from a party's "lack of reaction". We do not exclude that, in specific situations, the "lack of reaction" or silence by a particular treaty party may, in the light of attendant

[513]Panel Reports, footnote 396 to para. 7.253. Here, the Panel relied on Yasseen's statement that: "acceptance by a party may be 'deduced from that party's reaction or lack of reaction to the practice at issue'." (Yasseen, *supra*, footnote 70, p. 49, para. 18)

[514]Panel Reports, para. 7.255.

circumstances, be understood as acceptance of the practice of other treaty parties.[515] Such situations may occur when a party that has not engaged in a practice has become or has been made aware of the practice of other parties (for example, by means of notification or by virtue of participation in a forum where it is discussed), but does not react to it. However, we disagree with the Panel that "lack of protest" against one Member's classification practice by other WTO Members may be understood, on its own, as establishing agreement with that practice by those other Members. Therefore, the fact that Brazil and Thailand, having actually exported the products at issue, may have accepted the European Communities' import classification practice under heading 02.10, is not dispositive of whether other Members with actual or potential trade interests have also accepted that practice. We, therefore, disagree with the Panel that "subsequent practice" under Article 31(3)(b) has been established by virtue of the fact that the Panel "[had] not been provided any evidence to indicate that WTO Members protested against the EC classification practice in question from 1996 - 2002".[516]

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[515]"It is not necessary to show that each party has engaged in a practice, only that all have accepted it, albeit tacitly." (A. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000), p. 195) See also D. Anzilotti, *Corso di Diritto Internazionale* ["International Law Course"], Vol. 1, IV Edizione (CEDAM, 1955), p. 292:

> These conclusive facts also include silence, the value of which, as a manifestation of will, obviously cannot be reduced to general rules, because such value depends on the factual circumstances in which the silence is observed ... It is easy, moreover, to envisage circumstances in which silence on the part of a State cannot be construed as anything but indifference or failure to express its will in any form: The recently expressed view that, in international law, the principle of *qui tacet consentire videtur* is entirely valid cannot be accepted in such general terms[.].

(Unofficial English translation from available French translation by G. Gidel, *Cours de droit international*, Vol. 1, III édition (Librairie du Recueil Sirey, 1929), p. 344);

J.P. Cot, "La Conduite subséquente des Parties à un traité" ["Subsequent Conduct of the Parties to a Treaty"], in *Revue Générale de Droit International Public* (1966), 3rd series, Vol. 37, p. 645:

> ... the various facets of the subsequent conduct of the Parties in the law of treaties: Where it is the subject of tacit agreement, subsequent conduct should undoubtedly be approved by all the Parties; on the other hand, where it is merely indicative of the will of the Parties, it may be accepted even if it stems from a single State. *Its probative value then depends on the circumstances of the case.*

(Unofficial English translation; emphasis added);

W. Karl, *Vertrag und spätere Praxis im Völkerrecht* ["Treaty and Subsequent Practice in International Law"] (Springer Verlag, 1983), pp. 113 and 127; and F. Capotorti, "Sul Valore della Prassi Applicativa dei Trattati Secondo la Convenzione di Vienna" ["On the Value of Practice in the Application of Treaties under the Vienna Convention"], in *Le Droit international à l'heure de sa codification*, Studi in onore di Roberto Ago (Giuffré, 1987), Vol. I, pp. 197.

[516]Panel Reports, para. 7.255.

273. Finally, we recall that, according to the European Communities, Article IX:2 of the *WTO Agreement*[517] suggests that "any practice relating to the interpretation of the multilateral trade agreements and acceptance thereof must take the form of overt acts that are explicitly submitted for consideration of all WTO Members and adopted by a large majority of the WTO Membership."[518] To our mind, the existence of Article IX:2 of the *WTO Agreement* is not dispositive for resolving the issue of how to establish the agreement by Members that have not engaged in a practice. We fail to see how the express authorization in the *WTO Agreement* for Members to adopt interpretations of WTO provisions—which requires a three-quarter majority vote and not a unanimous decision—would impinge upon recourse to subsequent practice as a tool of treaty interpretation under Article 31(3)(b) of the *Vienna Convention*. In any case, we are mindful that the Appellate Body, in *Japan – Alcoholic Beverages II*, cautioned that relying on "subsequent practice" for purposes of interpretation must not lead to interference with the "exclusive authority" of the Ministerial Conference and the General Council to adopt interpretations of WTO agreements that are binding on all Members.[519] In our view, this confirms that "lack of reaction" should not lightly, without further inquiry into attendant circumstances of a case, be read to imply agreement with an interpretation by treaty parties that have not themselves engaged in a particular practice followed by other parties in the application of the treaty. This is all the more so because the interpretation of a treaty provision on the basis of subsequent practice is binding on all parties to the treaty, including those that have not actually engaged in such practice.

C. *Was there "Consistency" of Customs Classification Practice in this Case?*

274. Our next task is to consider the Panel's conclusion that there was evidence of a "consistent, common and discernible pattern" of classification under heading 02.10 of the EC Schedule during the period 1996 to 2002.[520] The Panel found "a reasonable indication of consistent practice" by the European Communities between 1996 and 2002 on the basis of the classification of imports of the products at issue under heading 02.10.[521] In addition, the Panel examined evidence of classification practice regarding imports into and exports from Brazil and Thailand, and imports into and exports

[517]Article IX:2 of the *WTO Agreement* gives the "Ministerial Conference and the General Council … the exclusive authority to adopt interpretations of [that] Agreement and of the Multilateral Trade Agreements".

[518]European Communities' appellant's submission, para. 124. (original underlining omitted)

[519]The fact that such "exclusive authority" to adopt interpretations of the treaty "has been established so specifically in the *WTO Agreement*" was one of the reasons for the Appellate Body to conclude, in *Japan – Alcoholic Beverages II*, that "such authority does not exist by implication or by inadvertence elsewhere". (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, 97, at 107)

[520]Panel Reports, paras. 7.265 and 7.275.

[521]*Ibid.*, paras. 7.267 and 7.275. (original emphasis omitted)

from the third parties, namely, China and the United States, but found that this evidence was of limited probative value.[522]

275. However, in view of the fact that we disagreed above with several aspects of the interpretation and application by the Panel of the requirements of Article 31(3)(b), we do not believe that it is necessary for us to examine whether there was "consistency" of the European Communities' classification practice between 1996 and 2002 so as to establish "subsequent practice" within the meaning of Article 31(3)(b). Even if we were to agree with the Panel that the European Communities consistently classified the "products at issue" under heading 02.10 of the EC Schedule, between 1996 and 2002, this would not change our view with respect to the Panel's interpretation and application of Article 31(3)(b).

D. *Conclusion*

276. For the reasons set out above, we *reverse* the Panel's interpretation and application of the concept of "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*; consequently, the Panel's conclusions, in paragraphs 7.289-7.290 and 7.303 of the Panel Reports, that the European Communities' practice of classifying, between 1996 and 2002, the products at issue under heading 02.10 of the EC Schedule "amounts to subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention* cannot stand.

XI. Interpretation of the EC Schedule in the Light of Article 32 of the *Vienna Convention*

A. *Introduction*

277. After summarizing the "preliminary conclusions" of its interpretative analysis of the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule in the light of Article 31 of the *Vienna Convention*[523], the Panel stated:

> ... while the interpretation undertaken by the Panel pursuant to Article 31 of the *Vienna Convention* suggests that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule, we turn to supplementary means of interpretation of the concession contained in heading 02.10 of the EC Schedule pursuant to Article 32 of the *Vienna Convention* to seek confirmation that this is, in fact, the case.[524]

[522]Panel Reports, paras. 7.284 and 7.288-7.289.

[523]*Ibid.*, para. 7.331.

[524]*Ibid.*, para. 7.332.

278. The Panel structured its analysis under Article 32 as follows. It looked first at "preparatory works", and then continued with "circumstances of the conclusion of the EC Schedule". It interpreted the concept of "circumstances of [a treaty's] conclusion" in respect of its substantive and temporal scope. Having completed this general interpretation of "circumstances", the Panel considered the relevance, for the interpretation of the term "salted" in heading 02.10 in the EC Schedule, of certain legal instruments of the European Communities (specifically, EC Regulation 535/94, the *Dinter* and *Gausepohl* judgments[525] of the ECJ, and the Explanatory and Additional Notes to the European Communities' customs legislation) and the classification practice of the European Communities.

279. The Panel concluded its analysis of "supplementary means" within the meaning of Article 32 with the following finding:

> We considered EC Regulation No. 535/94, the *Dinter* and *Gausepohl* ECJ judgements, EC Explanatory Notes, an EC Additional Note and classification practice prior to the conclusion of the EC Schedule. In the Panel's view, the relevant aspects of the supplementary means of interpretation, most particularly, EC Regulation No. 535/94, indicate that meat that has been deeply and homogeneously impregnated with salt and has a minimum salt content of 1.2% by weight would qualify as "salted" meat under the concession contained in heading 02.10 of the EC Schedule. Therefore, the Panel concludes that the supplementary means of interpretation considered under Article 32 of the *Vienna Convention* confirm the preliminary conclusions we reached ... above following an analysis under Article 31 of the *Vienna Convention*.[526]

280. The European Communities appeals the Panel's interpretation of the term "salted" in heading 02.10 of the EC Schedule in the light of Article 32 of the *Vienna Convention*. It challenges the Panel's interpretation of the concept of "circumstances of [a treaty's] conclusion" in Article 32 and the legal characterization of, in particular, EC Regulation 535/94 and the ECJ's *Gausepohl* judgment. The European Communities also claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU, to the extent that the Panel's conclusions under Article 32 were "premised on an erroneous assessment of the facts".[527]

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[525]ECJ Judgment, *Dinter*, *supra* footnote 151; ECJ Judgment, *Gausepohl*, *supra*, footnote 106.

[526]Panel Reports, para. 7.423.

[527]European Communities' Notice of Appeal (attached as Annex I to this Report), para. 2(e).

281. We recall that, above, we concluded that the term "salted" in heading 02.10, read in the context of the Harmonized System, does not contain a requirement that salting must, by itself, ensure "preservation".[528] At the same time, we have found that the Harmonized System does not, as such, preclude the use of this criterion for purposes of classification and that Members have the flexibility to negotiate particular tariff commitments within the parameters required by the Harmonized System. The purpose of our analysis under Article 32 is, ultimately, to ascertain whether WTO Members have agreed on the preservation criterion advanced by the European Communities with respect to the tariff commitment under heading 02.10 of the EC Schedule.

B. *The Concept of "Circumstances of the Conclusion of a Treaty"*

282. We begin our analysis by pointing out that the means of interpretation listed in Article 32 [529] are supplementary means to be resorted to when interpretation in the light of Article 31 leaves the meaning of a treaty provision ambiguous or obscure, or, in order to confirm the meaning resulting from the application of the interpretation methods listed in Article 31. In this regard, we recall that the Appellate Body recognized in *EC – Computer Equipment* that:

> ... the classification practice in the European Communities during the Uruguay Round [was] part of 'the circumstances of [the] conclusion' of the *WTO Agreement* and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*.[530]

283. We stress, moreover, that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they *include* the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a

[528]We noted that such criteria must either be specifically provided for in a tariff heading description, or be discernible from the structure of the Harmonized System (including the relevant Section, Chapter, Subheading or Explanatory Notes). See *supra*, paras. 229-230.

[529]Article 32 of the *Vienna Convention* provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

[530]Appellate Body Report, *EC – Computer Equipment*, para. 92.

certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.[531]

284. The Panel interpreted the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule in the light of the circumstances of the conclusion of the *WTO Agreement*, noting that these circumstances "may provide insights into the historical background against which the EC Schedule was negotiated".[532] The Appellate Body expressed a similar view in *EC – Computer Equipment*:

> With regard to "the circumstances of [the] conclusion" of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.[533]

285. The Panel considered as "circumstances of conclusion" in this case the "historical background compris[ing] the collection of events, acts and other instruments that characterize the prevailing situation in the European Communities"[534] at the time the tariff commitment under heading 02.10 of the EC Schedule was negotiated. Accordingly, the Panel decided to "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".[535]

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[531]We agree with Yasseen who says:

> Let us not forget that the list of supplementary means of interpretation contained in Article 32 of the Vienna Convention is not exhaustive. If the circumstances in which the treaty was concluded are expressly mentioned, it is to underline their importance in the elaboration of the Treaty, and not to exclude the possibility of wider-ranging and more thorough historical research into a period preceding that of the conclusion of the treaty[.]

(Yasseen, *supra*, footnote 70, p. 92, paras. 10-11 (quoted in Panel Reports, footnote 570 to para. 7.342))

[532]Panel Reports, para. 7.340. The Panel relied upon Yasseen, who states that the circumstances of conclusion are "the *historical background that comprises the collection of events which led the parties to conclude the treaty* in order to maintain or confirm the status quo, or to bring about an alteration made necessary by a new situation." (Yasseen, *supra*, footnote 70, p. 90, paras. 3-4 (quoted in Panel Reports, footnote 568 to para. 7.340)) (emphasis added)

[533]Appellate Body Report, *EC – Computer Equipment*, para. 86 (referring, in footnote 65, to a statement of Sinclair, on which the Panel also relied). For Sinclair, the reference in Article 32 to "circumstances of the conclusion of a treaty" suggests that the interpreter should "bear constantly in mind the historical background against which the treaty has been negotiated." (Sinclair, *supra*, footnote 36, p. 141)

[534]Panel Reports, para. 7.340. (footnote omitted)

[535]*Ibid.*, para. 7.347. Specifically, the Panel examined EC Regulation 535/94, the ECJ's *Dinter* and *Gausepohl* judgments, Explanatory and Additional Notes to the European Communities' customs legislation, and the classification practice of the European Communities prior to 1994.

286. The European Communities challenges the Panel's analysis under Article 32 on various grounds. We discuss first the European Communities' arguments with respect to the Panel's interpretation of the concept of "circumstances of the conclusion of the treaty".

1. The Concept of "Circumstances"

287. According to the European Communities, the concept of "circumstances" must be interpreted narrowly. Circumstances must have directly influenced the common intention of all the parties to the treaty. A very high degree of consistency and strict conditions as to duration are required for prior practice to be established. WTO jurisprudence shows that a "circumstance" in the form of a condition relating to a negotiating party must have been an objective fact, evident to all the negotiators at the time. There must be a direct and genuine link between the relevant circumstances and the common intentions of the parties; mere "constructive knowledge" is not sufficient.[536]

288. We turn first to the European Communities' argument that, for an "event, act or instrument" to qualify as a "circumstance of the conclusion of a treaty", it "must have directly influenced the common intentions of parties, that is, all parties to a treaty"[537] when they "were actually drafting the text".[538] According to the European Communities, in the absence of such a "direct link"[539], any event, act, or instrument does not amount to a "circumstance" within the meaning of Article 32. The European Communities relies on the opinion of Yasseen who, in his work, *L'interprétation des Traités d'après la Convention de Vienne sur le Droit des Traités*, defines "circumstances of conclusion" as the historical background that "comprises the collection of *events which led the parties to conclude the treaty* in order to maintain or confirm the status quo, or to bring about an alteration made necessary by a new situation".[540] The European Communities infers from this statement that something that has not directly influenced the conclusion of the treaty cannot be a "circumstance" of conclusion; nor does something that has not influenced *all* the parties to the treaty qualify as such a "circumstance". The European Communities also relies on the Appellate Body's statement in *EC – Computer Equipment* that "the purpose of treaty interpretation is to establish the

[536]European Communities' appellant's submission, executive summary, para. 34.

[537]European Communities' appellant's submission, para. 229.

[538]*Ibid.*, para. 253.

[539]*Ibid.*, para. 228.

[540]Yasseen, *supra*, footnote 70, p. 48, para. 16. (emphasis added) Yasseen also wrote that treaties "are the consequence of a series of causes." It is, therefore, useful to know the "conditions of the parties and the reality of the situation that the parties wished to resolve, the importance of the problem they wanted to settle and the scope of the dispute they wanted to terminate through the Treaty being interpreted." (*Ibid.*, p. 90, paras. 3-4)

common intentions of the parties" in support of its position that a circumstance must have directly influenced the common intentions of the parties.[541]

289. Although we do not disagree with the general proposition by Yasseen, we do not agree with the European Communities that a "direct link" to the treaty text and "direct influence" on the common intentions must be shown for an event, act, or instrument to qualify as a "circumstance of the conclusion" of a treaty under Article 32 of the *Vienna Convention*. An "event, act or instrument" may be relevant as supplementary means of interpretation not only if it has actually influenced a specific aspect of the treaty text in the sense of a relationship of cause and effect; it may also qualify as a "circumstance of the conclusion" when it helps to discern what the common intentions of the parties were at the time of the conclusion with respect to the treaty or specific provision. Moreover, the European Communities has taken the Appellate Body statement out of context; the Appellate Body was speaking of the sum or end-result of treaty interpretation; it should not be misconstrued as introducing a concept that an act, event, or instrument qualifies as a circumstance only when it has influenced the intent of all the parties. Thus, not only "multilateral" sources, but also "unilateral" acts, instruments, or statements of individual negotiating parties may be useful in ascertaining "the reality of the situation which the parties wished to regulate by means of the treaty" and, ultimately, for discerning the common intentions of the parties.[542]

2. Relevance of Circumstances for Interpretation

290. We agree with the Panel that "relevance", as opposed to "direct influence" or "[genuine] "link", is the "more appropriate criterion" to judge the extent to which a particular event, act, or other instrument should be relied upon or taken into account when interpreting a treaty provision in the light of the "circumstances of its conclusion".[543] As to how such relevance should be demonstrated, the Panel said 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."[544] The European Communities

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

[542]Sinclair, *supra*, footnote 36, p. 141. Sinclair adds that it may also be necessary to take into account "the individual attitudes of the parties—their economic, political and social conditions, their adherence to certain groupings or their status, for example, as importing or exporting country in the particular case of a commodity agreement—in seeking to determine the reality of the situation which the parties wished to regulate by means of the treaty." (*Ibid.*)

[543]Panel Reports, paras. 7.343-7.344.

[544]*Ibid.*, para. 7.343. (footnote omitted)

submits that the relevance of a circumstance should not be ascertained on the basis of whether it could have influenced the ultimate treaty text but, rather, on the basis of "objective facts".[545]

291. In our view, the relevance of a circumstance for interpretation should be determined on the basis of objective factors, and not subjective intent. We can conceive of a number of objective factors that may be useful in determining the degree of relevance of particular circumstances for interpreting a specific treaty provision. These include the type of event, document, or instrument and its legal nature; temporal relation of the circumstance to the conclusion of the treaty[546]; actual knowledge or mere access to a published act or instrument; subject matter of the document, instrument, or event in relation to the treaty provision to be interpreted; and whether or how it was used or influenced the negotiations of the treaty.

3. "Circumstances " at What Time?

292. As regards the temporal correlation between an event, act, or instrument and the conclusion of the treaty, the Panel stated that:

> ... there is not necessarily a single point in time when the "circumstances of conclusion" should be ascertained. Rather, we consider that it relates to a period starting some time prior to the conclusion of the treaty in question and ending at the point of conclusion.[547] (footnote omitted)

293. According to the European Communities, the Panel's recognition that an interpreter should ascertain the "circumstances of conclusion", not at a single point in time but, rather, over a certain period, "sits uncomfortably" with the Panel's observation that the date of conclusion of the

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[545]European Communities appellant's submission, para. 253.

[546]We note that the term "conclusion" has a temporal connotation that may give contextual guidance for interpreting the relevance of "circumstances". (See *infra*, para. 293)

[547]Panel Reports, para. 7.342. The Panel relied upon Yasseen, who defined the "circumstances of [a treaty's] conclusion" as:

> ... the circumstances of a certain period in time, that is to say the period during which the treaty was concluded. But does this mean that the possibility of historical research into an earlier period must be ruled out? We think not. Indeed, it is useful, and sometimes even necessary, to carry out such research in order to acquire a better understanding of the actual circumstances in which the treaty was concluded. In any case, an overall examination of the treaty's historical background may be considered as a supplementary means of interpretation, given the series of events leading to its conclusion.

(Yasseen, *supra*, footnote 70, p. 92, paras. 10-11 (quoted in Panel Reports, footnote 570 to para. 7.342)

WTO Agreement is 15 April 1994.[548] We disagree with the European Communities, because the precise date of *conclusion* of a treaty should not be confused with the *circumstances* that were prevailing at that point in time. Events, acts, and instruments may form part of the "historical background against which the treaty was negotiated", even when these circumstances predate the point in time when the treaty is concluded, but continue to influence or reflect the common intentions of the parties at the time of conclusion. We also agree with the Panel that there is "some correlation between the timing of an event, act or other instrument ... and their relevance to the treaty in question"[549], in the sense that "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", the less relevant it will be for interpreting the treaty in question.[550] What should be considered "temporally proximate will vary from treaty provision to treaty provision" and may depend on the structure of the negotiating process.[551] Accordingly, we see no error in the Panel's finding that the circumstances of the conclusion should be ascertained over a period of time ending on the date of the conclusion of the *WTO Agreement.*

4. What Kind of Knowledge is Required?

294. The European Communities also contests the Panel's "doctrine of 'constructive knowledge', whereby all negotiating parties were deemed to have knowledge of a particular event, act or instrument through publication".[552] The Panel considered "whether knowledge on the part of all parties of an event, act or other instrument is necessary in order for [it] to qualify as 'circumstances of conclusion' under Article 32".[553] The Panel found that actual knowledge was not necessary, provided that:

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[548]European Communities, appellant's submission, para. 245.

[549]Panel Reports, para. 7.344. We recall, in this vein, that the panel and the Appellate Body in *EC – Computer Equipment* examined customs classification practice during the Uruguay Round when interpreting the relevant part of the EC Schedule. (Appellate Body Report, *EC – Computer Equipment*, para. 93) In considering "supplementary means of interpretation" in *Canada – Dairy*, the Appellate Body observed that the terms and conditions at issue "were incorporated into Canada's Schedule after lengthy negotiations" between Canada and the United Sates regarding "reciprocal market access opportunities for dairy products". (Appellate Body Report, *Canada – Dairy*, para. 139) The Appellate Body also recognized in *US – Gambling* that certain Scheduling Guidelines "were drafted in parallel with the GATS itself" and, in that sense, could be considered to have been "drawn up on the occasion of the conclusion of the treaty". (Appellate Body Report, *US – Gambling*, footnote 244 to para. 196)

[550]Panel Reports, para. 7.344. See also Appellate Body Report, *Chile – Price Band System*, footnote 206 to para. 230.

[551]Panel Reports, para. 7.344.

[552]European Communities' appellant's submission, para. 254.

[553]Panel Reports, para. 7.346.

> ... [when] 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*.[554] (emphasis added; footnote omitted)

295. In the European Communities' view, "deemed knowledge" or publication is not sufficient for purposes of Article 32; a "circumstance" must be an "objective fact, evident to all negotiators at the time".[555] The European Communities argues that "the Panel's notion of deemed knowledge on the basis of general 'access' cannot substitute the need to demonstrate a direct link between a circumstance and the common intentions of the parties."[556]

296. The Panel turned, as support for the concept of "constructive knowledge" of circumstances of conclusion, to a statement made by Sir Iain Sinclair in his work, *The Vienna Convention on the Law of Treaties*, in relation to "preparatory works".[557] This statement expresses concerns about "the unity of a multilateral treaty" if "different methods of interpretation [w]ould be employed, the one for States who participated in the *travaux préparatoires* and the other for States who did not so participate" and acceded later on.[558] The Panel saw "no reason why these comments would not be equally applicable with respect to 'circumstances of conclusion' under Article 32 of the *Vienna Convention*."[559] We are not so convinced that the remarks on the knowledge of preparatory works by States not participating in negotiations are applicable to the "circumstances of conclusion" which we are dealing with here.

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[554]Panel Reports, para. 7.346.

[555]European Communities' appellant's submission, para. 252.

[556]*Ibid.*, para. 262.

[557]Sinclair stated that:

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

(Sinclair, *supra*, footnote 36, p. 144 (quoted in Panel Reports, footnote 574 to para. 7.346))

[558]*Ibid.*

[559]Panel Reports, footnote 574 to para. 7.346.

297. We understand the Panel's notion of "constructive knowledge" to mean that "parties have deemed notice of a particular event, act or instrument through publication".[560] We note the European Communities' view that "deemed knowledge" on the basis of general "access" to a publication cannot substitute the need for demonstrating a direct link between a circumstance and the common intentions of the parties.[561] However, we consider that the European Communities conflates the preliminary question of what may qualify as a "circumstance" of a treaty's conclusion with the separate question of ascertaining the degree of relevance that may be ascribed to a given circumstance, for purposes of interpretation under Article 32. As far as an act or instrument originating from an individual party may be considered to be a circumstance under Article 32 for ascertaining the parties' intentions, we consider that the fact that this act or instrument was officially published, and has been publicly available so that any interested party could have acquired knowledge of it, appears to be enough. Of course, proof of actual knowledge will increase the degree of relevance of a circumstance for interpretation.

5. Whose Acts or Instruments May Qualify as "Circumstances"?

298. In addition, the European Communities criticizes the Panel for failing to take into account the "internationally prevailing situation" and the practice of other Members, specifically, the United States.[562]

299. As noted above, the Panel understood the "circumstances of conclusion" as the "historical background" comprising "the collection of events, acts and other instruments" against which the treaty was negotiated. The Panel found that the "historical background" against which heading 02.10 of the EC Schedule was negotiated was the "events, acts and other instruments" that characterize the "prevailing situation in the European Communities".[563] However, the Panel also referred in this respect to the Appellate Body's guidance in *EC – Computer Equipment* that "it is most useful to examine the classification practice of all WTO Members".[564] In *EC – Computer Equipment*, the Appellate Body emphasized that, "while each Schedule represents the tariff commitments made by

[560]Panel Reports, para. 7.346.

[561]European Communities' appellant's submission, para. 262.

[562]The European Communities refers to a ruling of United States' customs authorities of November 1993 dealing with fresh and frozen beef to which 3 per cent of salt had been added by means of tumbling. (Panel Reports, para. 7.420) The European Communities submits that this ruling quotes Explanatory Notes of the Combined Nomenclature and supports the proposition that heading 02.10 concerns meat salted for preservation. (European Communities' appellant's submission, para. 290)

[563]Panel Reports, para. 7.340.

[564]*Ibid.*, para. 7.421.

one Member, they represent a common agreement among *all* Members".[565] It also found that in the "specific case of the interpretation of a tariff concession in a Schedule", the purpose of interpretation is "to establish the *common* intention of the parties to the treaty".[566] The Appellate Body concluded that:

> ... the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States was *not* relevant.[567] (original emphasis)

300. We agree with the Panel that, for purposes of interpreting the term "salted" under heading 02.10 of the EC Schedule in the light of the "circumstances of its conclusion", the customs classification practice in the European Communities is of great importance[568]; however, we share the European Communities' view that its situation is not of exclusive relevance, and that the "prevailing situation internationally" is relevant.[569] We note that the Panel did, in fact, examine the United States' classification practice. The Panel concluded that this evidence had limited probative value, notably because it concerned products other than those at issue. Moreover, the United States indicated that the ruling of the United States' custom authorities of 1993 did not "endorse" the European Communities' interpretation of heading 02.10.[570] We also observe that the Panel considered that it had been provided with only "limited evidence" in respect of the classification practice of other WTO Members.

301. In our view, the Panel's conclusion regarding the evidence of other WTO Members' classification practice, including that of the United States, falls within its discretion as the trier of facts. We, therefore, see no basis for objecting to the Panel's treatment of the "prevailing situation internationally".

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[565]Appellate Body Report, *EC – Computer Equipment*, para. 109. (original emphasis)

[566]*Ibid.*, para. 93.

[567]*Ibid.*

[568]Panel Reports, para. 7.340.

[569]European Communities' Notice of Appeal (attached as Annex I to this Report), para. 3(a).

[570]United States' third participant's submission, paras. 7-10; United States' response to questioning at the oral hearing.

6. What Types of Events, Acts, and Instruments?

302. The Panel also addressed the question of *what types* of events, acts, and other instruments may be taken into account as circumstances of conclusion under Article 32. In this dispute, the question arises whether the classification practice of customs authorities and the customs legislation of the European Communities and court judgments of the ECJ relating to tariff classification may be relevant as "circumstances" of the conclusion of the WTO agreements, including the EC Schedule.

303. The Panel noted that the Appellate Body recognized in *EC – Computer Equipment* that:

> ... the *classification practice* in the European Communities during the Uruguay Round [was] part of 'the circumstances of [the] conclusion' of the *WTO Agreement* and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*.[571] (emphasis added)

304. In this statement, the Appellate Body referred to customs classification practice *prior* to the conclusion of a treaty. The Panel noted that practice that "does not qualify as 'subsequent practice' under Article 31(3)(b) ... may, nevertheless, be taken into consideration under Article 32".[572] The European Communities criticizes the Panel for considering classification practice *subsequent to* the conclusion of the treaty as relevant for purposes of interpretation under Article 32.[573]

305. In our view, it is possible that documents published, events occurring, or practice followed *subsequent to* the conclusion of the treaty may give an indication of what were, and what were not, the "common intentions of the parties" *at the time* of the conclusion.[574] The relevance of such documents, events or practice would have to be determined on a case-by-case basis.

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[571]Appellate Body Report, *EC – Computer Equipment*, para. 92.

[572]Panel Reports, para. 7.422. The Panel found support for its position in Sinclair's statement that Article 31(3)(b):

> ... does not cover subsequent practice in general, but only a specific form of subsequent practice—that is to say, concordant, subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the Convention.

(Sinclair, *supra*, footnote 36, p. 138 (quoted in Panel Reports, footnote 725 to para. 7.422))

[573]European Communities' appellant's submission, paras. 233-234 (referring to Panel Reports, para. 7.422).

[574]As we have noted above, the list of supplementary means in Article 32 is not exhaustive because the Article refers to supplementary means of interpretation *including* the preparatory work of the treaty and the circumstances of its conclusion. See also Yasseen, *supra*, footnote 70, p. 92, paras. 10-11, and his statement cited *supra*, at footnote 531.

306. In addition, the European Communities asserts on appeal that the classification practice must show a high level of "consistency" for it to be relevant as a "circumstance of the conclusion of a treaty".[575] The European Communities refers to the "standards of consistency" that were endorsed by the Appellate Body in *EC – Computer Equipment*, and states that customs classification practice should not be considered separately from applicable legislation. Moreover, according to the European Communities, classification practice should not have been interrupted and must have "endured".[576]

307. We believe that the Appellate Body's statement in *EC – Computer Equipment* regarding the "consistency" of classification practice should not be read as setting a benchmark for determining whether a particular classification practice may qualify at all as "circumstance of the conclusion". A careful reading reveals that the Appellate Body addressed the degree of *relevance* of customs classification practice. The Appellate Body said:

> Consistent prior classification practice may often be significant. Inconsistent classification practice, however, *cannot* be relevant in interpreting the meaning of a tariff concession.[577] (original emphasis)

Thus, the Appellate Body concluded that the "consistent prior classification practice" is "significant", whereas "inconsistent classification practice" is not "relevant".

308. Regarding the relevance of *legislation* relating to customs classification for purposes of interpretation, we agree with the Panel's reliance[578] on the following statement of the Appellate Body in *EC – Computer Equipment*:

> If the classification practice of the importing Member at the time of the tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, surely that Member's *legislation on customs classification* at that time is also relevant.[579] (emphasis added)

[575]European Communities' appellant's submission, paras. 239-242.

[576]*Ibid.*, para. 241.

[577]Appellate Body Report, *EC – Computer Equipment*, para. 95.

[578]Panel Reports, para. 7.341.

[579]Appellate Body Report, *EC – Computer Equipment*, para. 94.

309. In addition, the Panel asked whether a Member's *court judgments* may, in principle, be taken into account as supplementary means of interpretation under Article 32. The Panel concluded that:

> 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 *Vienna Convention*.[580] (footnote omitted)

We share the Panel's consideration that judgments of domestic courts are not, in principle, excluded from consideration as "circumstances of the conclusion" of a treaty if they would be of assistance in ascertaining the common intentions of the parties for purposes of interpretation under Article 32.[581] It is necessary to point out, however, that judgments deal basically with a specific dispute and have, by their very nature, less relevance than legislative acts of general application (although judgments may have some precedential effect in certain legal systems).[582]

C. *Characterization of Relevant Law of the European Communities*

310. Having discussed the concept of "circumstances of the conclusion of a treaty" within the meaning of Article 32, we turn to reviewing the Panel's findings determining the relevance, for interpreting the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule, of the customs classification legislation, practice, and court judgments of the European Communities (namely, EC Regulation 535/94, the *Dinter* and *Gausepohl* judgments of the ECJ, certain Explanatory Notes to the Combined Nomenclature, and classification practice prior and subsequent to the conclusion of the EC Schedule). We then review whether the elements of the European Communities' law and practice examined by the Panel qualify as supplementary means of interpretation under Article 32 and support the Panel's conclusion with respect to the meaning of the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule.

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[580]Panel Reports, para. 7.391. The Panel believed that its "conclusion would seem to be particularly valid in relation to the present case where the ECJ judgements in question interpret EC legislation. In [the Panel's] view, it would be an odd situation if such legislation could be considered under Article 32 of the *Vienna Convention* but not court judgements, which interpret that legislation." (*Ibid.*, footnote 681 thereto)

[581]In this respect, we note the United States' argument that, "where a Member's domestic system provides for judicial decisions to have a role in interpreting or understanding legislation ... it follows that judicial decisions need to be taken into account as well." (United States' response to questioning at the oral hearing) See also China's third participant's submission, paras. 28-36.

[582]The European Communities appeals certain aspects of the Panel's interpretation of the concept of "circumstances of conclusion". However, it argues that, if domestic instruments are taken into account at all under Article 32, then domestic court judgments must be considered as well. The European Communities objects to the Panel's characterization of those judgments in relation to other domestic instruments.

311. The European Communities submits on appeal that the Panel mischaracterized the customs classification law and practice of the European Communities, in particular EC Regulation 535/94 and the ECJ judgment in *Gausepohl*, and that this mischaracterization amounts to a distortion of facts contrary to Article 11 of the DSU.[583] According to the European Communities, the Panel failed to consider the "totality" of the European Communities' customs legislation, practice, and court judgments and erred in interpreting the interaction between various elements of the European Communities' legal system.[584] The European Communities challenges specifically the Panel's finding that EC Regulation 535/94 "superseded" the ECJ judgment in *Gausepohl*, such that the criterion of preservation under heading 02.10 of the European Communities' Combined Nomenclature no longer applies.[585]

312. Brazil contends that EC Regulation 535/94 introduced an objective criterion for the classification of salted meat (deep salt impregnation with a salt content of at least 1.2 per cent), and did not refer to the concept of "preservation". Brazil observes that the Regulation was enacted before the conclusion of the WTO agreements and therefore determines the product definition that applies to heading 02.10 of the European Communities' WTO Schedule. Brazil submits that the Panel appropriately considered relevant law, practice, and court judgments of the European Communities. According to Brazil, even if the European Commission took the ECJ's judgment in *Gausepohl* into account in enacting EC Regulation 535/94, that judgment suggests that deep impregnation with at least 1.2 per cent of salt meets the ECJ's understanding of "preservation".[586]

313. Thailand argues that, in *Gausepohl*, the ECJ held that there are three characteristics for bovine meat to be classified under heading 02.10: the meat must (i) be deeply and evenly impregnated with salt in all its parts; (ii) be for the purpose of preservation; and (iii) have a minimum total salt content of 1.2 per cent by weight.[587] In contrast, Additional Note 7, inserted into the European Communities' Combined Nomenclature through EC Regulation 535/94, provides that, in order to fall under heading 02.10, meat must (i) be deeply and homogeneously impregnated with salt in all its parts; and (ii) have a total salt content of not less than 1.2 per cent by weight. In Thailand's view, the European

[583]European Communities' appellant's submission, para. 288.

[584]*Ibid.*, para. 273.

[585]*Ibid.*, para. 278 (referring to Panel Reports, para. 7.402). The European Communities also challenges the Panel's interpretation of the ECJ's judgment in *Gausepohl*, with respect to heading 02.10, as not being necessarily governed by the principle of "long-term preservation". (European Communities' appellant's submission, paras. 275-276 (referring to Panel Reports, paras. 7.398-7.400))

[586]Brazil's appellee's submission, para. 258.

[587]Thailand's appellee's submission, para. 159.

Communities deliberately omitted from EC Regulation 535/94 the criterion that salting must ensure preservation.[588]

1. EC Regulation 535/94

314. As explained above[589], EC Regulation 535/94 provided a product description for heading 02.10 of the European Communities' Combined Nomenclature that was inserted as an Additional Note into Chapter 2 of that nomenclature.[590] The Additional Note states:

> 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 of no less than 1.2% by weight.

315. The recitals to EC Regulation 535/94 indicate the reasons why it was enacted:

> 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.

316. Regarding the legal effect of EC Regulation 535/94 in European Communities' law, the Panel found that:

> ... EC Regulation No. 535/94 introduced an Additional Note into the [Combined Nomenclature]. The effect of that Regulation, through the Additional Note that it introduced, was that if meat had been deeply and homogeneously impregnated with salt, with a minimum salt content of 1.2% by weight, it would meet the requirements of that Regulation and would qualify as "salted" meat under heading 02.10 of the [Combined Nomenclature].[591]

[588]Thailand's appellee's submission, paras. 160-161.

[589]See *supra*, para. 142.

[590]This Additional Note to the Combined Nomenclature was originally numbered Additional Note 8, but was subsequently renumbered as Additional Note 7.

[591]Panel Reports, para. 7.369.

317. The Panel observed that EC Regulation 535/94 was part of the European Communities' legislation on customs classification at the time of the conclusion of the WTO agreements and that, therefore, it is relevant as a "circumstance of its conclusion".[592] We agree with the Panel that "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".[593] Indeed, this is consistent with the Appellate Body's statement in *EC – Computer Equipment* that a Member's customs legislation is relevant in interpreting tariff concessions.[594]

318. We turn now to review the Panel's findings concerning the relevance of EC Regulation 535/94 for purposes of interpreting the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule in the light of Article 32. As we noted above[595], a number of factors may be useful in ascertaining the relevance of a "circumstance of conclusion" for interpretation.

319. We look first to the *temporal aspect* of the relevance of EC Regulation 535/94. We note that it was published in the *Official Journal of the European Communities* on 11 March 1994 and entered into force on 1 April 1994.[596] Having considered the participants' arguments, we believe that the temporal proximity of these dates to the conclusion of the *WTO Agreement* on 15 April 1994 makes EC Regulation 535/94 relevant as a "circumstance of conclusion" for the interpretation of the tariff commitment under heading 02.10 of the EC Schedule.

320. The European Communities submits that the final results of tariff negotiations that took place between 1986 and 15 December 1993 cannot be altered by a unilateral measure.[597] We agree. However, the European Communities acknowledges that a legislative act taken during the verification period, prior to the formal adoption of the *WTO Agreement*, could be relevant for interpreting the

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[592]Panel Reports, para. 7.360 (referring to Appellate Body Report, *EC – Computer Equipment*, para. 94).

[593]*Ibid.*, para. 7.360. We note the argument of the United States that EC Regulation 535/94 may be relevant as evidence of the meaning that the European Communities itself assigned to the term "salted" under Article 31(1) of the *Vienna Convention* or, alternatively, that it could be considered as part of the "circumstances of [the] conclusion" of the *WTO Agreement* under Article 32. (United States' third participant's submission, paras. 5-6)

[594]Appellate Body Report, *EC – Computer Equipment*, para. 94.

[595]*Supra*, para. 291.

[596]The European Communities points out that the Regulation was published after the tariff negotiations of the Uruguay Round ended on 15 December 1993. We also note the argument of Brazil and Thailand that the publication occurred before the period for verification of Schedules resulting from those negotiations ended on 25 March of 1994, and that the verification process was an important and integral component of the negotiating process leading to the conclusion of the Schedules of WTO Members.

[597]European Communities' appellant's submission, para. 304.

tariff commitment under heading 02.10 of the EC Schedule, provided that compelling evidence proves that negotiators "actually took note" of such act.[598]

321. We do not believe that the mere fact that EC Regulation 535/94 was enacted after the conclusion of the Uruguay Round tariff negotiations makes it irrelevant for ascertaining what the European Communities intended when offering its tariff concession, or for ascertaining whether it reflects the common intentions of the parties in respect of the tariff commitment under heading 02.10 of the EC Schedule.

322. Turning to the *subject-matter*, EC Regulation 535/94 (which inserts an Additional Note to heading 02.10 of the European Communities' Combined Nomenclature) clearly covers the same salted meat products that fall under the tariff commitment under heading 02.10 of the European Communities' WTO Schedule. Although the European Communities' Combined Nomenclature cannot be equated with the European Communities' WTO Schedule, the Combined Nomenclature implements the European Communities' WTO Schedule and the Harmonized System in the domestic legal system of the European Communities.[599]

323. Turning to the content of EC Regulation 535/94, we note that, although Additional Note 7 mentions deep impregnation with salt, with a minimum salt content of 1.2 per cent by weight, there is no criterion of preservation or long-term preservation stated in the text of that Regulation. The European Communities contends that EC Regulation 535/94 provides only one part of the product description applicable to the tariff commitment under heading 02.10 of the EC Schedule. According to the European Communities, for purposes of the tariff commitment under heading 02.10 of the EC Schedule, salting must ensure long-term preservation, and this requirement is not altered by EC Regulation 535/94.

324. The European Communities supports its position with several arguments. First, it asserts that the criterion of preservation is intrinsic to and flows directly from heading 02.10 of the Harmonized System. In addition, it contends that the notion of "preservation" has always governed the European Communities' customs classification practice for "salted" meat products and that it has also been confirmed in judicial pronouncements of the ECJ since the 1980s.[600] EC Regulation 535/94 lays down only a technical minimum level of 1.2 per cent of salt for considering a product to be salted for "preservation", but it does not and cannot "supersede" the requirement of "preservation". As we held

[598]European Communities' appellant's submission, paras. 305, 308, and 310.

[599]The Combined Nomenclature may also contain additional specifications and requirements to the extent that those are not precluded by the Harmonized System or WTO law.

[600]European Communities' appellant's submission, paras. 282-284.

above, the product description in heading 02.10 of the Harmonized System (read together with relevant Chapter and Explanatory Notes) does not contain a requirement of "preservation" and does not limit the scope of heading 02.10 of the Harmonized System to products that are salted for the purpose of "preservation".[601] However, we do not see that EC Regulation 535/94 explicitly requires that meat must be salted so as to ensure "preservation".

325. We turn next to the European Communities assertion that the requirement of preservation in respect of heading 02.10 flows from prior case-law of the ECJ interpreting European Communities' customs legislation and from relevant Explanatory Notes. According to the European Communities, that criterion was embedded in the European Communities' legal system also after the enactment of EC Regulation 535/94 as well, because that Regulation only implements, but cannot derogate from, ECJ case-law and the European Communities' Combined Nomenclature.

2. The *Dinter* and *Gausepohl* Judgments of the European Court of Justice

326. The Panel addressed the ECJ judgments in *Dinter* and *Gausepohl* before dealing with the Explanatory Notes from the 1980s. In 1982-1983, the ECJ was asked in the *Dinter* case[602] whether turkey meat seasoned with salt and pepper was properly classified under Chapter 2 or, instead, under Chapter 16 of the European Communities' Combined Nomenclature. The ECJ ruled that the meat was properly classified under Chapter 16, because "Chapter 02 comprises poultrymeat which has undergone a preserving process."[603]

327. We note that the *Dinter* judgment relates to salted turkey meat, which is a subset of the products covered by heading 02.10 of the EC Schedule. However, the temporal relationship between that judgment (published in 1983) and the conclusion of the *WTO Agreement* is remote. In our view, this diminishes its relevance for the "historic background" against which tariff commitments were negotiated during the Uruguay Round. We agree with the Panel that the *Gausepohl* judgment (published in May 1993) is more relevant.[604]

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[601]However, we also found above, that preservation criterion may be agreed upon between WTO Members within the parameters required by the Harmonized System with respect to a particular tariff commitment. (See Section VIII.B of this Report entitled "Context")

[602]ECJ Judgment, *Dinter*, *supra*, footnote 151, para. 6.

[603]The ECJ further stated in *Dinter* that chapter 2 "refers to frozen, chilled or salted meat or meat in brine and dried or smoked meat. *Seasoning which is not intended as a preservative of meat does not appear among those processes*." (*Ibid.* (emphasis added))

[604]Panel Reports, paras. 7.392-7.394.

328. In 1993, in *Gausepohl*, the ECJ considered the question whether beef to which salt had been added should be classified under heading 02.10.[605] The ECJ held that:

> ... meat of bovine animals to which a quantity of *salt has been added merely for the purpose of transportation cannot be regarded as salted* for the purposes of heading 0210. On the other hand, *salting as a method of preserving meat* of bovine animals for a *longer period* must be applied evenly to all parts of the meat.
>
> ...
>
> The reply to the questions from the national court should therefore be that heading 0210 of the Common Customs Tariff (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.*[606] (emphasis added)

329. As to the meaning of the *Gausepohl* judgment in European Communities' law, the Panel took the view that:

> Heading 0210 of [the Combined Nomenclature] … must be interpreted as meaning that meat of bovine animals may be classified under that heading as salted meat only if it has been deeply and evenly impregnated with salt in all its parts for the purposes of long-term preservation so that it has a minimum total salt-content of 1.2% by weight.[607]

However, the Panel found that:

> … the aspects of the *Gausepohl* judgment that are relevant to this case [—that is, preservation or long-term preservation—] were *superseded* through the enactment of EC Regulation No. 535/94.[608] (emphasis added)

[605]ECJ Judgment, *Gausepohl*, *supra*, footnote 106, paras. 10-12 and 16.

[606]*Ibid.*

[607]Panel Reports, para. 7.396 (quoting ECJ Judgment, *Gausepohl*, *supra*, footnote 106, paras. 10-12 and 16).

[608]*Ibid.*, para. 7.405.

330. The Panel also considered that there were "certain ambiguities concerning the meaning and effect of the *Gausepohl* judgment". The Panel understood the judgment to mean that "bovine meat that has been deeply and homogeneously impregnated with salt and has a minimum salt content of 1.2% by weight will be covered by heading 02.10 of the EC Schedule".[609] It was not persuaded that "the 1.2% salt content is merely a minimum above which it is possible that meat qualifies under heading 02.10, presumably subject to meeting other conditions"[610] (such as a preservation criterion). The Panel, therefore, concluded that its interpretation of the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule as excluding a requirement that salting must ensure preservation was "not affected" by the *Gausepohl* judgment.[611]

331. The European Communities challenges the Panel's finding that EC Regulation 535/94 "superseded" the ECJ *Gausepohl* judgment, such that the criterion of preservation in heading 02.10 of the European Communities' Combined Nomenclature no longer applies.[612] According to the European Communities, the Panel failed to consider the "totality" of the European Communities' legal system (including customs legislation, practice, and court judgments)[613] and erred in interpreting the interaction between various elements of the European Communities' legal system.[614] Specifically, the European Communities submits that a Commission Regulation cannot override an interpretation given by the ECJ to the European Communities' Combined Nomenclature, where that Nomenclature is implementing the Harmonized System[615], because the Commission "is only empowered to issue Regulations at the 'technical level' to ensure the uniform implementation of the Combined Nomenclature".[616] In addition, the European Communities challenges the Panel's interpretation of the *Gausepohl* judgment as not being necessarily governed by the principle of "long-term preservation".[617] Thailand contends that EC Regulation 535/94 did not alter the scope of heading

[609]Panel Reports, para. 7.399.

[610]*Ibid*.

[611]*Ibid*., para. 7.405.

[612]European Communities' appellant's submission, para. 278 (referring to Panel Reports, para. 7.402).

[613]*Ibid*., para. 273.

[614]*Ibid*., paras. 274 ff.

[615]*Ibid*., para. 279 (referring to ECJ Judgment, *French Republic v. Commission*, Case C-267/94, ECR [1995] p. I-4845).

[616]*Ibid*., para. 283.

[617]*Ibid*., paras. 275-276 (referring to Panel Reports, paras. 7.398-7.400).

02.10 as interpreted by the ECJ in *Dinter* and *Gausepohl* [618]; rather, it merely specified the criteria to be taken into account for classifying products under heading 02.10.[619]

332. Regarding the relevance of the *Gausepohl* judgment for the interpretation of the term "salted" in heading 02.10, we note that the Panel ascribed relevance to *Gausepohl* because that judgment concerned "the interpretation of heading 02.10 of the [Combined Nomenclature], corresponding to the specific heading at issue in this dispute".[620] We also note that salted beef—at issue in *Gausepohl*—is a subset of the products that may fall under heading 02.10, and thus both concern the same subject matter.[621]

333. We further note, as did the Panel, the temporal proximity between the publication of the *Gausepohl* judgment in May 1993, the Uruguay Round tariff negotiations that came to an end in December 1993, and the conclusion of the *WTO Agreement* in April 1994.[622] However, temporal correlation alone should not be taken to imply that the *Gausepohl* judgment actually influenced or reflected, in substance, the common intentions of the negotiators with respect to heading 02.10 of the EC Schedule.

334. The Panel record does not indicate that parties to the Uruguay Round tariff negotiations other than the European Communities had actual knowledge of the *Gausepohl* judgment, although they could have taken notice of the publication of the judgment outside the framework of the Uruguay Round.[623] However, we noted above that mere access to a published judgment cannot be equated with

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[618]Thailand's appellee's submission, para. 164.

[619]*Ibid.*, para. 166. Thailand refers to an ECJ judgment (*Gijs van de Kolk-Douane Expéditeur BV v Inspecteur der Invoerrecten en Accijnzen*, Case C-233/88, ECR [1990] I-00265, para. 18 (Exhibit THA-35 submitted by Thailand to the Panel)) where the ECJ reviewed an Additional Note that did not change the scope of the chapters, sections and headings of the Combined Nomenclature, but merely specified the criteria to be taken into account for classifying certain goods under a particular heading of the Common Customs Tariff". (Thailand's appellee's submission, para. 167) At the oral hearing, Brazil and Thailand argued that EC Regulation 535/94 clarified or implemented the *Gausepohl* judgment, rather than superseded it.

[620]Panel Reports, para. 7.394.

[621]As we have noted earlier, what is at issue in the present dispute is the interpretation of the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule, rather than the classification of the frozen salted poultry meat covered by the challenged measures.

[622]Panel Reports, paras. 7.392-7.394.

[623]Brazil stated that, contrary to what the European Communities argued before the Panel, it had knowledge of EC Regulation 535/94 because, "during the Uruguay Round, the Brazilian Mission in Brussels [was] tasked with monitoring legislative developments in the EC through the publication of legislative acts in the EC's Official Journal. Monitoring and verification of Court judgements, however, have never been a part of that job, and it still is not." (Brazil's response to Question 122 posed by the Panel, Panel Reports, pp. C-57-C-58 (original emphasis omitted)), At the oral hearing before the Appellate Body, Brazil and Thailand stated that tariff negotiators cannot be expected to follow the publication of ECJ judgments in the European Court Reports.

acceptance of the criterion of preservation (assuming that the *Gausepohl* judgment enshrines it). Therefore, we are not persuaded that the negotiating partners of the European Communities can be said to have negotiated the tariff commitment under heading 02.10 of the EC Schedule against the background of a requirement that "salting" must ensure preservation (assuming that it is enshrined in ECJ case-law).

335. In general, tariff commitments are negotiated against the background of the situation prevailing in the negotiating parties prior to the conclusion of the treaty (including, in particular, the situation of the importing Member). However, in this case, as pointed out by the Panel, it is not entirely clear whether the ECJ's *Gausepohl* judgment implies that bovine meat that has been deeply and homogeneously impregnated with a salt content of 1.2 per cent will *ipso facto* be considered as preserved for the long-term, and thus covered by heading 02.10 of the EC Schedule; or, whether the judgment should be read in the sense that the 1.2 per cent salt content is merely a minimum above which meat qualifies under heading 02.10 only if it is additionally preserved for the long-term. Therefore, it is not clear whether the ECJ's *Gausepohl* judgment requires that, for purposes of heading 02.10, salting must ensure preservation, and whether such a criterion "lives on" in the European Communities' legal system after EC Regulation 535/94 entered into force.

336. Regarding the interaction between EC Regulation 535/94 and the *Gausepohl* judgment, we do not find it necessary, for purposes of resolving this appeal, to decide whether the Regulation "superseded" the judgment.[624] Regardless of whether EC Regulation 535/94 "superseded", clarified, or implemented the ECJ judgment in *Gausepohl*, we are not persuaded that *Gausepohl* must be understood in the sense that the 1.2 per cent salt content is merely a minimum above which it is necessary to show—in addition—that salting ensures long-term preservation.[625] In any event, we do not see evidence on record that the *Gausepohl* judgment was taken into account in the Uruguay Round negotiations with respect to the tariff commitment at issue.

337. In addition, the European Communities argues that the Panel incorrectly "dismissed" relevant Explanatory Notes to the European Communities' Combined Nomenclature, although these Notes remained relevant for assessing classification practice even after the insertion of the Additional Note

[624]Panel Reports, para. 7.402.

[625]We recall in this regard the Panel's conclusion that *Gausepohl* meant that "meat that has been deeply and homogeneously impregnated with salt and has a minimum salt content of 1.2% by weight" will be considered as preserved and thus "covered by heading 02.10 of the EC Schedule". (*Ibid.*, para. 7.399)

to the Combined Nomenclature through EC Regulation 535/94.[626] In 1981[627], and again in 1983, the European Communities inserted an Explanatory Note into its Common Customs Tariff.[628] According to the European Communities, both Explanatory Notes suggest that only meat salted for the purpose of "preservation" is classifiable under heading 02.10 of the EC Schedule. We note that the Panel did not ignore, but rather considered the relevance of the Explanatory Notes for interpreting heading 02.10 of the EC Schedule. The Panel decided that these Notes did not suggest that a criterion of preservation applied under that tariff commitment.[629] We also note the remote temporal relationship between these Explanatory Notes from the early 1980s and the conclusion of the *WTO Agreement*.

338. We now turn to consider whether the classification practice of the European Communities *after* the conclusion of the *WTO Agreement* confirms the European Communities' position that the criterion of "preservation" governs its customs classification practice.[630] In this regard, we note that EC Regulation 535/94 remained in force and seems to have determined the customs classification practice of the European Communities between 1996 and 2002. We recall that the Panel examined, in its analysis under Article 31(3)(b), three sets of evidence regarding the classification practice of the European Communities between 1996 and 2002: (i) the European Communities' acknowledgement that, during this period, certain European Communities' customs offices were classifying the products at issue under heading 02.10; (ii) a number of BTIs relating to the classification by European Communities' Customs authorities under heading 02.10; and (iii) three

[626]European Communities' appellant's submission, para. 286.

[627]The 1981 Explanatory Note to Common Customs Tariff (the predecessor of the Combined Nomenclature) refers to heading 02.06 of the Brussels Nomenclature and provided that heading 02.06 covered only swine meat that has:

> ... been preserved, by deep dry salting or pickling in brine without any other supplementary treatment such as drying or smoking. The percentage salt content necessary to ensure preservation may vary considerably between different types and cuts of meat. Although this method of preservation is normally used as a temporary measure, the period of such preservation must considerably exceed the time required for transportation. Meat merely sprinkled with salt in order to ensure its preservation while being transported remains classified as fresh meat.

[628]The 1983 Explanatory Note, concerning subheadings 0203.22-11 and 0203.22-19, referred to "frozen hams, shoulder or cuts thereof, with bones" and states:

> Hams, shoulders and parts thereof which have been partially dehydrated, but the *actual preservation* of which is ensured by freezing or deep-freezing, fall in subheadings 0203.22-11 or 0203.22-19. (emphasis added)

[629]Panel Reports, paras. 7.413 and 7.416.

[630]We noted above that classification practice subsequent to the conclusion of a treaty may give an indication of what was intended at the time of its conclusion. (See *supra*, para. 305)

sets of minutes of meetings of the European Communities' Customs Code Committee concerning classification under heading 02.10.[631]

339. More specifically, the European Communities had acknowledged that, between 1996 and 2002, customs offices at major ports of the European Communities (including Hamburg, Rotterdam, and certain ports in the United Kingdom) were classifying products with a salt content of between 1.2 and 3 per cent under heading 02.10[632], and that "substantial trade" of the products at issue entered the European Communities under that tariff heading during the period 1996 to 2002.[633]

340. Moreover, the Panel reviewed a number of BTI notices relating to product classification by customs authorities under heading 02.10. The BTIs pertaining to frozen salted chicken cuts with a salt content of between 1.2 and 3 per cent indicated that, from 1998 to 2002, these products were classified under subheading 02.10.90.[634] The Panel also stated that it was not provided with any BTIs indicating that the products at issue were being classified under any heading other than heading 02.10 (such as, for instance, heading 02.07) before the introduction of EC Regulation 1223/2002 and EC Decision 2003/97/EC.[635]

341. Turning to the minutes of the meetings of the European Communities' Customs Code Committee concerning classification under heading 02.10, the Panel observed that, at the relevant meetings, the Committee considered that products with characteristics matching those of the products at issue were "classifiable" and were also classified under heading 02.10.[636]

342. The Panel also reviewed trade statistics concerning trade flows into the European Communities under headings 02.07 and 02.10 of the EC Schedule.[637] According to the Panel, when read together, the BTIs and trade data indicate that, between 1996 and 2002, significant trade volumes of chicken cuts with a salt content of 1.2 to 3 per cent imported from Brazil and Thailand to the European Communities were being classified under heading 02.10.[638]

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[631]Panel Reports, para. 7.268.

[632]*Ibid.*, paras. 7.260 and 7.269.

[633]*Ibid.*, paras. 7.269 and 7.275.

[634]*Ibid.*, para. 7.270.

[635]*Ibid.*, para. 7.275.

[636]*Ibid.*, paras. 7.272 and 7.275.

[637]*Ibid.*, para. 7.272.

[638]*Ibid.*, paras. 7.272 and 7.275.

343. Thus, the evidence reviewed by the Panel does not indicate that a requirement that salting must ensure long-term preservation was applied in the customs classification practice of the European Communities under heading 02.10 between 1994 and 2002 pursuant to EC Regulation 535/94. In view of this, we fail to see how such a criterion could have entered into—even by implication—an agreement between the European Communities and other WTO Members with respect to the tariff commitment under heading 02.10 of the EC Schedule.

344. As we held above, the term "salted" in heading 02.10 of the Harmonized System does not contain a requirement that salting must, by itself, ensure long-term preservation; but, at the same time, it does not exclude the notion of "preservation". Therefore, we are of the view that, if a specific criterion of long-term preservation—such as the one advocated by the European Communities, namely, that salting, by itself, must ensure long-term preservation and that therefore it must be "much higher than 3%"—is to form a part of the tariff commitment of the European Communities under its Schedule relating to heading 02.10, then there must be clear evidence that such a criterion was agreed upon by the parties for the European Communities' WTO Schedule. We see no such evidence on record; nor do we see it stated explicitly in the European Communities' customs legislation in force at the time of conclusion of the *WTO Agreement*, namely, EC Regulation 535/94; nor do we find it clearly enshrined in the ECJ's case-law prior to the enactment of EC Regulation 535/94. Rather, we find that the products at issue in this dispute were invariably classified by the customs authorities under heading 02.10 between 1996 and 2002, when the European Communities adopted EC Regulation 1223/2002, introducing the phrase "provided ... salting ensures long-term preservation".

345. We turn briefly to the European Communities' claim under Article 11 of the DSU. In the light of the foregoing, we disagree with the European Communities that the Panel failed to consider the "totality" of the European Communities' legal system.[639] To the contrary, the Panel examined relevant customs legislation, practice, and relevant court judgments of the ECJ, although it characterized the *Gausepohl* judgment and interpreted the interaction between this judgment and EC Regulation 535/94 in a way with which the European Communities does not agree.[640] Therefore, we find that the Panel did not fail to make an objective assessment of the facts within the meaning of Article 11 of the DSU.

[639]European Communities' appellant's submission, para. 273.

[640]*Ibid.*, paras. 274 ff.

D. *Conclusion*

346. For the reasons set out above, we *modify* certain aspects of the Panel's interpretation of the concept of "circumstances of [a treaty's] conclusion" within the meaning of Article 32 of the *Vienna Convention;* and *find* that the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule, interpreted in the light of supplementary means under Article 32 of the *Vienna Convention*, does not include the requirement that salting must be for the purpose of preservation. Therefore, we *uphold* the Panel's conclusion, in paragraph 7.423 of the Panel Reports, that the supplementary means of interpretation considered under Article 32 confirm that the products at issue are covered by the tariff commitment under heading 02.10 of the EC Schedule.

XII. Findings and Conclusions

347. For the reasons set forth in this Report, the Appellate Body:

(a) regarding the terms of reference:

(i) upholds the Panel's finding, in paragraph 7.37 of the Panel Reports, that the Panel's terms of reference do not include EC Regulation 1871/2003 and EC Regulation 2344/2003;

(ii) upholds the Panel's finding, in paragraph 7.37 of the Panel Reports, that the products covered by the Panel's terms of reference are those covered by the specific measures at issue, namely, frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2 to 3 per cent;

(b) regarding the interpretation of the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule in the light of Articles 31 and 32 of the *Vienna Convention*:

(i) upholds the Panel's conclusion, in paragraph 7.150 of the Panel Reports, that "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", and upholds the Panel's conclusion, in paragraph 7.151 of the Panel Reports, 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";

(ii) finds that the term "salted", in heading 02.10 of the Harmonized System, does not contain a requirement that salting must, by itself, ensure "preservation"; and consequently, upholds the Panel's finding, in paragraphs 7.245 and 7.331(c) of the Panel Reports, that the context of the term "salted" in the tariff commitment under heading 02.10 of the EC Schedule "indicates that that concession is not necessarily characterized by the notion of long-term preservation", and finds that the scope of that tariff commitment is not limited to products salted provided that it ensures long-term preservation;

(iii) upholds the Panel's conclusion, in paragraph 7.328 of the Panel Reports, that "the lack of certainty associated with the application of the criterion of long-term preservation with respect to the concession contained in heading 02.10 of the EC Schedule ... could undermine the object and purpose of security and predictability, which lie at the heart of both the WTO Agreement and the GATT 1994";

(iv) reverses the Panel's interpretation and application of the concept of "subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*; and consequently, reverses the Panel's conclusions, in paragraphs 7.289-7.290 and 7.303 of the Panel Reports, that the European Communities' practice of classifying, between 1996 and 2002, the products at issue under heading 02.10 of the EC Schedule "amounts to subsequent practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*;

(v) modifies certain aspects of the Panel's interpretation of the concept of "circumstances of [a treaty's] conclusion" within the meaning of Article 32 of the *Vienna Convention*; but upholds the Panel's conclusion, in paragraph 7.423 of the Panel Reports, that the supplementary means of interpretation considered under Article 32 confirm that the products at issue are covered by the tariff commitment under heading 02.10 of the EC Schedule; and consequently

(c) upholds the Panel's findings, in paragraphs 7.424 and 8.1 of the Panel Reports, that:

(i) frozen boneless chicken cuts that have been impregnated with salt, with a salt content of 1.2 to 3 per cent (the products at issue) are covered by the tariff commitment under heading 02.10 of the EC Schedule;

(ii) EC Regulation 1223/2002 and EC Decision 2003/97/EC result in the imposition of customs duties on the products at issue that are in excess of the duties provided for in respect of the tariff commitment under heading 02.10 of the EC Schedule; and

(iii) accordingly, that the European Communities has acted inconsistently with the requirements of Articles II:1(a) and II:1(b) of the GATT 1994 and, thus, nullified or impaired benefits accruing to Brazil and Thailand; and

(d) finds that the Panel complied with its obligations under Article 11 of the DSU.

348. The Appellate Body recommends that the Dispute Settlement Body request the European Communities to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the *General Agreement on Tariff and Trade1994*, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 27th day of August 2005 by:

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Giorgio Sacerdoti
Presiding Member

_____ _____

Luiz Olavo Baptista
Member

A.V. Ganesan
Member

Annex I

WORLD TRADE ORGANIZATION

WT/DS269/6
WT/DS286/8
13 June 2005
(05-2500)

Original: English

EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF FROZEN BONELESS CHICKEN CUTS

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 13 June 2005, from the Delegation of the European Commission, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the European Communities ("EC") hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the reports of the Panel established in response to the requests from Brazil and Thailand in the disputes *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (WT/DS269/R, WT/DS286/R) and certain legal interpretations developed by the Panel in these reports.

The European Communities seeks review of:

1) The Panel's conclusion that "Frozen boneless chicken cuts that have been impregnated with salt, with a salt content of 1.2% - 3% (the product at issue) are covered by the concession contained in heading 02.10 of the EC Schedule" (para. 8.1(a) of the Panel Reports) and that, as a consequence, EC Regulation No. 1223/2002 and EC Decision 2003/97/EC result in the EC imposing customs duties in excess of those provided for in the EC's Schedule in respect of products falling under heading 02.10 (para. 8.1(b) of the Panel Reports) such that the EC has acted inconsistently with the requirements of Articles II:1(a) and II:1(b) of the GATT 1994 (para. 8.1(c) of the Panel Reports).

2) The Panel's conclusion is based on several elements of erroneous legal reasoning. Its ultimate erroneous conclusion is that the term "salted" in heading 02.10 is not based on the notion of preservation (para. 7.424). It reaches this erroneous conclusion by failing properly to examine the term "salted" in heading 02.10 in light of the applicable rules of treaty interpretation. The EC seeks review of all elements of this incorrect examination.

The Panel erroneously applies Article 31 of the *Vienna Convention of the Law of Treaties*. In particular, but not necessarily exclusively, the Panel fails properly to apply the notions of:

a) Ordinary meaning (paras. 7.105; 7.114-7.115; 7.117; 7.140-7.151), in particular, by taking into consideration what the Panel referred to as "the factual context for the consideration of the ordinary meaning";

b) Context (paras. 7.161-7.163; 7.171-7.173; 7.179-7.180; 7.189; 7.199-7.202; 7.205; 7.241; 7.245), in particular by failing to properly examine the immediate context of the term "salted" in heading 02.10 and the relevant aspects of the Harmonised System;

c) Subsequent practice (paras. 7.251; 7.253-7.256; 7.265-7.276; 7.284; 7.288-7.290; 7.298-7.299; 7.302-7.303), in particular, by misinterpreting the notion of "subsequent practice" and by considering that the unilateral "practice" [1] of one party could have a bearing on a multilaterally agreed text and by wrongly analysing the existence of "practice" at the EC and multilateral level.

d) Object and purpose of the treaty (paras. 7.316 to 7.328), in particular, the Panel's reliance on "security and predictability".

e) To the extent that the Panel's conclusions are premised on an erroneous assessment of the facts, the EC seeks review of that assessment pursuant to Article 11 of the DSU.

3) The Panel erroneously applies Article 32 of the *Vienna Convention* (paras. 7.336 - 7.423). In particular, but not necessarily exclusively, the Panel fails to examine properly the circumstances of conclusion (paras. 7.340 et seq.) with a view to establishing the common intention of the parties to the treaty in the sense that it:

a) wrongly limits its analysis to "the prevailing situation in the European Communities" ignoring the prevailing situation internationally (that is the multilateral context) and the practice of other Members (para. 7.340; 7.421);

b) develops and applies an erroneous notion of constructive knowledge (para. 7.346*);*

c) wrongly analyses prior practice of the Community, relying exclusively on or giving undue probative value to and misinterpreting, EC Commission Regulation 535/94, classification between 1996-2002 and other irrelevant post-1994 acts as part of the circumstances of conclusion (paras. 7.359-7.364 7.365-7.370), thereby failing to give proper consideration to prevailing EC law and practice throughout the Uruguay Round, in particular in respect of case-law of the European Court of Justice interpreting heading 02.10 of the *Council Regulation establishing the Combined Nomenclature* (paras. 7.390-7.405), EC Explanatory Notes (7.411-7.413) and ignoring the legal relationship between the different elements of EC law and practice;

d) To the extent that the Panel's conclusions are premised on an erroneous assessment of the facts, the EC seeks review of that assessment pursuant to Article 11 of the DSU.

[1] For the avoidance of doubt, the EC does not consider that the actions examined by the Panel can be qualified as "practice".

The provisions of the covered agreements which the European Communities consider to have been erroneously interpreted or applied by the Panel include:

- Heading 02.10 of the EC's Schedule read in conjunction with Article II :1(a) and II:1(b) of the GATT 1994;

The EC also considers that the Panel erroneously interpreted and applied Article 3.2 of the DSU read in conjunction with the customary rules of interpretation of public international law, in particular Article 31 (3)(b) and Article 32 of the *Vienna Convention* and misapplied Article 11 of the DSU.

Annex II

WORLD TRADE ORGANIZATION

WT/DS269/7
27 June 2005

(05-2790)

Original: English

EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF FROZEN BONELESS CHICKEN CUTS

Notification of an Other Appeal by Brazil
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 27 June 2005, from the Delegation of Brazil, is being circulated to Members.

Pursuant to Articles 16 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23 of the Working Procedures for Appellate Review, Brazil hereby notifies its decision to appeal certain issues of law and legal interpretation contained in the Panel report in *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* (WT/DS269/R).

Brazil seeks appellate review of:

1) The Panel's Term of Reference

a) The Panel's conclusion that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 are measures outside the Panel's terms of reference [1] based, inter alia, on its interpretation that Brazil's Panel request was not broad enough to include EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003.[2] This conclusion was based on an erroneous interpretation of Articles 6.2 and 7 of the DSU.

b) The Panel's conclusion that the product within its terms of reference is "frozen boneless chicken cuts impregnated with a salt content of 1.2%-3%".[3] In particular, the Panel's interpretation that the product at issue is determined by the measures considered by the Panel to be within its terms of reference and not by the product described in Brazil's Panel request[4] is not consistent with Articles 6.2 and 7 of the DSU.

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[1] Panel Report, paras. 6.15 and 7.32.

[2] Panel Report, paras. 6.9, 6.13, 7.28 and 7.29.

[3] Panel Report, paras. 6.16-6.18 and 7.36.

[4] Panel Report, paras. 6.18 and 7.36.

2) *Contextual Interpretation of the EC Schedule: Harmonized System (HS)*

a) The Panel's conclusion that the evolution of the terms and structure of Chapter 2 of the Harmonized System (HS) do not clarify the meaning of the concession contained in heading 0210 of the EC Schedule,[5] specifically in view of its finding that the evolution of the terms and structure does not indicate that the predecessor to HS heading 0210 was characterized by the notion of "preparation" and not "preservation".[6]

b) The Panel's conclusion that the HS Notes and Explanatory Notes do not clarify the meaning of the concession contained in heading 0210 of the EC Schedule.[7] In particular, the finding that the HS Explanatory Notes to heading 0210 and Chapter 2 and the HS Notes to Chapter 16 do not help in the interpretation of heading 0210 because the terms "preparation" and "preservation" may not be mutually exclusive in the context of heading 0210.[8]

c) The Panel's decision not to apply General Rule 3 in the interpretation of heading 0210 based on its improper reliance on and acceptance of the parties' alleged position that - within their analysis – the products at issue are not *prima facie* classifiable under two or more headings.[9]

d) The Panel's overall conclusion that the HS does not further clarify the interpretation of the concession contained in heading 0210 of the EC Schedule, in so far as this conclusion was based on the Panel's flawed interpretations of the evolution of the terms and structure of HS Chapter 2; the HS [Explanatory] Notes to Chapter 2, heading 0210 and Chapter 16; and the application of General Rule 3.[10]

Brazil requests that the Appellate Body reverse the conclusions and findings listed above. In the event the Appellate Body reverses the Panel's decision not to apply General Rule 3, Brazil requests that the Appellate Body complete the legal analysis by examining Brazil's claim that the application of General Rule 3 leads to the classification of the product under heading 0210 on the basis of the Panel's factual findings and the facts on the record.

The provisions of the WTO Agreement that Brazil considers the Panel to have erroneously interpreted or applied are Articles 6.2 and 7 of the DSU and heading 0210 of the EC Schedule read in conjunction with Articles II:1(a) and II:1(b) of the GATT 1994.

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[5] Panel Report, para. 7.205.

[6] Panel Report, paras. 7.204 and 7.205.

[7] Panel Report, paras. 7.223.

[8] Panel Report, paras. 7.222 and 7.223.

[9] Panel Report, paras. 7.238 and 7.241.

[10] Panel Report, Para. 7.241.

Annex III

WORLD TRADE ORGANIZATION

WT/DS286/9
27 June 2005

(05-2791)

Original: English

EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF FROZEN BONELESS CHICKEN CUTS

Notification of an Other Appeal by Thailand
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 27 June 2005, from the Delegation of Thailand, is being circulated to Members.

Pursuant to Article 17.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") and Rule 23 of the Appellate Body's Working Procedures for Appellate Review, Thailand hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report *European Communities – Customs Classification of Chicken Cuts*, WT/DS286/R, (the "Panel Report") and certain legal interpretations developed by the Panel in that Report.

Thailand seeks appellate review of:

(a) the Panel's findings and conclusion set out in paragraphs 7.25–7.32, that EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003 are outside its terms of reference;

(b) the Panel's findings and conclusion, set out in paragraphs 6.17, 6.18, 7.36 and 7.37, that the products included in the Panel's terms of reference are limited to frozen boneless chicken cuts impregnated with salt, with a salt content of 1.2%- 3%;

(c) the Panel's findings and conclusion, set out in paragraph 7.223, that all the "Explanatory Notes" of the Harmonized System cited by Thailand are "non-binding" and do not further clarify the interpretation of the concession in heading 02.10 of the EC Schedule; and,

(d) the Panel's findings and conclusion, set out in paragraph 7.238, that General Rule for the Interpretation of the Harmonised System 3 ("General Rule 3") is not applicable.

The above findings and conclusions are based on the following legal errors:

- the Panel's error in determining the scope of its terms of reference with respect to the measures at issue based on its interpretation, *inter alia*, that Thailand's panel request was not broad enough in its formulation to include EC Regulation No. 1871/2003 and EC Regulation No. 2344/2003. (paras. 7.16–7.32 of the Panel Report);

- the Panel's error in determining the scope of its terms of reference with respect to the products at issue by interpreting that the product at issue is determined by the measures the Panel considered to be within its terms of reference and not by the product described by Thailand in its request for the establishment of a panel. (paras. 7.36 and 7.37 of the Panel Report);

- the Panel's error in applying Article 31 of the Vienna Convention on the Law of Treaties with respect to its analysis of relevant aspects of the Harmonized System for the interpretation of the concession in heading 0210 of the EC Schedule. In particular, Thailand considers that the Panel erred in finding that the HS Explanatory Notes to heading 02.10 and Chapter 2 and the Note to Chapter 16 are not helpful to clarify the ordinary meaning of the term "salted" in the concession contained in heading 02.10 of the EC Schedule. Thailand also considers that the Panel incorrectly characterised the Note to Chapter 16 as an Explanatory Note when it is in fact a Chapter Note that forms part of the Harmonized System and is therefore binding. (paras. 7.206–7.223 of the Panel Report); and

- the Panel's error in deciding not to apply General Rule 3. The Panel improperly relied on the parties' position that – in their view – the product at issue does not fall *prima facie* under two or more headings and consequently erred in failing to provide its own analysis of whether the product at issue *prima facie* falls under two or more headings. (paras. 7.224–7.241.)

Thailand requests the Appellate Body to review the above findings or conclusions of the Panel. The provisions of the Marrakesh Agreement Establishing the WTO that Thailand considers the Panel to have erroneously interpreted or applied are heading 0210 of the EC Schedule read in conjunction with Article II:1(a) and II:1(b) of the GATT 1994, as well as Article 3.7, 6.2 and Article 7 of the DSU.

Annex IV

CHAPTER 2 OF THE HARMONIZED SYSTEM (1992 VERSION)

2	**MEAT AND EDIBLE MEAT OFFAL**
0201	**Meat of bovine animals, fresh or chilled**
0201.10	-Carcasses and half-carcasses
0201.20	-Other cuts with bone in
0201.30	-Boneless
0202	**Meat of bovine animals, frozen.**
0202.10	-Carcasses and half-carcasses
0202.20	-Other cuts with bone in
0202.30	-Boneless
0203	**Meat of swine, fresh, chilled or frozen.**
	-Fresh or chilled :
0203.11	--Carcasses and half-carcasses
0203.12	--Hams, shoulders and cuts thereof, with bone in
0203.19	--Other
	-Frozen :
0203.21	--Carcasses and half-carcasses
0203.22	--Hams, shoulders and cuts thereof, with bone in
0203.29	--Other
0204	**Meat of sheep or goats, fresh, chilled or frozen.**
0204.10	-Carcasses and half-carcasses of lamb, fresh or chilled
	-Other meat of sheep, fresh or chilled :
0204.21	--Carcasses and half-carcasses
0204.22	--Other cuts with bone in
0204.23	--Boneless
0204.30	-Carcasses and half-carcasses of lamb, frozen
	-Other meat of sheep, frozen :
0204.41	--Carcasses and half-carcasses
0204.42	--Other cuts with bone in
0204.43	--Boneless
0204.50	-Meat of goats
0205	**Meat of horses, asses, mules or hinnies, fresh, chilled or frozen.**
0205.00	Meat of horses, asses, mules or hinnies, fresh, chilled or frozen.
0206	**Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen.**
0206.10	-Of bovine animals, fresh or chilled
	-Of bovine animals, frozen :
0206.21	--Tongues
0206.22	--Livers
0206.29	--Other
0206.30	-Of swine, fresh or chilled
	-Of swine, frozen :
0206.41	--Livers
0206.49	--Other
0206.80	-Other, fresh or chilled
0206.90	-Other, frozen

2	**MEAT AND EDIBLE MEAT OFFAL**
0207	**Meat and edible offal, of the poultry of heading No. 01.05, fresh, chilled or frozen.**
0207.10	-Poultry not cut in pieces, fresh or chilled
	-Poultry not cut in pieces, frozen:
0207.21	--Fowls of the species *Gallus domesticus*
0207.22	--Turkey
0207.23	--Ducks, geese and guinea fowls
	-Poultry cuts and offal (Including livers) , fresh or chilled
0207.31	--Fatty livers of geese or ducks
0207.39	--Other
	-Poultry cuts and offal other than livers, frozen:
0207.41	--of fowls of the species *Gallus domesticus*
0207.42	--of turkeys
0207.43	--Of ducks, geese or guinea fowls
0207.50	--Poultry livers, frozen
0208	**Other meat and edible meat offal, fresh, chilled or frozen.**
0208.10	-Of rabbits or hares
0208.20	-Frogs' legs
0208.90	-Other
0209	**Pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted, fresh, chilled, frozen, salted, in brine, dried or smoked.**
0209.00	Pig fat, free of lean meat, and poultry fat, not rendered or otherwise extracted, fresh, chilled, frozen, salted, in brine, dried or smoked.
0210	**Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal.**
	-Meat of swine :
0210.11	--Hams, shoulders and cuts thereof, with bone in
0210.12	--Bellies (streaky) and cuts thereof
0210.19	--Other
0210.20	-Meat of bovine animals
0210.90	-Other, including edible flours and meals of meat or meat offal