ANNEX A

**EXECUTIVE SUMMARY BY THAILAND
AFTER THE FIRST SUBSTANTIVE MEETING**

(21 October 2004)

I. INTRODUCTION 2
II. BACKGROUND 3
A. FACTUAL BACKGROUND 3
B. EC REGULATIONS AND COMMISSION DECISION 4
1. Regulation No. 2658/87 of 23 July 1987 as amended by Regulation No. 535/94 of 9 March 1994 4
2. Regulation No. 3115/94 of 29 December 1994 5
3. Regulation No. 1223/2002 of 8 July 2002 6
4. Commission Decision of 31 January 2003 addressed to the Federal Republic of Germany 6
5. Regulation No. 1871/2003 of 23 October 2003 7
6. Regulation No. 2344/2003 of 30 December 2003 7
C. EXPORTS OF POULTRY FROM THAILAND TO THE EC 7
III. LEGAL ARGUMENTS 8
A. THE EC'S CLASSIFICATION OF FROZEN SALTED CHICKEN IS INCONSISTENT WITH THE CORRECT INTERPRETATION OF THE RELEVANT HEADINGS IN SCHEDULE LXXX 8
(a) The ordinary meaning 8
(b) The context 12
(c) The object and purpose 12
(d) The Harmonized System and the Explanatory Notes 13
(i) Terms of headings HS 0207 and HS 0210 13
(ii) Chapter Notes to Chapter 2 14
(iii) Heading notes to 0207 and 0210 14
(iv) General Rule of Interpretation 3 15
(e) EC Court Judgments 16
2. The supplementary means of interpretation under Article 32 confirm that frozen salted chicken should be classified under the HS heading 0210 17
B. THE EC'S CLASSIFICATION OF THE PRODUCT AT ISSUE RESULTS IN TREATMENT LESS FAVOURABLE FOR FROZEN SALTED CHICKEN THAN THAT BOUND IN THE EC'S SCHEDULE OF CONCESSIONS AND IS THEREFORE INCONSISTENT WITH ARTICLE II:1(A) AND ARTICLE II:1(B) OF THE GATT 18
IV. CONCLUSION 18

I. INTRODUCTION

1. The basic legal issue in this case is that, as a result of the EC's classification of frozen salted chicken cuts with a salt content of 1.2% by weight or more in a manner inconsistent with the correct interpretation of headings 0210 and 0207 in the EC's Schedule of Concessions, the EC provides to Thai exports of frozen salted chicken cuts treatment less favourable than that accorded to that product in the EC's Schedule of Concessions. The EC's measure is therefore inconsistent with the basic obligations set out in Article II:1(a) and Article II:1(b) of the GATT.

2. Tariff concessions are the cornerstone of the multilateral trading system. Article II of the GATT requires WTO Members to limit their ordinary customs duties or tariffs on a particular good as described in its Schedule of Concessions up to the maximum level specified therein. As recognised by the Appellate Body, "[a] basic object and purpose of GATT 1994 as reflected in Article II, is *to preserve the value of tariff concessions negotiated by a Member with its trading partners,* and bound in that Member's Schedule." (Emphasis added)[1]

3. Thus, a Member's obligation under Article II is to provide on products from other Members tariff treatment "no less favourable" than that described and bound on that product in its Schedule. A tariff concession is comprised of at least four essential elements: (i) the numerical heading, (ii) the description of the product, (ii) the maximum bound tariff level and, (iv) the method of valuation of the good for customs purposes. A Member's tariff concession would be rendered meaningless if that Member were able to alter unilaterally any of those elements in such a manner as to provide "less favourable treatment" to the products of other Members.

4. Thailand submits that the terms of the EC's concession cover chicken cuts deeply and homogenously impregnated in all parts with a total salt content of 1.2% or more by weight. The EC argues that this chicken meat is "salted" within the meaning of its tariff concession *only if the salt was added for the purpose of long-term preservation*. The EC argues that if long-term preservation is achieved through freezing, the Thai chicken meat can no longer be deemed to be "salted" and should not benefit from the EC's concession.

5. The basic interpretative issue is whether the term "salted" describes the *physical characteristics of the products benefiting from the tariff concession* - as claimed by Thailand - or whether that term refers to the *objective or purpose for which the product has been salted* – as argued by the EC. The EC's argument is entirely novel and would mean that in order to determine the customs classification of a product, it would no longer be sufficient to examine the physical characteristics of the product. Instead, it would also be necessary to examine for what *purpose* the product was given its physical characteristics. The EC's novel approach is not supported by the term "salted", is completely foreign to the Harmonised System, deviates from the normal practice of customs classification of Members and would, if introduced into WTO law, create great uncertainty in the determination of the scope of the tariff concessions.

6. There are also important practical reasons why classification must depend on the physical characteristics of the product: a customs officer clearing products upon import would not be in the best position to determine whether the characteristics of the product presented achieve a certain purpose or objective. The EC's first written submission to the Panel, citing judgments of the European Court of Justice, recognises this basic principle, stating that it is the "objective

[1] Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items* ("*Argentina – Textiles and Apparel*"), WT/DS56/AB/R, para. 47.

characteristics and properties" of products at the time of customs clearance that is the "decisive criterion" for the purposes of customs classification.[2]

II. BACKGROUND

A. FACTUAL BACKGROUND

7. During the Uruguay Round, the EC bound the products that fit the description of frozen boneless poultry cuts under subheading 0207.41.10 at the rate of 1024 ECU/T and designated those products as subject to the special safeguard provisions of Article 5 of the Agreement on Agriculture. The EC also bound the products that fit the description of salted meat under subheading 0210.90.20 at the *ad valorem* rate of 15.4%, but did not designate those products as being subject to the special safeguard provisions. In 1994, when the EC finalised its Schedule of Concessions, the prevailing view of the EC as defined in its own domestic Customs classification law ("Combined Nomenclature" or "CN") was that the product "salted meat" was meat that had been "deeply and homogeneously impregnated in all parts with a minimum salt content of 1.2%."[3] Therefore, Thailand's understanding was that the product that the EC had bound in its Schedule LXXX as salted meat of heading 0210.90.20 was consequently the product which met the EC's own definition of salted meat as stated in its own laws at that time.

8. In 1996, Thailand started exporting salted chicken to the EC in response to requests from European food processors for salted chicken meat that could be used directly in the manufacture of processed chicken products. These chicken products were deeply and homogenously impregnated with a minimum salt content of 1.2%. Due to the geographic distance between Thailand and the EC and the fact that the duration of transportation by ship takes between 21-28 days, Thai salted chicken exports by ship also have to be frozen. Even though the Thai salted chicken exports had always been frozen, the EC did not classify these products as frozen chicken. The EC considered it sufficient that the Thai exports met the EC's own definition of salted meat as set out in its Combined Nomenclature and, consequently, the EC's Schedule LXXX. As a result, from 1996 to mid-2002, Thai frozen salted boneless chicken cuts were classified by the EC as 'salted meat' under heading 0210.90.20 at the *ad valorem* tariff rate of 15.4%.

9. In November 2001, a Member of the European Parliament drew the attention of EC Agriculture Commissioner Fischler to an increase in EC imports of salted chicken and asked whether the EC could "unilaterally change the import duty on salted chicken fillet by raising the stipulated salt content of 1.2%".[4]

10. Commissioner Fischler replied that:

> [T]he Commission follows with great interest the evolution of imports on the market for all types of meat … The Honourable Member assumes that the meat in question is lightly salted and the salt may be shaken off. This fact would not be inconformity with the definition in the Combined Nomenclature which reads: 'For the purposes of heading 0210, the terms "meat and edible meat offal, salted, in brine, mean meat and edible meat offal, deeply and homogeneously impregnated in all parts having a total salt content of not less than 1.2% by weight." *The Commission is however not aware*

[2] As set out in the *Dinter* and *Gausepohl* judgements of the European Court of Justice, referred to in the EC's First Written Submission, para. 82.

[3] Commission Regulation (EC) No. 535/94 of 9 March 1994, published in the Official Journal of the European Communities No. L 68, 11 March 1994, p. 15. ("Regulation 535/94") Exhibit THA-3.

[4] Written Question E-3046/01 by Albert Maat (PPE-DE) to the Commission, 15 November 2002/C147/081. Exhibit THA-4.

> *that imported salted poultry meat does not comply with this definition*. The Commission has drawn the attention of Member States to monitor closely the compliance of these poultry meat imports with the relevant Community provisions in customs or veterinary legislation. *Furthermore, the options to deal with any problems that may arise regarding the products in question are being examined at present by the various departments of the Commission.* (Emphasis added.)[5]

11. In response to protectionist concerns, however, the EC adopted Regulation 1223/2002, which alters the description of the product by classifying "boneless chicken cuts, frozen and impregnated with salt in all parts with a salt content of 1.2 to 1.9%" under the subheading of 0207.14.10. As a result, chicken that previously met the definition of "salted meat" by virtue of its minimum salt content of 1.2% in all parts is now classified as "frozen chicken." Prior to Regulation 1223/2002, when the same chicken product was classified as salted meat, it was accorded tariff treatment at an *ad valorem* rate of 15.4%. Following Regulation 1223/2002, this same product - now classified as frozen chicken – is accorded the bound tariff rate of 102.4€/100 kg/net.[6] Based on 2003 chicken prices, the specific tariff rate is equivalent to an *ad valorem* rate of 58.9% -- much higher than the 15.4% *ad valorem* rate. On the basis of the average annual price of salted chicken exported from Thailand to the EC from 1997 to 2002, the equivalent *ad valorem* rate was 43.9%. This tariff rate is much higher than the bound rate of 15.4% that the EC committed to in its Schedule of Concessions for salted meat.

12. Nothing in the WTO Agreement allows a WTO Member to address an anomalous influx of imports by changing the description of a product so that it falls under a different tariff heading with a higher tariff level. Nevertheless, it is clear from exchanges in the European Parliament and other fora that this was precisely the EC's goal in its classification of Thai chicken. In this case, by modifying the description of frozen salted chicken, so that it is now classified as frozen chicken rather than salted meat, the EC has raised the tariff rate on that product from 15.4% to the *ad valorem* equivalent of 58.9% (based on the price of chicken in June 2003)[7] and effectively rendered its tariff concession on salted meat meaningless.

B. EC REGULATIONS AND COMMISSION DECISION

1. Regulation No. 2658/87 of 23 July 1987 as amended by Regulation No. 535/94 of 9 March 1994[8]

13. The applicable EC customs regime at the time of the conclusion of the Uruguay Round was set out in the Combined Nomenclature published in Annex I to Council Regulation 2658/87 on the tariff and statistical nomenclature and on the common customs tariff. Article 12 of Regulation 2658/87 provides that the Commission shall adopt each year no later than 31 October, by means of a Regulation, a complete version of the Combined Nomenclature together with the corresponding autonomous and conventional rates of duty. The most important element of the annual update is the amendment to Annex I to Regulation 2658/87, which contains the complete Combined Nomenclature.

---

[5] *Ibid.*

[6] Under Schedule LXXX the tariff rate provided for products under subheading 0207.41.10 is 1024 ECU/T, whereas under the EC's Combined Nomenclature, the tariff rate provided for products under subheading 0207.14.10 (the successor of heading 0207.41.10) is 102.4 € /100 kg/net.

[7] Thai chicken exports to the EC stopped in June 2003 as a result of the avian flu problem. In June 2003, the price of chicken was 1738.78€/tonne. Exhibit THA-2.

[8] Council Regulation (EEC) No. 2658/87, of 23 July 1987, on the tariff and statistical nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Communities No. L 256, 7 September 1987, p. 1 ("Regulation No. 2658/87"). Exhibit THA-6 (only relevant portion).

14. The structure of the Combined Nomenclature was based on that of the Harmonized System. Prior to the conclusion of the Uruguay Round, the Combined Nomenclature was amended by Regulation 535/94 which inserted the following additional note to Chapter 2 of the CN (originally additional note 8, renumbered in 1995 as additional note 7):

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

15. Regulation 535/94 provides that "… to ensure uniform application of the CN, provisions should be laid down for the classification of *salted meat* and edible meat offal falling within CN code heading 0210, *in order to distinguish them from fresh, chilled or frozen meat and edible meat offal; whereas a total salt content of 1.2% or more by weight appears to be an appropriate criterion for distinguishing between these two types of products*" (emphasis added). At this point, therefore, the EC considered that a product with a salt content of 1.2% satisfied the criterion to be met for a product to be classified as salted meat under heading 0210 and served to distinguish that product from products that were fresh, chilled or frozen.

16. The verification process of tariff schedules among all Uruguay Round negotiating parties took place from 15 February to 25 March 1994.[9] It was during this period of verification of tariff schedules, that, by way of Regulation 535/94, the EC clarified the scope of its tariff concession under heading 0210, in particular, with respect to the term "salted." This additional note was published in Regulation 535/94 on 11 March 1994 and remained valid in the EC Combined Nomenclature until 13 November 2003.[10]

2. Regulation No. 3115/94 of 29 December 1994

17. The definition of "salted" as set out in Regulation 535/94 was incorporated into Regulation 2658/87 through Regulation 3115/94.[11] The Preamble of Regulation 3115/94 states the need to:

> … amend the combined nomenclature to take account of:
>
> - changes in requirements relating to statistics or commercial policy, in particular by virtue of *Council Decision bringing into force simultaneously the acts implementing the results of the Uruguay Round of multilateral trade negotiations* and Council Regulation concerning certain measures resulting from the conclusion of negotiations under Article XXIV:6 and other measures necessary for simplification purposes,
>
> - the need to align or clarify texts; (emphasis added.)

18. Regulation 3115/94 was enacted in order to meet the requirements of Article 12 of Regulation 2658/87 which provides for the Commission to adopt each year a complete version of the Combined Nomenclature.

---

[9] Informal Meeting of Heads of Delegation of 20 January 1994, Statement of the Chairman, MTN.TNC/W/131, 21 January 1994. Exhibit THA-7.

[10] Regulation 535/94 was only replaced on 14 November 2003 by Regulation 1871/2003, which entered into force on the 20th day following the day of its publication in the Official Journal on 25 October 2003.

[11] Commission Regulation (EC) No. 3115/94 of 20 December 1994, amending Annexes I and II to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the common customs tariff, published in the Official Journal of the European Communities, No. L 345, 31 December 1994, p. 1. ("Regulation 3115/94"). Exhibit THA-8.

3. Regulation No. 1223/2002 of 8 July 2002[12]

19. Regulation 1223/2002, concerning the classification of certain goods, states that its adoption is necessary to ensure the uniform application of the Combined Nomenclature pursuant to the general rules for the interpretation of the Combined Nomenclature laid down in Regulation 2658/87.[13]

20. Article 1 of Regulation 1223/2002 sets forth that goods described in column 1 of the table set out in the Annex to the Regulation should be classified under the CN code indicated in column 2, by virtue of the reasons set out in column 3. The Annex to Regulation 1223/2002 is reproduced below:

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

21. Article 2 of Regulation 1223/2002 further established that binding tariff information (BTI) issued by customs authorities of EC Member States, which was not in accordance with the provisions of the Regulation, could continue to be invoked for a period of three months. Regulation 1223/2002 entered into force on 29 July 2002 and is binding in its entirety and directly applicable in all EC Member States.[14]

4. Commission Decision of 31 January 2003 addressed to the Federal Republic of Germany[15]

22. On 12 February 2003, the Commission of the EC adopted Commission Decision of 31 January 2003 ("Decision") concerning the validity of certain BTIs issued by Germany. The Decision noted that Regulation 1223/2002 was adopted to clarify and confirm the classification of the products described as frozen poultrymeat of heading 0207, under CN subheading 0207.14.10 "[b]oneless chicken cuts, frozen and impregnated with salt in all parts. They have a salt content by

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

[13] Recital (2) of Regulation 1223/2002.

[14] On 13 August 2002, the EC issued a Corrigendum regarding recital (5) of Regulation No. 1223/2002. Recital (5) of Regulation No. 1223/2002 stated that the measures provided for in Regulation No. 1223/2002 were in accordance with the opinion of the Customs Code Committee. Pursuant to the Corrigendum, recital (5) now provides that "[t]he Customs Code Committee has not issued an opinion within the time limit set by its Chairman." Official Journal of the European Communities, L 217, 13 August 2002, p.8. Exhibit THA-10.

[15] Commission Decision of 31 January 2003 concerning the validity of certain binding tariff information issued by the Federal Republic of Germany. Official Journal of the European Communities No. L 36, 12 February 2003. Exhibit THA-11.

weight of 1.2 to 1.9%. The product is deep-frozen and has to be stored at a temperature of lower than -18° to ensure conservation for at least one year."

23. According to the Decision, following the publication of Regulation 1223/2002, all BTIs previously issued by Member States classifying the products concerned as salted meat of heading 0210 ceased to be valid. Pursuant to Regulation 1223/2002, some Member States later issued BTIs for frozen chicken cuts containing 2 to 2.7% of salt, under heading 0207. Nevertheless, there were a number of cases in which Germany was issuing BTIs classifying frozen boneless chicken cuts containing between 1.9 and 3% by weight of salt, under heading 0210.

5. Regulation No. 1871/2003 of 23 October 2003

24. On 25 October 2003, the EC published Commission Regulation (EC) No.1871/2003 of 23 October 2003, amending Annex I to Council Regulation (EEC) 2658/87.[16] Recital 3 of Regulation 1871/2003 maintains that classification in Chapter 2 of the Combined Nomenclature depends essentially on the process employed to ensure the long-term preservation of a given product. Recital 4 states that, according to the Harmonized System explanatory notes to Chapter 2, "fresh meat remains classified as fresh meat if it has been packed with salt as a temporary preserving agent during transport and that this reasoning equally applies to frozen meat." Recital 4 adds that for the purposes of heading 0210 (which comprises the EC's concession under heading 0210.90.20), salting must be sufficient to ensure long-term preservation for purposes other than transportation.

25. Recitals 5 and 6 reiterate that salting, within the meaning of heading 0210, is a process used to ensure long-term preservation and noted that additional note 7 to Chapter 2 of the CN should be amended accordingly. Therefore, Article 1 of Regulation 1871/2003 provides that the additional note 7 to Chapter 2 of the Combined Nomenclature is replaced by the following:

> For the purposes of heading 0210, the terms ‘meat and edible meat offal, salted, in brine' mean meat and edible meat offal deeply and homogeneously impregnated with salt in all parts and having a total salt content of not less than 1.2% by weight, provided it is the salting which ensures long-term preservation.

6. Regulation No. 2344/2003 of 30 December 2003

26. In light of these changes, the EC adopted Article 1 of Regulation 2344/2003, which, amends Annex I to Regulation 2658/87, including the amendment made by Regulation 1789/2003. Regulation 2344/2003 came in to force on 1 January 2004 and is binding in its entirety and directly applicable in all EC Member States.

C. EXPORTS OF POULTRY FROM THAILAND TO THE EC

27. Thailand began exporting salted chicken to the EC in 1996 in response to specific requirements of importers. Salted chicken is not sold to the average consumer. Rather, it is sold to the food processing industry. The salted chicken is used in the manufacturing of processed chicken products, such as chicken nuggets. For this end-use, salted chicken helps the manufacturers reduce preparation time and costs. The salt serves to reduce moisture loss during the cooking process, and results in meat with better processing properties.

[16] Commission Regulation (EC) No. 1871/2003, of 23 October 2003, amending Annex I to Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, published in the Official Journal of the European Union No. L 275, 25 October 2003, p. 5 ("Regulation No. 1871/2003"). Exhibit THA-13. All references to the recitals are made to this document.

III. LEGAL ARGUMENTS

A. THE EC'S CLASSIFICATION OF FROZEN SALTED CHICKEN IS INCONSISTENT WITH THE CORRECT INTERPRETATION OF THE RELEVANT HEADINGS IN SCHEDULE LXXX

28. The EC's Schedule LXXX is an annex to the GATT and must be interpreted in accordance with the Vienna Convention on the Law of Treaties. As the Appellate Body confirmed in *EC – Customs Classification of Certain Computer Equipment*:

> A Schedule is made an integral part of the GATT 1994 by virtue of Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the Vienna Convention.[17]

29. Applying Articles 31 and 32 of the Vienna Convention, Thailand submits that the scope of the EC's concessions under 0210 includes the Thai chicken product at issue here.

30. The ordinary meaning of the terms of Schedule LXXX provides a clear description of the products falling under headings 0210 and 0207, respectively. Heading 0210 covers "meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal." The ordinary meaning of "meat" includes poultry. The ordinary meaning of "salted" is "impregnated with, containing or tasting of salt."[18] The term "salted "is followed by the terms "in brine, dried, or smoked." The definitions of these terms are the following:

- in brine: "water, saturated or strongly impregnated with salt or to soak in or to saturate in brine"[19];
- dried: "to make or to become dry by wiping, evaporation, draining, etc., or to preserve (food, etc) by removing the moisture"[20];
- smoked: "to cure or darken by the action of smoke."[21]

31. The common element in these terms and in the term "salted" denotes an additional process to the natural state of the meat. That process could be either salting the meat, putting it in brine, drying it or smoking it. In other words, the common element is that the product undergoes a process that changes its natural condition by preparing it.

32. In contrast, heading 0207 covers "meat and edible meat offal of the poultry of heading 0105, fresh, chilled or frozen." The heading 0105 covers "live poultry, that is to say, fowls of the species *Gallus domesticus*, ducks, geese, turkey and guinea fowls." Domestic chicken is a fowl of the species *Gallus domesticus*.

(a) The ordinary meaning

33. The ordinary meaning of "fresh" refers to food "…not preserved by salting, tinning, freezing, etc."[22], "recently made, produced or harvested; not stale or spoiled" and "not preserved, as by canning

---

[17] Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*") WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 84.

[18] *The Concise Oxford Dictionary,* 9th Edition, Oxford University Press 1995, p. 1218.

[19] *Ibid*., p. 163.

[20] *Ibid*., p. 147.

[21] *Ibid*., p. 1313.

[22] *Ibid*., p. 541.

or freezing."[23] The ordinary meaning of "chilled" is to "preserve by cooling."[24] The ordinary meaning of frozen is to "…preserve (food) by refrigeration below freezing point"[25] or "to preserve (food for example) by subjecting to freezing temperatures".[26]

34. Based on the ordinary meaning of these three terms, heading 0207 covers poultry meat that is either fresh, chilled or frozen, which are the various stages in which the poultry meat may be maintained so that it is in its original natural state or may be easily returned to its original state. As noted, "[f]reezing is one of the easiest and least time-consuming methods of food preservation. Most foods retain their natural color, flavour, texture better than when other methods of food preservation are used" (such as canning).[27] There is no indication from the ordinary meaning of the terms in the headings that the state of freshness or the state of preservation by cooling is a more important criterion to determine classification than the state of preparation. Furthermore, even assuming preservation were the relevant criterion, there is certainly no reference to *long-term* preservation or conservation as being the decisive factor to determine the eventual classification of the product.

35. The term "frozen" refers to the preservation of the product by cooling or refrigeration. The verb "preserve" means "to maintain (a thing) in its existing condition"[28] or "to prevent (organic bodies) from decaying or spoiling."[29] In the light of these definitions, a "frozen" product that can be maintained in or returned to its original state without any change in its physical or chemical characteristics. If a product is frozen, it can easily be thawed in order to return the product to its original state.

36. In contrast to freezing, the salting of a product entails a process which alters the original state of the product. Meat of heading 0210 is "meat … salted, in brine, dried, smoked." Chicken that has been subject to one of these preparation processes: salt impregnation, salt-water immersion, removal of moisture or darkening caused by smoke falls under 0210.

37. Moreover, the processes listed in heading 0207 can be clearly distinguished from those in heading 0210. A process is defined in the *New Shorter Oxford English Dictionary* as, *inter alia*, "[a] thing that goes on or is carried on; a continuous series of actions, events or changes; a course of action, a procedure; *esp*. a continuous and regular action or succession of actions occurring or performed in a definite manner; a systematic series of actions or operations directed to some end, as in manufacturing, printing, photography, etc." Heading 0207 covers products that are "fresh, chilled, or frozen." If a product is fresh it cannot be said to have undergone a process. Chilling and freezing may be considered as processes. Of the three states (fresh, chilled or frozen) listed in the note to heading 0207, chilling and freezing relate to a process to ensure the purpose of preservation. However, all of the processes in heading 0207 relate to the temperature of the product. The note to heading 0207 states:

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

---

[23] *The American Heritage College Dictionary*, 3rd edition, Houghton Mifflin Company, 1993, p. 545.
[24] *The Concise Oxford Dictionary*, 9th edition, Oxford University Press, 1995, p. 228.
[25] *Ibid*., p. 539.
[26] *American Heritage College Dictionary*, 3rd edition, Houghton Mifflin Company, 1993, p.544.
[27] B.J. Willenberg, Department of Food Science and Human Nutrition, University of Missouri-Columbia, http://muextension.missouri.edu/xplor/hesguide/foodnut/gh1501.htm, last accessed 3 August 2004. Exhibit THA-14.
[28] *The Concise Oxford Dictionary*, 9th edition, Oxford University Press 1995, p. 1081.
[29] *American Heritage College Dictionary*, 3rd edition, Houghton Mifflin Company, 1993, p. 1082.

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

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

39. Chicken is salted by placing the meat in a drum-shaped container to which the salt is added. The container with the meat is slightly shaken ("tumbled") until the salt is dissolved. The meat is then left in the solution for a specified period of time. This process causes the meat to be salted to the very core of the product. Once the meat is salted in this manner, it cannot be completely washed off or otherwise thoroughly de-salted. The salt has two main effects on poultry: "[i]t dissolves protein in muscle, and the salt and protein reduce moisture loss in cooking. This makes the meat juicier, more tender and improves the flavour. The low levels of salt enhance the other natural levels of poultry."[30] High levels of salt are known to increase the water-binding properties of a meat product.[31] Thus, a frozen boneless chicken cut, once thawed and cooked, will taste the same as a fresh boneless chicken cut once cooked. However, a chicken cut that is salted, put in brine, dried or smoked would taste quite different once cooked after having undergone such a process.

40. Following the advent of refrigeration, there are more modern ways of preserving food than the use of salt. Therefore, today, salt is used primarily to flavour or to prepare food. Indeed, the EC has acknowledged that that "the exclusive use of salting of meat products for preservation is now relatively rare,"[32] and that "[p]roducts preserved by salting (or a combination of salting, drying and smoking) remain popular today *primarily by virtue of their taste and other characteristics*, regardless of the fact that *they are preserved by methods which have been surpassed* (at least technologically) by freezing" (emphasis added).[33] Thailand agrees with these EC statements.

41. Thailand emphasises that this dispute concerns tariff treatment under Article II of the GATT, therefore, requires an examination of the EC's concession in heading 0210 and an assessment of whether the product at issue has the physical characteristics of the product described in the EC's Schedule of Concessions. While the production processes that impart these characteristics and the end-uses of the product might be relevant to a determination of the likeness of products under GATT Article III, they are not relevant to the issue in this dispute.

42. Once a product is salted, it cannot be completely unsalted by immersion in water. The essential character of the chicken product is changed as a result of the salting. This also limits its end-uses. The salted chicken exported by Thailand to the EC is sold to the food processing industry in the EC and is intended for use in the manufacture of value-added chicken products. The importers in the EC market regard salted and unsalted chicken as completely different products.

43. The EC has stated that "[t]he addition of salt does not alter the character of the product as frozen meat under 0207." If this rationale were to be adopted by other countries, it would mean that a product such as Danish slab bacon which is smoked and cured but nevertheless frozen for export

---

[30] Dr. Alan Sam, Food Safety Feature, United States Department of Agriculture, December 1999, http://www.fsis.usda.gov/OA/pubs/bastebrine.htm, last accessed 3 August 2004. Exhibit THA-15.

[31] Effects of Preblending, Reduced Fat and Salt Levels on Frankfurter characteristics, *Journal of Food Science*, Volume 52, No.5, p. 1149 -1151, at 1151. Exhibit THA-16.

[32] EC's First Written Submission, para. 39.

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

purposes would have to be classified as frozen rather than smoked. Thailand has also submitted evidence that other salted meat products, such as Parma ham, prosciutto and jamón serrano must be conserved at a temperature below that of ambient temperature, namely at a chilled level. In other words, these products may be salted and dried but they are also chilled.

44. Moreover, the ordinary meaning of the term "salted" does not imply that the product must be salted for the purpose of preservation. Despite the fact that this purpose is not found in the ordinary meaning of "salted" and that the EC's own definition of salted for the purpose of heading 0210 (as stated in Regulation 535/94) did not refer to preservation, or long-term preservation, the EC nevertheless introduced in Regulation 1871/2003 the requirement that salting, of heading 0210, "…is a process used to ensure long-term preservation." The introduction of such a requirement is baseless and without any textual support in heading 0210.

45. The EC must be presumed to have been aware of the percentage of salt required to preserve a product for the purpose of long-term preservation. In its first definition of the terms "salted, in brine" under heading 0210 in Regulation 535/94, the EC established stipulated a minimum salt content of 1.2% deeply and homogeneously impregnated in all parts. At this low level, the product cannot be preserved by salting alone, as the Preamble in Regulation 535/94 acknowledges in stating that "provisions should be laid down for the classification of *salted meat* and edible meat offal falling within CN code heading 0210, *in order to distinguish them from fresh, chilled or frozen meat and edible meat offal; whereas a total salt content of 1.2% or more by weight appears to be an appropriate criterion for distinguishing between these two types of products*." If it were necessary to establish a minimum level of salt to classify a product as salted rather than frozen, it is clear that the EC assumed that such a product would enter the EC either in a salted and fresh state, or in a salted and chilled state, or in a salted and frozen state. Otherwise, there would be no need to distinguish these products from each other.

46. The Appellate Body has stated that one of the corollaries of the "general rule of interpretation" in Article 31 is that "interpretation [of a treaty] must give meaning and effect to all the terms of a treaty." An interpreter may not adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[34] The EC's interpretation of requiring "salting" to be carried out for the purpose of long-term preservation reduces the ordinary meaning of the term "salted" in heading 0210 and the EC's tariff concessions under that heading (when a product is both frozen and salted) to inutility.

47. Moreover, the EC has failed to demonstrate that WTO Members agreed that only meat salted for the purpose of long-term preservation would fall within the definition of "salted." The Appellate Body has said that the "[t]he duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties … [p]rinciples of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[35] There is no basis to impute the concept of preservation into the definition of "salted."

48. In addition, the EC itself acknowledges that the ordinary meaning of "salted" in heading 0210 can either refer to meat that has been "preserved by salt" *or* to meat for which "it's (sic) flavour has been altered by the addition of salt".[36] There may be purposes for salting other than those cited by the EC. However, the only common denominator between these meanings is that salt must be included in

[34] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/AB/R, page 23.

[35] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (US)*, WT/DS50/AB/R, adopted 16 January 1998, para. 45.

[36] EC's First Written Submission, para. 121.

the product. As acknowledged by the EC, the ordinary meaning of "salted" does not resolve the question of which meaning should be preferred[37] and the choice of which of the two possible meanings it cites for "salted" in heading 0210 must be resolved through an analysis of the "context."

(b) The context

49. The context of the headings in the EC's schedule of concessions also supports Thailand's arguments. Heading 0210.90 of the EC's Schedule of Concessions covers all salted meat other than "meat of swine" and "meat of bovine animals." In turn, the subheading 0210.90.20 covers salted meat other than "meat of swine" and "meat of bovine animals" and "horsemeat, salted in brine" and meat "of sheep and goats" as there are specific sub headings for such meat. "Salted meat" of chicken is not excluded from the terms of heading 0210.90.20 under this contextual analysis. Applying the principle *expressio unius est exclusio alterius*, this heading must be construed as including other types of meats not expressly excluded (*e.g.*, chicken). Therefore, this context confirms that the ordinary meaning of "salted meat" covers chicken.

50. Second, the structure of the headings at the 4-digit level indicates that the first 8 headings refer to different types of meat and offal that are fresh, chilled or frozen. There is one heading, namely that of 0209, pig fat, which covers not only fresh, chilled or frozen, but also salted, in brine, dried or smoked. The last heading covers meat and edible meat offal, salted, in brine, dried or smoked. Therefore, the products are either classified as fresh, chilled or frozen (the first 8 headings) or as salted, in brine, etc (heading 0210); only heading 0209, specifically lists all the various states. However, the heading 0210 does not list all the states. It only lists the states of salted, in brine, dried or smoked. This indicates that, for heading 0210, the type of preparation is the determining factor for the classification of that product.

51. The EC alleges that an interpretation of the term "salted" in its context must mean exclusively that meat is salted for the purpose of long-term preservation.[38] The context the EC examines is the surrounding terms in heading 0210 of "in brine", "dried", and "smoked". From these three terms, the EC attempts to infer that the common denominator is that of preservation. However, these terms also go to the *preparation* of the product. An examination of the context of the other tariff headings, such as headings 0812 and 0814 in the EC's Schedule LXXX shows that when preservation is the relevant criterion, it is expressly stated. Thus, when the EC considers that a product must be classified on the basis of its preservation characteristics, that objective characteristic of preservation is specifically listed in the tariff heading itself. Heading 0210, in contrast, makes no reference at all to a preservation requirement.

(c) The object and purpose

52. The Appellate Body has stated that the object and purpose of the Article II of the GATT, is *to preserve the value of tariff concessions negotiated by a Member with its trading partners,* and bound in that Member's Schedule. It is therefore essential that the description of the products falling under a particular subheading be maintained as they were established at the time of the negotiation of the concession. Accordingly, not only the numerical headings and the tariffs levels, but also the description of the products which give that tariff binding its complete scope and content must be respected in order to preserve the value of a concession.. A Member is not permitted, as the EC has done here, to undermine its concessions in its Schedule by changing the description of products falling under a particular heading.

[37] *Ibid.*, para. 122.
[38] *Ibid.*, para. 13.

(d) The Harmonized System and the Explanatory Notes

53. In *EC – Computer Equipment*, the Appellate Body made clear that a proper interpretation of Schedule LXXX must include a consideration of the Harmonized System and its Explanatory Notes. The EC's customs classification law, as set out in its Combined Nomenclature[39] is based on the Harmonized System. In the present case, therefore, the Panel should examine the Harmonized System and its Explanatory Notes in order to conduct a proper examination of the terms of Schedule LXXX.

54. Article 1 of the Harmonized System Convention defines the Harmonized System as comprising, *inter alia*, the General Rules for the Interpretation of the Harmonised System. Article 3.1(a) obliges Contracting Parties to ensure that its "Customs tariff and statistical nomenclatures shall be in conformity with the Harmonised System." Thus, if the Panel were to consider the Harmonized System, it would need to rely upon the General Rules for the Interpretation of the Harmonized System because they are an integral part of the Harmonized System.

55. In addition, the EC and Thailand as Contracting Parties to the Harmonized System Convention have accepted, *inter alia*, the following obligations under Article 3 of the Harmonized System Convention:

> (i) [they] shall use all the headings and subheadings of the Harmonized System without addition or modification, together with their related numerical codes;
>
> (ii) [they] shall apply the General Rules for the interpretation of the Harmonized System and all the Section, Chapter and Subheading Notes, and *shall not modify the scope of the* Sections, Chapters, *headings or subheadings of the Harmonized System* … (emphasis added)

56. The EC has also agreed to apply the General Rules for the Interpretation of the Harmonized System[40], including, in particular, General Rule of Interpretation l, which provides that:

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

(i) Terms of headings HS 0207 and HS 0210

57. The classification of products under HS 0207 and 0210 must be examined according to the terms of the headings.[41] The terms in the headings 0207 and 0210 in Schedule LXXX and the Harmonized System are identical. Under HS heading 0210, the term "salted" is not qualified in any way. In particular, there is no quantitative specification in the heading as to the threshold level of salt that must be met to classify the product as salted.

[39] *See* Regulation 2658/87.

[40] General Rules for the Interpretation of the Harmonized System. Exhibit THA-20.

[41] Therefore, as the titles of the Section (i.e. Live animals, animal products) and of the Chapter (i.e. Meat and edible meat offal) are provided for ease of reference only and have no legal status, they are not taken into account here for the purposes of classification.

(ii) Chapter Notes to Chapter 2

58. The Section Note to Section 1 covering "Live Animals, Animal Products" (the Section within which Chapter 2 falls) is not useful in the present case for the proper classification of the product at issue.

59. The first item in the General Note to Chapter 2 provides that the Chapter covers meat and meat offal in the following states: (i) fresh; (ii) chilled; (iii) frozen; and (iv) salted, in brine, dried or smoked. The state of "fresh" may include meat and meat offal that is packed with salt as a temporary preservative. The fact that the salt in this case is used as "packing" means that the salt has not impregnated the product and may be easily washed off. Meat that has been temporarily packed with salt does not have its essential characteristics modified. This temporary packing with salt is completely different from the process of adding salt so that it is deeply and homogenously impregnated with salt in all parts.[42] In Regulation 1871/2003, the EC extrapolates from the reasoning in the first item in the Chapter Note to the effect that if the addition of salt in fresh meat means that the meat must be classified as fresh, then the addition of salt in meat that is frozen means that the meat must be classified as frozen. However, this is inconsistent with the EC's own definition of "salted" in Regulation 535/94 meaning a product that is "deeply and homogenously impregnated with salt in all parts and having a total salt content of not less than 1.2% by weight." It is also inconsistent with the rationale in item 1 of the Chapter Note stating that fresh meat that has been packed with salt as a temporary preservative must be classified as fresh meat. Thai chicken exports are not 'packed' with salt as a temporary preservative. They are deeply and homogenously impregnated with salt in all parts at a minimum of 1.2% in order to prepare the product. Therefore, once the salt is added as more than a temporary preservative, it must be classified as something other than "fresh" or "frozen". It must be classified as "salted."

(iii) Heading notes to 0207 and 0210

60. The note to heading 0207 (which the EC claims the product at issue falls under) provides, in part, that:

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

61. Chapter 2 covers the classification of meat in different states or which have undergone different processes: fresh, chilled, frozen, salted, in brine, dried or smoked. However, the note to heading 0207 makes clear that it applies *only* to meat in *three* of them – i.e., fresh, chilled or frozen. In other words, heading 0207 clearly excludes meat that is salted, in brine, dried or smoked.

62. Applying the principle of treaty interpretation, *expressio unius est exclusio alterius*, the note to heading 0207 expressly includes meat that is fresh, chilled or frozen out of *all* the possible different states of meat covered by Chapter 2. Therefore, heading 0207 expressly excludes meat that is salted, in brine, dried or smoked. Thailand submits that by adding meat that is salted to fall under the

[42] Indeed, Commissioner Fischler recognised the difference between the usage of salt for temporary purposes which could be easily washed off and the usage of salt for longer-lasting duration. As quoted above, in his reply to the Member of Parliament referring to the imports of salted chicken from Thailand, among others, he stated: "… [t]he Honourable Member assumes that the meat in question is lightly salted and the salt may be shaken off. This fact would not be in conformity with the definition in the Combined Nomenclature which reads: 'For the purposes of heading 00210, the terms 'meat and edible meat offal, salted, in brine, mean meat and meat offal deeply and homogeneously impregnated in all parts having a total salt content of not less than 1.2% by weight'. The Commission is however not aware that imported salted poultry meat does not comply with this definition … " *See* Exhibit THA-4.

classification of heading 0207, the EC is specifically *modifying the scope of the HS heading 0207*. By modifying the scope of the HS heading, it is consequently modifying the scope of heading 0207 in Schedule LXXX.

63. Heading 0207 specifically excludes meat that is salted, in brine, dried or smoked because they have undergone a process of preparation. This interpretation is supported by the note to heading 0210, which states that " "This heading applies to *all kinds of meat* and edible meat offal which have been *prepared as described in the heading*" (emphasis added). Therefore, any meat that is prepared as described in the heading must be classified under heading 0210.

64. There is no textual justification in the Chapter or heading notes in the HS to support the EC's position that the method of conservation or preservation alone should determine proper classification of a product. The Chapter and heading notes confirm the ordinary meaning of salted to mean a product that contains salt, and not a product that is preserved by the method of salting. Applying General Rule of Interpretation 1, which provides that classification shall be determined according to the terms of the headings and the relevant notes, salted chicken, which is frozen, must be classified under only one heading 0210, specifically under subheading 0210.90 of the Harmonized System nomenclature.

65. Thailand also emphasises that the HS does not characterise "preservation and preparation" as "processes." Rather, they are the *purposes* for which a particular *process* is undertaken. For example, a product may be smoked by a particular process in order to achieve the purpose of preparation. Thus, the *Explanatory Note* t o Chapter 2 makes a reference to "prepared or preserved by any process". The *Chapter Note* to Chapter 16 makes a reference to "prepared or preserved by the processes specified in Chapter 2 or 3 or heading 05.04." This means that the *purposes* of preservation and preparation may be achieved by the *processes* which are specified in Chapter 2, Chapter 3 and in heading 05.04.

66. Insofar as the purpose of the process is relevant to the scope of the EC's concession on 0210 in Schedule LXXX, the purpose of the processes in 0207 (chilling or freezing) would be that of preservation. The purpose of the processes to which products falling under heading 0210 are subject would be that of preparation. This is confirmed by the EC's own Additional Note 6 which states that: "products falling within heading No. 0210 to which seasoning has been added during the *process of preparation* remain classified therein, provided that the addition of seasoning has not changed the character of the product"(emphasis added). This Additional Note 6, which clearly refers to products in heading 0210 as having undergone a process for the purpose of preparation, has been included in the EC's Combined Nomenclature since at least 1992 until 2003. This definition is still in the 2003 version of the Combined Nomenclature.

(iv) General Rule of Interpretation 3

67. General Rule of Interpretation 3(a) states that the heading which provides the most specific description of the product shall be preferred to headings providing a more general description. In this case, salting, unlike freezing, modifies the characteristics of a product. Salted chicken has a different flavour and texture that cannot be removed and makes it suitable for the manufacture of processed chicken products. In contrast, frozen and unfrozen chicken are the same product and once a product has been frozen it can be easily thawed to return to its original state. The EC has acknowledged this in the context of an anti-dumping investigation on imports of Salmon from Norway, Chile and the Faeroe Islands, where it noted that "freezing of salmon was [not] sufficient to alter the basic characteristics of the product" and that "[r]ather than adding value to the product that was appreciated

by certain users, it was considered that one of the main reasons for freezing the product was to facilitate its transport to the Community."[43]

68. In addition, General Rule of Interpretation 3(b) is not applicable to an edible meat product as it relates to "mixtures, composite goods consisting of different materials or made up of different components." Rule 3(c) provides that when the classification of goods cannot be resolved by reference to Rule 3(a) or Rule 3(b) they shall be classified under the heading which occurs last in numerical order among those that equally merit consideration.

69. However, the minutes of the EC's Customs Code Committee state that the "… product corresponds at the same time to the wording of the heading 0207 (frozen) and to the wording of the heading 0210 (salted)." In its First Written Submission, Thailand indicated that it did not consider that Rule 3(c) is applicable in this case because the product at issue is only classifiable under heading 0210 as salted meat and not under the heading of 0207 for frozen chicken. Nonetheless, if the Panel were to consider that the product is *prima facie* classifiable under both 0207 and 0210, then the application of Rule 3(c) would be warranted. In that event, between the two headings that equally merit consideration in the view of the EC's Customs Code Committee, heading 0210 occurs last in numerical order. Therefore, the Panel could find on this basis alone that the product frozen salted chicken is classifiable under heading 0210.

(e) EC Court Judgments

70. The EC relies on the *Gausepohl* case, in which Court of Justice held that for meat of bovine animals to be classified under heading 0210, the product had to be (i) deeply and evenly impregnated with salt in all its parts; (ii) for the purposes of long-term preservation; and (iii) with a minimum total salt content of 1,2% by weight. However, when the EC codified the findings of the *Gausepohl* case in Additional Note 8 through Regulation 535/94 (later renumbered as Additional Note 7), which was published prior to the *conclusion* of the Uruguay Round, it retained the first and third of these criteria, but specifically omitted the second criterion that the product had to be for the purpose of long-term preservation. This was not just an unintended omission; the EC deliberately decided to exclude the notion of long-term preservation. Therefore, as of the time of the *conclusion* of the treaty, the EC itself recognised that the "purpose of long-term preservation" was not a relevant factor for determining whether a product should be considered as salted, and therefore, classified, under 0210. This confirms that the EC was of the view at that time that products had to be classified on the basis of the objective physical characteristics. This is presumably why the Commission "partly altered its position in the course of the oral procedure by suggesting a minimum salt content required for meat to be classified under heading 0210, namely 1.2% of the weight."[44] The logic of the *Gausepohl* case also contradicts the EC's claim that the purpose of preservation was so self-evident that it saw no need to include specific reference to this criterion in Regulation 535/94.

71. Moreover, EC documents submitted by Thailand directly contradict the EC's position. The Minutes of the EC's Customs Code Committee of 25 January 2002 expressly acknowledged that the element of long-term preservation was excluded from the final definition of "salted" meat for the purposes of classification under heading 0210 in Regulation 535/94 and subsequently in Additional Note 7.[45]

---

[43] Council Regulation (EC) No. 930/2003 of 26 May 2003, terminating the anti-dumping and anti-subsidy proceedings concerning the imports of farmed Atlantic salmon originating in Norway and the anti-dumping proceedings concerning imports of farmed Atlantic salmon originating in Chile and the Faeroe Islands, published in the Official Journal of the European Communities No. L 133, 29 May 2003, p.01. para. 19. ("Regulation 930/2003") Exhibit THA-21.

[44] EC's First Written Submission, Exhibit EC-14, Opinion of the Advocate General Tesauro, para. 7.

[45] Exhibit THA-22.

72. Under EC law, Additional notes, such as "Additional note 7", become part of the heading to which they refer. As explained by the European Court of Justice,

> [… an Additional Note] decided upon by the Council, becomes *part of the heading to which it refers* and *has the same binding effect* whether it constitutes an authentic interpretation of the heading or supplements it.[46] (emphasis added).

73. The EC has also specified quantitative levels that must be met for a product to be considered as "dried or smoked." Additional Note 2(E) in Chapter 2 provides that:

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

74. The structure of Additional Note 2(E) is the same as that of Additional Note 7, in that the classification of a product as "dried or smoked" or "salted" is dependent on a neutral and objective criterion – here, a specific water/protein ratio. In both instances, these criteria for determining whether a product would fall under heading 0210 could be easily assessed by a Customs Officer at the border. In addition, there is no requirement in Additional Note 2(E) that the product must be dried or smoked for the purposes of long-term preservation.

2. The supplementary means of interpretation under Article 32 confirm that frozen salted chicken should be classified under the HS heading 0210

75. In *EC – Computer Equipment*, the Appellate Body recognised that the classification practices of the respondent "during the Uruguay Round negotiations is 'part of the circumstances' of [the] conclusion of the *WTO Agreement* and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*."[47] The Appellate Body further noted that "…[i]f the classification practice of the importing Member at the time of the tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, surely that Member's legislation on customs classification at that time is also relevant."[48]

76. Thus, the latest relevant time that the meanings of the headings of EC's Schedule LXXX should be assessed is 15 April 1994, namely the date on which the Schedule was annexed to the Marrakech Protocol and the EC thereby assumed its commitments under the Uruguay Round. As the Appellate Body stated in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the key date for the interpretation of the treaty at issue was 1994, which was the time at Members assumed their obligations under the WTO Agreement. In particular, the Appellate Body examined the term "exhaustible natural resources" in GATT Article XX(g) in the light of the wording of the Preamble of the WTO Agreement.[49]

77. The EC's customs classification legislation at the time of the conclusion of the Uruguay Round stated that for the purposes of heading 0210, the term "salted" means meat or edible meat offal which has been meat deeply and homogenously impregnated with salt in all parts with a total salt content not less than 1.2% by weight. The 1.2% threshold was specifically added to *distinguish* the classification of *salted meat* and edible meat offal falling within heading 0210 from *fresh, chilled or*

---

[46] Case 38-75, Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrchten en accijnzen, 19 November 1975, ECR 1975, page 01439, at para. 10.

[47] Appellate Body Report, *EC – Computer Equipment*, para. 92.

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

[49] Appellate Body Report, *US – Shrimp*, para. 129.

frozen meat. The definition is silent as to the requirement that the product be salted for the purpose of long-term preservation.

B. THE EC'S CLASSIFICATION OF THE PRODUCT AT ISSUE RESULTS IN TREATMENT LESS FAVOURABLE FOR FROZEN SALTED CHICKEN THAN THAT BOUND IN THE EC'S SCHEDULE OF CONCESSIONS AND IS THEREFORE INCONSISTENT WITH ARTICLE II:1(A) AND ARTICLE II:1(B) OF THE GATT

78. In *Argentina – Textiles and Apparel*, the Appellate Body made clear that the "application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994, *to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule*."[50] (Emphasis added).

79. The change from an *ad valorem* rate to a specific duty in this case is WTO-inconsistent to the extent that it results in the application of duties over the bound rates and where there was no ceiling provided to ensure that the bound rate is not exceeded.

80. Thailand has demonstrated that the specific rate of 102.4€/100 kg/net would only be equivalent to the *ad valorem* rate of 15.4% if the price for boneless chicken were 6.65 €/kg. Once the price of chicken is lower than 6.65€/kg, then the specific tariff rate of 102.4 €/100kg/net would exceed the *ad valorem* bound rate of 15.4% and would therefore, result in "less favourable treatment" being provided.

81. Thailand first began exporting chicken in 1996 to the EC. During the period between 1997 and mid-2002, the average price of chicken has been 2.3€/kg.[51] Thus, the application of the specific duty of 102.4€/100 kg/net - given the price of chicken in June 2003 and the average price of chicken from 1997 to 2002, has always led - to the application of an ordinary customs duty in excess of the bound rate of 15.4% *ad valorem*, provided for in the EC's Schedule of Concessions. This is "treatment less favourable" within the meaning of GATT Article II:1(a).

82. The EC measure is inconsistent with Article II:1(b) of the GATT because the consequence of the classification of chicken set out in Regulation 1223/2002 and the Decision of 31 January 2003 leads to the same product being subject to the application of duties higher than the EC's *ad valorem* bound rate of 15.4%. The EC is free to use whatever system of customs classification it wishes, *as long as duties remain at or below the bound rates, for that product.* Because the EC's classification of frozen boneless chicken cuts as provided in Regulation 1223/2002 and elaborated in the Decision of 31 January 2003 leads to the application of duties higher than the bound rate for frozen salted chicken, the EC is in violation of its Article II obligations.

IV. CONCLUSION

83. The EC's basic argument in this case is that Thailand is exporting an "artificial product" that was "created only to avoid the tariff levels which the [EC] negotiated" during the Uruguay Round. The EC argues that it negotiated a low tariff for heading 0210 because it did not expect any trade in that product[52] and that its purpose during the Uruguay Round was "to achieve a desirable level of protection for frozen chicken."[53] To achieve this purpose, the EC apparently focussed on tariffs for products classified under heading 0207. However, the EC cannot now use the classification process to correct what it may now view as omissions or *lacunae* in its negotiated schedules.

---

[50] Appellate Body Report, *Argentina – Textiles*, para. 55.
[51] *See* Exhibit THA-2.
[52] EC's First Written Submission, para. 163.
[53] *Ibid*., para. 54.

84. Thus, the EC's argument that the addition of salt is a mere artifice designed to avoid the higher tariff for frozen cuts is legally irrelevant.[54] As long as the product meets the description of the tariff heading, the reasons why the exporter makes the product fall under that heading are irrelevant. The motives of the exporter are simply irrelevant to the issue of determining the correct customs classification of a product. As the EC acknowledges, the purpose of the Harmonized System was to ensure "greater uniformity among countries in customs classification."[55] For that reason, the paramount consideration in determining the correct classification of a product has always been the objective physical characteristics of the product at issue. The Panel should not allow the EC's attempts to draw negative inferences from rational commercial behaviour to distract it from properly analyzing the classification of this product based solely on its objective physical characteristics, in the light of the EC's concession.

85. Thailand requests the Panel to find that the EC is acting inconsistently with its obligations under Article II:1(b) and II:1(a) of the GATT by according "less favourable treatment" to the chicken product in question than that provided for in the EC's Schedule of Concessions. Thailand requests the Panel to recommend, in accordance with Article 19.1 of the DSU, that the DSB request the EC to bring the measure at issue into conformity with the GATT.

[54] *Ibid*., para. 19.
[55] *Ibid*., para. 61.