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EUROPEAN COMMUNITIES – TRADE DESCRIPTION OF SARDINES

Report of the Panel

The report of the Panel on *European Communities — Trade Description of Sardines* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 29 May 2002 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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I. INTRODUCTION

1.1 In a communication dated 20 March 2001, Peru requested consultations with the European Communities pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and Article 14 of the Agreement on Technical Barriers to Trade (the "TBT Agreement"), with respect to Council Regulation (EEC) No. 2136/89 (the "EC Regulation" or "Regulation") laying down common marketing standards for preserved sardines.[1]

1.2 On 31 May 2001, Peru and the European Communities held the requested consultations but failed to reach a mutually satisfactory solution.

1.3 In a communication dated 7 June 2001,[2] Peru requested the establishment of a panel to examine the EC Regulation, with the standard terms of reference set out in Article 7 of the DSU. Peru made its request in accordance with Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 14 of the TBT Agreement. In its communication, Peru stated that it considered the EC Regulation to constitute an unnecessary obstacle to international trade which is inconsistent with Articles 2 and 12 of the TBT Agreement, Article XI:1 of the GATT 1994 and the principle of non-discrimination under Articles I and III of the GATT 1994.

1.4 At its meeting on 24 July 2001, the Dispute Settlement Body ("DSB") established a panel pursuant to Peru's request in accordance with Article 6 of the DSU. Canada, Chile, Colombia, Ecuador, the United States and Venezuela reserved their rights to participate in the Panel proceedings as third parties in accordance with Article 10 of the DSU.

1.5 At the meeting of the DSB on 24 July 2001, the parties to the dispute agreed that the Panel should have standard terms of reference provided in Article 2.1 of the DSU. The terms of reference of the Panel are as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by Peru in document WT/DS231/6, the matter referred to the DSB by Peru in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.6 On 31 August 2001, Peru requested the Director-General of the World Trade Organization ("WTO") to determine the composition of the Panel pursuant to paragraph 7 of Article 8 of the DSU:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

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[1] WT/DS231/1; G/L/449; G/TBT/D/22, 23 April 2001.
[2] WT/DS231/6, 8 June 2001.

1.7 On 11 September 2001, the Director-General accordingly composed the Panel as follows:

Chairperson: Ms. Margaret Liang

Members: Ms. Merit Janow

Mr. Mohan Kumar

1.8 The Panel met with the parties on 27, 28 November 2001 and 23 January 2002. The Panel met with the third parties on 28 November 2001.

1.9 The Panel submitted its interim report to the parties on 28 March 2002. On 3 May 2002, the parties requested the Panel to suspend its proceedings in accordance with Article 12.12 of the DSU until 21 May 2002 so as to enable the parties to find a mutually satisfactory solution to the dispute. The Panel agreed to this request.[3] As the parties were unable to reach a mutually satisfactory solution within the requested period of time, the Panel issued its final report to the parties on 22 May 2002.

II. FACTUAL ASPECTS

A. BASIC CHARACTERISTICS OF *SARDINA PILCHARDUS WALBAUM* AND *SARDINOPS SAGAX SAGAX*

2.1 This dispute concerns *Sardina pilchardus Walbaum* ("*Sardina pilchardus*") and *Sardinops sagax sagax* ("*Sardinops sagax*"), two small fish species which belong, respectively, to genus Sardina and Sardinops of the *Clupeinae* subfamily of the *Clupeidae* family; fish of the *Clupeidae* family populate almost all oceans.

2.2 *Sardina pilchardus* is found mainly around the coasts of the Eastern North Atlantic, in the Mediterranean Sea and in the Black Sea, and *Sardinops sagax* is found mainly in the Eastern Pacific along the coasts of Peru and Chile. Despite the various morphological differences that can be observed between them, such as those concerning the head and length, the type and number of gillrakes or bone striae and size and weight, *Sardina pilchardus* and *Sardinops sagax* display similar characteristics: they live in a coastal pelagic environment, form schools, engage in vertical migration, feed on plankton and have similar breeding seasons.

2.3 The taxonomic classification of *Sardina pilchardus* and *Sardinops sagax* is as follows:

	"*Sardina pilchardus* Walbaum"	"*Sardinops sagax* sagax"
Phylum	Chordata	Chordata
Subphylum	Vertebrata	Vertebrata
Superclass	Gnathostomata	Gnathostomata
Class	Osteichthyes	Osteichthyes
Order	Clupeiformes	Clupeiformes
Suborder	Clupeoidei	Clupeoidei
Family	Clupeidae	Clupeidae
Subfamily	Clupeinae	Clupeinae
Genus	*Sardina*	*Sardinops*
Species	*Sardina pilchardus Walbaum*	*Sardinops sagax sagax*

2.4 Both fish, as well as other species of the *Clupeidae* family, are used in the preparation of preserved and canned fish products, packed in water, oil or other suitable medium.

[3] WT/DS231/9, 8 May 2002.

B. THE COUNCIL REGULATION (EEC) 2136/89 OF 21 JUNE 1989 LAYING DOWN COMMON MARKETING STANDARDS FOR PRESERVED SARDINES

2.5 Council Regulation (EEC) No. 2136/89 laying down common marketing standards for preserved sardines (the "EC Regulation") was adopted on 21 June 1989.[4] The EC Regulation defines the standards governing the marketing of preserved sardines in the European Communities.

2.6 Article 2 of the EC Regulation provides that only products prepared from fish of the species *Sardina pilchardus* may be marketed as preserved sardines. Article 2 reads as follows:

> Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:
>
> – they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
>
> – they must be prepared exclusively from the fish of the species '*Sardina pilchardus* Walbaum";
>
> – they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
>
> – they must be sterilized by appropriate treatment.

C. THE CODEX ALIMENTARIUS COMMISSION STANDARD FOR CANNED SARDINES AND SARDINE-TYPE PRODUCTS (CODEX STAN 94 –1981 REV.1 – 1995)

2.7 The Codex Alimentarius Commission of the United Nations Food and Agriculture Organization ("FAO") and the World Health Organisation ("WHO") (the "Codex Alimentarius Commission") adopted in 1978 a standard ("Codex Stan 94") for canned sardines and sardine-type products.[5] Article 1 of Codex Stan 94 states that this standard applies to "canned sardines and sardine-type products packed in water or oil or other suitable packing medium" and that it does not apply to speciality products where fish content constitutes less than 50% m/m of the net contents of the can.

2.8 Article 2.1 of Codex Stan 94 provides that canned sardines or sardine-type products are prepared from fresh or frozen fish from a list of 21 species, amongst them *Sardina pilchardus* and *Sardinops sagax*.[6]

2.9 Article 6 of Codex Stan 94 reads as follows:

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[4] The EC Regulation in its entirety is attached as Annex 1.
[5] Codex Stan 94 is attached in its entirety as Annex 2.
[6] Article 2.1.1 lists the following species:
– *Sardina pilchardus*
– Sardinops melanostictus, S. neopilchardus, S. ocellatus, S. sagax S. caeruleus
– Sardinella aurita, S. brasiliensis, S. maderensis, S. longiceps, S. gibbosa
– Clupea harengus
– Sprattus sprattus
– Hyperlophus vittatus
– Nematalosa vlaminghi
– Etrumeus teres
– Ethmidium maculatum
– Engraulis anchoita, E. mordax, E. ringens
– Opisthonema oglinum

"6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following specific provisions shall apply:

6.1 NAME OF THE FOOD

The name of the products shall be:

6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or

(ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer".

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

3.1 Peru makes the following requests:

(a) Peru requests the Panel to find that the measure at issue, the EC Regulation, prohibiting the use of the term "sardines" combined with the name of the country of origin ("Peruvian Sardines"); the geographical area in which the species is found ("Pacific Sardines"); the species ("Sardines — *Sardinops sagax*"); or the common name of the species *Sardinops sagax* customarily used in the language of the member State of the European Communities in which the product is sold ("Peruvian Sardines" in English or "Südamerikanische Sardinen" in German), is inconsistent with Article 2.4 of the TBT Agreement because the European Communities did not use the naming standard set out in paragraph 6.1.1(ii) of Codex Stan 94 as a basis for its Regulation even though that standard would be an effective and appropriate means to fulfil the legitimate objectives pursued by the Regulation.

(b) If the Panel were to find that the EC Regulation is consistent with Article 2.4 of the TBT Agreement, Peru requests the Panel to find that the EC Regulation is inconsistent with Article 2.2 of the TBT Agreement because it is more trade-restrictive than necessary to fulfil the legitimate objective of market transparency that the European Communities claims to pursue.

(c) If the Panel were to find that the EC Regulation is consistent with Articles 2.2 and 2.4 of the TBT Agreement, Peru requests the Panel to find that the measure is inconsistent with Article 2.1 of the TBT Agreement because it is a technical regulation that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.

(d) If the Panel were to find that the measure at issue is consistent with the TBT Agreement, Peru requests the Panel to find that it is inconsistent with Article III:4 of the GATT 1994 because it is a requirement affecting the offering for sale of imported sardines that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.

3.2 Peru requests the Panel to recommend that the DSB request the European Communities to bring its measure into conformity with the TBT Agreement. Peru further requests the Panel to suggest that the European Communities permit Peru, without any further delay, to market its sardines in accordance with a naming standard consistent with the TBT Agreement.

3.3 The European Communities requests the Panel to reject Peru's claims that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

IV. ARGUMENTS OF THE PARTIES

A. ALLOCATION OF THE BURDEN OF PROOF

4.1 **Peru** contends that in the case of Article 2.4 of the TBT Agreement, the elements of the *prima facie* case to be presented by the complainant party include the presentation of evidence demonstrating the existence of a technical regulation; a relevant international standard; and the failure of the European Communities to base the Regulation at issue on the international standard, Codex Stan 94. Peru claims that in the case of Article 2.2 of the TBT Agreement, the elements of the *prima facie* case presented by the complainant party must show evidence of the existence of a technical regulation and of the trade-restrictive consequences of that regulation. Peru argues that it is then for the European Communities, as the Member imposing the technical regulation, to justify in terms of its own legitimate objectives the failure to base its technical regulation on the international standard in the case of Article 2.4 of the TBT Agreement, and the need to impose a trade-restrictive technical regulation in the case of Article 2.2 of the TBT Agreement.

4.2 Peru also submits that in allocating the evidentiary burden on the specific elements of Articles 2.2 and 2.4 of the TBT Agreement, the provisions of Article 2.5, as well as the object and purpose of the TBT Agreement, need to be taken into account. In Peru's view, Article 2.5 of the TBT Agreement reflects the fact that if a Member adversely affected by a technical regulation had to explain and demonstrate that the deviation from an international standard is not necessary to fulfil a legitimate objective, it would have to prove the negative, which is impossible. Peru argues that the terms of Article 2.5 relate to a pre-dispute settlement situation and therefore do not establish a rule for the allocation of the burden of proof. However, Peru considers that Article 2.5 of the TBT Agreement does reflect a principle that also applies during the dispute settlement stage, namely the principle that a party to a dispute cannot be asked to prove the negative. Article 2.5 establishes not only a right for the Members adversely affected by a technical regulation; it establishes also an important right for the Member that has prepared, adopted or applied the regulation. This is the right to indicate which legitimate objective it is pursuing with a regulation challenged under Article 2.4 of the TBT Agreement and why it could not use the relevant international standard as a basis. This right is important because it means that it is that Member which may determine the policy objectives and constraints against which a challenged regulation is evaluated. It is important that this right be respected also in panel proceedings. Prior to the exercise of that right, the complainant may, depending on the circumstances of the case, only be able to guess what the objectives and constraints of the defendant might be. It is only after the defendant has exercised its right that the complainant is in the position to present evidence demonstrating that the objective identified can be achieved by using international standards as a basis. Article 2.5 therefore distributes the "burden of explanation" in the pre-dispute settlement situation in the same manner as the burden of proof should be distributed during dispute settlement proceedings. Peru concludes that it is for the European Communities to present evidence explaining why the monopolization of the name sardines for *Sardina pilchardus* is necessary to achieve the declared objective of market transparency.

4.3 Peru subsequently argues that in light of the extensive evidence submitted by both parties and Canada, it is no longer necessary for the Panel to decide the question of whether there is an allocation of the burden of proof specific to Articles 2.2 and 2.4 of the TBT Agreement. Noting the

Appellate Body's statement in *EC — Hormones* that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case", Peru argues that it established a *prima facie* case of violation of Articles 2.4, 2.2 and 2.1 of the TBT Agreement. Thus, Peru claims that whether the burden of proof is allocated on the basis of the specific provisions and objectives of the TBT Agreement or on the basis of the generally applicable principles followed by the Appellate Body, the result would be the same.

4.4 The **European Communities** agrees with Peru that it is for the party asserting a particular claim or a defence to prove such a claim or defence, but rejects Peru's interpretation of Article 2.5 of the TBT Agreement. The European Communities submits that the scope of Article 2.5 is to enhance the transparency that a central government body has to follow when preparing, adopting and applying a technical regulation; therefore, Article 2.5 of the TBT Agreement is not intended, as Peru alleges, to establish a higher threshold of explanation.

4.5 The European Communities argues that the Appellate Body in *EC — Hormones* dealt with a provision in the Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement") that is parallel to Article 2.5 of the TBT Agreement:

> Article 5.8 of the SPS Agreement does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. To the contrary, a Member seeking to exercise its right to receive information under Article 5.8 would, most likely, be ina pre-dispute situation, and the information or explanation it receives may well make it possible for that Member to proceed to dispute settlement proceedings and to carry out the burden of proving on a prima face basis that the measure involved is not consistent with the SPS Agreement.

4.6 The European Communities contends that the burden of proving that Article 2 of the EC Regulation is not in conformity with paragraphs 4, 2 and 1 of Article 2 of the TBT Agreement and with Article III:4 of GATT 1994 rests entirely with Peru. Accordingly, all the elements of Article 2.4 of the TBT Agreement that must be demonstrated to establish a *prima facie* case are: that a technical regulation has been prepared; that "a relevant international standard" was in existence or imminent; that the Member did not use the standard or the relevant part of it as a basis for the technical regulation; and that the use of the standard was ineffective or inappropriate for the fulfilment of the legitimate objectives pursued.

4.7 The European Communities further argues that, according to Article 2.2 of the TBT Agreement, Peru has to demonstrate trade-restrictive effects; identify correctly the legitimate objectives pursued; and finally, establish that these restrictive effects are more trade-restrictive than necessary.

4.8 With regard to Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, concerning which the European Communities asserts that Peru has indicated no criterion to allocate the burden of the proof, the European Communities claims that, in line with the consolidated WTO jurisprudence on the matter, Peru must present evidence and argument sufficient to establish a presumption that Article 2 of the EC Regulation is inconsistent with its obligations under these Articles. The European Communities argues that Peru must prove that (1) it is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, distribution or use; (2) the imported and domestic products affected by it are "like"; and (3) the treatment accorded to the imported products is less favourable.

B. WHETHER THE EC REGULATION IS A TECHNICAL REGULATION

4.9 **Peru** notes that paragraph 1 of Annex 1 of the TBT Agreement defines the term "technical regulation" as a document which lays down product characteristics with which compliance is mandatory and submits that the EC Regulation, according to its title, lays down "common marketing standards for preserved sardines". Peru argues that the EC Regulation constitutes a technical regulation within the meaning of Annex 1 of the TBT Agreement because it lays down characteristics preserved sardines must possess if they are to be marketed under the name sardines in the European Communities. In particular, Peru submits that Article 2 of the EC Regulation states which characteristics preserved sardines must possess in order to market them in the European Communities under the name "sardines" and notes that one such characteristic is that the product in question must be prepared from the fish of species *Sardina pilchardus*. Peru also argues that the language of Article 9 of the EC Regulation which provides that the EC Regulation "shall be binding in its entirety and directly applicable in all Member States" makes compliance with the measure mandatory.

4.10 The **European Communities** accepts that its Regulation is a technical regulation for the purposes of the TBT Agreement and that it lays down marketing standards for preserved *Sardina pilchardus*. The European Communities submits that, in 1989, it notified the Regulation at issue under the Tokyo Round Agreement on Technical Barriers to Trade (the "Tokyo Round Standards Code"). Referring to the Appellate Body's statement in *EC — Asbestos* that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole", the European Communities, therefore does not accept that Article 2 of the EC Regulation, taken in isolation, is a technical regulation as Peru claims. The European Communities argues that Article 2 can only be interpreted in the context of the entire Regulation.

4.11 The European Communities submits that its Regulation provides that the name specified for preserved *Sardina pilchardus* cannot be used for other products. However, this does not mean that it lays down mandatory labelling requirements for products other than preserved *Sardina pilchardus* and therefore it is not considered a technical regulation for preserved *Sardinops sagax*, preserved herrings or any other product except *Sardina pilchardus*. The system of rules concerning the labelling of foodstuffs in the European Communities is established by Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the member States relating to the labelling, presentation and advertising of foodstuffs (the "EC Directive 2000/13").[7] EC Directive 2000/13 sets out the basic framework and is designed to be complemented by more detailed European Communities rules or, in their absence, more detailed member States rules.

4.12 The European Communities further submits that Article 2 of its Regulation is not a technical regulation because the definition of a technical regulation in the TBT Agreement refers only to labelling, not naming. The names of the products of interest to Peru and the third parties are set out in various measures of the member States of the European Communities which have not been identified by Peru. It is EC Directive 2000/13, in conjunction with the various measures of the member States of the European Communities that constitute the technical regulation for the products identified by Peru and the third parties.

4.13 In response to the European Communities' arguments, **Peru** claims that it considers the whole of the EC Regulation to be a technical regulation because it lays down the characteristics of the product that may be marketed as preserved sardines. Peru, however, argues that it is only challenging in this dispute the WTO-consistency of the requirement set out in Article 2 of the EC Regulation which reserves the use of the term "sardines" exclusively for *Sardina pilchardus*. Peru argues that the

[7] OJ L 109 of 6.5.2000, pp. 29-42.

other elements contained in the EC Regulation are nevertheless relevant in determining whether this requirement is consistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement.

4.14 In respect of the European Communities' argument that the Regulation at issue is not a technical regulation for preserved *Sardinops sagax* or any other product except preserved *Sardina pilchardus*, Peru argues that it never claimed that the EC Regulation indicates the name under which *Sardinops sagax* must be marketed and that it is not challenging the European Communities' regulations governing the naming of products made from *Sardina pilchardus*. Peru argues, on the contrary, that it is challenging the prohibition of the use of the word "sardines" as a trade name for *Sardinops sagax*.

4.15 Peru explains that the reason for initially referring to the EC Regulation as a labelling requirement[8] is based on the fact that paragraph 6 of the Codex Standard for Canned Sardines and Sardine-Type Products is entitled "LABELLING" and sub-paragraph 6.1 is entitled "NAME OF THE FOOD". Peru argues that for the drafters of the Codex standard, the rule on the naming of sardines constituted a labelling requirement and Peru therefore considered it appropriate to describe the EC Regulation as a labelling requirement. Peru further submits that EC Directive 2000/13, to which the European Communities refers to in its arguments, unlike the Codex Stan 94, makes a distinction between rules setting out which characteristics must be indicated on the packages in which foodstuffs are sold (labelling requirements) and rules prescribing the name under which a product must be sold (naming requirement). Peru argues that Article 2 of the EC Regulation neither states which characteristics must be indicated on the packages containing products made from *Sardinops sagax* nor prescribes the name under which such products must be sold. According to Peru, the prohibition on the use of the term "sardines" in the trade description of products made from *Sardinops sagax* therefore appears to be neither a labelling requirement nor a naming requirement within the meaning of EC Directive 2000/13.

4.16 Peru claims that the European Communities' argument that Article 2 of its Regulation is not covered by the TBT Agreement because the definition of a technical regulation refers only to labelling but not to naming is incorrect. Peru, however, claims that whether the EC Regulation should be called a "labelling" requirement, a "naming" requirement or simply a "terminology" requirement is a question that the Panel need not address. Peru argues that a technical regulation covers any "document which lays down product characteristics" and the EC Regulation is indisputably part of such a document. Peru concludes that the prohibition of the use of the term "sardines" in the trade name for products that do not conform to the product characteristics set out in the EC Regulation comes within the ambit of the definition of technical regulations.

C. APPLICATION OF THE TBT AGREEMENT TO MEASURES ADOPTED BEFORE 1 JANUARY 1995

4.17 The **European Communities** argues that Article 2.4 of the TBT Agreement is not applicable to measures that were drawn up before its entry into force. Article 2.4 of the TBT Agreement requires WTO Members to *use* existing relevant international standards *as a basis for* drawing up their technical regulations when they decide that these are required. The European Communities therefore submits that the obligation exists prior to the adoption of the measure, not afterwards.

4.18 The European Communities argues that the language of Article 2.4 of the TBT Agreement makes clear that it does not apply to the *existence or maintenance* of technical regulations. In support of this argument, it submits that Article 2.4 is different from the provision of the SPS Agreement considered by the Appellate Body in *EC — Hormones*. According to the European Communities, in

[8] Peru initially argues that the EC Regulation constitutes a technical regulation in the form of a labelling requirement. Subsequently, in response to a question posed by the Panel, Peru states that "at issue in this dispute is not a labelling requirement *per se* but a technical regulation laying down the characteristics of the products that may be marketed as preserved sardines".

that case, the Appellate Body based its view on the wording of Articles 2.2, 3.3 and 5.6 of the SPS Agreement, all of which include the word "maintain" and is absent from Article 2.4 of the TBT Agreement.

4.19 The European Communities argues that Article 2.4 of the TBT Agreement, by its clear terms, only applies to the *preparation and adoption* of technical regulations. It argues that the preparation and adoption of the Regulation, in contrast to its maintenance, are "acts or facts which took place, or situations which ceased to exist, before the date of [the] entry into force" of the TBT Agreement within the meaning of Article 28 of the Vienna Convention on the Law of Treaties (the "Vienna Convention"), entitled "Non-Retroactivity of Treaties".[9]

4.20 The European Communities further argues that it is only possible to use relevant international standards as a basis for the technical regulation when the technical regulation is being drafted or when it is amended. However, this particular question is not before the Panel because the EC Regulation has not been amended. In its view, the question is whether Members are under an obligation after the WTO Agreement entered into force to revise their existing technical regulations to ensure that they could be considered to have used international standards "as a basis". It is clear from the text of Article 2.4 of the TBT Agreement, especially the words "where technical regulations are required", that such an obligation has not been created by Article 2.4.

4.21 With regard to Article XVI:4 of the Marrakesh Agreement Establishing the WTO (the "WTO Agreement"), the European Communities argues that this provision creates an obligation to ensure that WTO obligations are complied with, but the precise scope of the obligations depends on the language of each specific provision under the covered agreements. In the European Communities' view, Article XVI:4 does not render WTO obligations applicable to acts performed before the entry into force of the WTO Agreement where this does not result from the terms of the provision itself. The European Communities argues that there must be an obligation somewhere in the covered agreements before Article XVI:4 can have effect and the wording of Article 2.4 of the TBT Agreement makes clear that there is no obligation to revise existing technical regulations to bring them into conformity with international standards.

4.22 **Peru** submits that Article 2.4 of the TBT Agreement does not oblige WTO Members to use international standards as a basis for drawing up their technical regulations when Members decide that these are required but "where technical regulations are required". Accordingly, Peru argues that Article 2.4 applies to situations in which technical regulations are required and not merely at the time when the decision to adopt them is taken. In Peru's view, an international standard can be "used" both in drafting a new technical regulation and in amending an existing regulation. Therefore, Peru contends that the temporal element the European Communities claims to see in the wording of Article 2.4 of the TBT Agreement simply does not exist.

4.23 Peru contends that the European Communities' argument cannot be reconciled with the principle of non-retroactivity of treaties enshrined in Article 28 of the Vienna Convention. Peru points out that, in the instant case, both the international standard and the EC Regulation continued to exist after the entry into force of the TBT Agreement. Accordingly, Peru claims that the European Communities has been, since 1 January 1995, under the obligation to use Codex Stan 94 as a basis for its Regulation. Moreover, Peru submits that the European Communities' argument has no basis in fact because the naming standard incorporated in Codex Stan 94 did exist when the European Communities adopted the Regulation at issue. Peru notes that the current version of this standard was adopted in 1978, 11 years prior to the adoption of the EC Regulation in 1989.

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[9] Article 28 reads as follows:
Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

4.24 Peru further submits that the text of Article 2.4 of the TBT Agreement does not distinguish between regulations adopted after the standard was prepared and regulations adopted before the standard was prepared. Peru argues that the European Communities' proposition cannot be reconciled with Article XVI:4 of the WTO Agreement, according to which "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided for in the annexed Agreements".

4.25 Furthermore, Peru recalls that the Appellate Body rejected a similar claim by the European Communities in *EC — Hormones* where it stated that "if the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 … it appears reasonable to us to expect that they would have said so explicitly". Peru concludes that given the general principle enshrined in Article XVI:4 of the WTO Agreement, existing legislation can be deemed to be exempted from WTO law only if a provision in one of the agreements annexed to the WTO Agreement specifically provides for such an exemption; however there is no such exemption in the TBT Agreement.

D. ARTICLE 2.4 OF THE TBT AGREEMENT

1. Whether Codex Stan 94 is a relevant international standard

4.26 **Peru** argues that Codex Stan 94 is a relevant international standard. Peru argues that the Codex Alimentarius Commission, established by the FAO and WHO, is an internationally recognized standard setting body that develops standards for food products. The Codex Alimentarius contains more than 200 standards for foods or groups of foods, of which 28 are standards for fish and fishery products; these standards are an internationally agreed reference point for consumers, food producers and processors, national food control agencies and the international food trade.

4.27 Referring to Canada's third party submission, Peru agrees with Canada's statement that:

> The Codex Standard is an "international standard". The TBT Agreement defines "standard" but not "international standard". A standard is defined in Annex 1 as a:
>
> > Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.
>
> The Codex Commission is an internationally recognized standard setting body. Codex standards are the internationally agreed global reference point for consumers, food producers and processors, national food control agencies and the international food trade. The Codex Standard in issue is not mandatory.

4.28 Peru argues that Codex Stan 94 is not only an international standard but is also a relevant international standard and that Members are obliged to use relevant international standards as a basis for their technical regulations. Peru notes that the Codex Stan 94, a standard for canned sardines and sardine-type products, was adopted by the Codex Alimentarius Commission in 1978 and revised in 1995. Peru submits that the products to which Codex Stan 94 applies are sardines and sardine-type products that are prepared from fresh or frozen fish of 21 different species, including *Sardina pilchardus* and *Sardinops sagax*. Peru further notes that paragraph 6.1.1 of Codex Stan 94 states:

> The name of the product shall be:
>
> 6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or

(ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

4.29 The **European Communities** does not contest the status of the Codex Alimentarius Commission as an international standardizing body for the purposes of the TBT Agreement. It is also of the opinion that only standards of international bodies with international treaty status that respect the same principles of membership and due process that form the basis for WTO membership should be recognized as international standards.

4.30 The European Communities makes the general observation that Codex Stan 94 contains 20 "sardine-type" species belonging to 11 genera. The underlying rationale for including these 20 species in the list is not apparent as it includes very different species; it is not the fact that they are from a same family, as some of these genera belong to a family other than *Clupeidae*, e.g., *Engaulis anchoita*, *E. mordax* and *E. ringens* (anchovies) which belong to the family *Engraulidae*. The European Communities notes that the common name for some of these species are not sardines and that other species that are called "sardines" in other parts of the world are not included in Codex Stan 94. In its view, the objection of Codex members to include *Clupea bentinckti* at the 24th Session of the Codex Alimentarius Commission illustrates the concern that the list set out in Codex Stan 94 would end up including all *Clupeidae*, and potentially *Engraulidae*, species. The consequence would be that the Codex standard would include so many "sardine-type" species that it would be more misleading than informative for the consumer. To illustrate the difficulties involved in determining the coverage of the species under Codex Stan 94, the European Communities refers to the fact that Peru is exporting *Sardinops sagax* to more than 20 countries under the trade description of "sardines" rather than "Pacific sardines" even though Codex Stan 94 does not permit *Sardinops sagax* to be called "sardines" without any qualification.

4.31 The European Communities claims that Codex Stan 94 cannot be considered a *relevant* international standard. The obligation contained in Article 2.4 is to *use* relevant international standards, where they *exist* or their completion is *imminent*, as a basis for the technical regulation. However, the European Communities claims that Codex Stan 94 is not a relevant international standard within the meaning of Article 2.4 of the TBT Agreement because it did not exist and its adoption was not "imminent" when the EC Regulation was adopted.

4.32 The European Communities further argues that there is no obligation to have used a draft international standard as a basis for a technical regulation if its adoption was not "imminent"; therefore, it cannot have been intended that an already existing technical regulation could become inconsistent with Article 2.4 of the TBT Agreement when the adoption of the draft international standard becomes "imminent" or when it is actually adopted and becomes "existing". The European Communities submits that Peru would have had to invoke non-conformity with the predecessor standard in order to make its case and it has not done so. In any case, the European Communities points out that it did comply with the requirements of the Tokyo Round Standards Code when it adopted its Regulation and notified it to the GATT. In its view, it is obvious that a 1994 standard cannot be a "relevant standard" for a Regulation adopted in 1989.

4.33 According to the European Communities, another reason for not considering Codex Stan 94 as a relevant international standard is that it was not adopted in accordance with the principle of consensus set out by the TBT Committee in the Decision of the Committee on Principles for the Development of the International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement (the "Decision"). In support of its claim, the European Communities submits the following: (a) According to Rule VI:2 of the Rules of Procedure of the Codex Alimentarius Commission, decisions can be taken by a majority of the votes cast; even if it is not recorded whether Codex Stan 94 was elaborated and adopted by means of a formal vote, it

is clear that it was adopted in circumstances in which dissenting members could have been outvoted and, therefore, may have decided not to express their disagreement, i.e., by not insisting on a vote. This is especially so, since the General Principles of the Codex Alimentarius make clear that Codex standards are recommendations that need to be accepted by governments and that their acceptance can be unconditional, conditional or with deviations. (b) Codex Stan 94 has been accepted by only 18 countries, of which only four accepted it fully. None of the member States of the European Communities, or Peru, has accepted the standard. (c) The available records of the discussions relating to Codex Stan 94 demonstrate that Members held diverging views on the appropriate names for preserved sardines and sardine-type products.

4.34 With regard to the elaboration procedure of Codex Stan 94, the European Communities submits that an editorial change, and not a substantive change, was made at step 8 of the procedure. If a substantive amendment had been made at this stage, it would have been necessary to refer the text back to the relevant committee for comments before its adoption. However, if a substantive change had nevertheless been made at step 8 of the Codex elaboration procedure, the European Communities claims that Codex Stan 94 would, in this case, be rendered invalid and could not, therefore, be considered a relevant international standard within the meaning of Article 2.4 of the TBT Agreement.

4.35 Finally, European Communities contends that paragraph 6.1.1(ii) of Codex Stan 94 is not "relevant" for the EC Regulation since the EC Regulation does not regulate products other than preserved *Sardina Pilchardus,* and the relevant part of Codex Stan 94 for the name of this product is paragraph 6.1.1(i).

4.36 **Peru** notes Canada's argument that Codex Stan 94 meets the principles and procedures set out by the TBT Committee in the Decision. Peru agrees with Canada's argument that Codex Stan 94 was developed in a manner consistent with the principles of the Decision, including the resort to the multilateral consensus based approach in establishing the relevant international standard.

4.37 However, Peru claims that the issue of whether or not Codex Stan 94 was in effect adopted by consensus is not an issue that the Panel needs to decide and that the Decision is not a covered agreement for the purposes of the DSU. Peru argues that the Decision is not an authoritative interpretation of the TBT Agreement. In Peru's view, the Decision merely articulates principles and procedures which, in the view of the TBT Committee, should be followed in developing international standards. Peru asserts that it does not define the term "international standard" in Article 2.4 of the TBT Agreement.

4.38 In addition, Peru submits that it is clear from the relevant report of the Codex Alimentarius Commission that Codex Stan 94 was adopted without a vote and that it can reasonably be assumed that when the TBT Committee used the term "consensus" it referred to a decision-making process similar to the one stipulated in the WTO Agreement where Article IX:1 states that "where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting". Therefore, the issue is whether the procedures and practices of the decision-making by consensus followed by the Codex Alimentarius Commission resemble those followed by the WTO.

4.39 For the above reasons, Peru considers that there can be no doubt that Codex standards are adopted in accordance with the principle of consensus as it is understood in the WTO. Furthermore, Peru recalls that in the TBT Committee, the European Communities stated that only the standards of international bodies with international treaty status that respect the same principles of membership and due process that form the basis for WTO membership should be recognized as international standards in the WTO context. According to Peru, the European Communities also stated in the TBT Committee that the Codex Alimentarius Commission could therefore be considered as

developing international standards within the meaning of the TBT Agreement.[10] Hence, Peru maintains that the European Communities' argument presented in this dispute cannot be reconciled with the position taken in the TBT Committee. Peru also submits that it is perfectly normal that international standards are adopted after a reconciliation of divergent views, otherwise there would probably be no Codex standard that could be considered to have been adopted by consensus.

4.40 In response to a question posed by the Panel in relation to the meaning of the explanatory note contained in Annex 1 of the TBT Agreement which reads "[t]his Agreement covers also documents that are not based on consensus", Peru argues that "relevant international standards" within the meaning of Article 2.4 of the TBT Agreement include standards that were not adopted by consensus.

4.41 Finally, Peru disputes the European Communities' argument that Codex Stan 94 is not a relevant international standard because the Codex Alimentarius Commission would have violated its procedural rules according to which substantive changes to proposed standards can only be made under certain circumstances. Peru is of the view that it is for the members of the Codex Alimentarius Commission to examine whether the procedural requirements for the adoption of standards have been observed and, if necessary, to request corrective action in accordance with the rules and procedures of the Commission. Peru claims that the Panel is not competent to make findings on such issues.

2. Whether Codex Stan 94 was used "as a basis" for the EC Regulation

4.42 **Peru** argues that Article 2.4 of the TBT Agreement requires Members to use international standards as a basis for their technical regulations except when they are an ineffective or inappropriate means for the fulfilment of their objectives. Peru notes that the ordinary meaning of the word "basis" is "foundation", "main constituent" or "a determining principle". Peru argues that "shall use as a basis" therefore means "shall use as a foundation, main constituent or determining principle".

4.43 Peru claims that a measure would be consistent with paragraph 6.1.1(i) if it requires the term "sardines", when used without any qualification, be reserved for *Sardina pilchardus*. However, Peru contends that all other species referred to in Codex Stan 94 may be marketed, pursuant to sub-paragraph (ii), as "X sardines" where "X" is either a country, a geographic area, the species or the common name of the species. According to Peru, its sardines should therefore be marketable as "Peruvian sardines", "Pacific sardines", or just "sardines" combined with the name of the species or the common name in the European Communities' member State in which the sardines are sold, such as "Südamerikanische Sardinen" in Germany. Peru contends that in each of the four alternatives set out in this labelling standard, the term "sardines" is part of the trade description and a total prohibition on the use of the term "sardines" in the labelling of canned sardines is not foreseen.

4.44 Peru argues that it is therefore inconsistent with sub-paragraph (ii) of paragraph 6.1.1 of Codex Stan 94 if sardines of the species *Sardinops sagax* may not be marketed under the name "sardines" qualified by the name of a country, name of a geographic area of origin, name of the species or the common name. Peru argues that the EC Regulation could only be deemed consistent with Article 2.4 of the TBT Agreement if it had used Codex Stan 94 as a main ingredient, foundation or determining principle in formulating its labelling regulation. Peru claims that no element of the standard contained in paragraph 6.1.1(ii) of Codex Stan 94 is reflected in the EC Regulation. Peru concludes that the EC Regulation is not based on the Codex Stan 94, the relevant international standard, and is therefore inconsistent with Article 2.4 of the TBT Agreement.

4.45 The **European Communities** argues that, under paragraph 6.1.1(ii) of Codex Stan 94, each country has the option of choosing between "X sardines" and the common name of the species. It argues that "the common name of the species in accordance with the law and customs of the country

[10] Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 21 July 2000, G/TBT/M/20, para. 90.

in which the product is sold" is intended to be a self-standing option independent of the formula "X sardines" and that this interpretation is evidenced by the fact that the phrase "the common name of the species in accordance with the law and customs of the country in which the product is sold" is found between commas; there is no comma between "species" and "in accordance with"; and there is a comma before "and in a manner not to mislead the consumer". The European Communities is of the view that the French [11] and Spanish[12] versions of Codex Stan 94 make it clear that there is no choice to be made but that there is an express indication that, irrespective of the formula used, it should be in accordance with the law and custom of the importing country and in a way that does not mislead the consumer.

4.46 It is the European Communities' view that under paragraph 6.1.1(ii) of Codex Stan 94, importing Members can choose between "X sardines" or the common name of the species. The fact that the name for products other than *Sardina pilchardus* could not be harmonized and had to defer to each country is reflected in the language "in accordance with the law and customs of the country in which the product is sold". The European Communities notes that there is an additional element contained in Codex Stan 94 that is not applicable to *Sardina pilchardus* but applicable to other species, namely that the trade description of the latter group of species must not mislead the consumer in the country in which the product is sold.

4.47 The European Communities argues that the use of the word "sardines" for products other than preserved *Sardina pilchardus* would not be in accordance with the law and customs of the member States of the European Communities and would mislead the European consumers. The term "sardines" has historically been known as referring to *Sardina pilchardus*. In light of the confusion created by sales of other species, such as sprats as "brisling sardines", the European Communities has constantly attempted to clarify the situation. There is now a uniform consumer expectation throughout the European Communities that the term "sardines" refers only to preserved *Sardina pilchardus*. The names for preserved *Sardinops sagax* that are in accordance with the law and custom of the United Kingdom and Germany are Pacific pilchard and Sardinops or pilchard, respectively. Based on these reasons, the European Communities argues that Article 2 of its Regulation follows the guidance provided by Codex Stan 94.

4.48 In support of its interpretation that Codex Stan 94 allows Members to choose between "X sardines" and the common name of the species in accordance with the law and custom the country in which the product is sold, the European Communities refers to the negotiating history of Codex Stan 94, where the text of paragraph 6.1.1 submitted to the Codex Alimentarius Commission by the technical Committee was divided into three paragraphs, with "the common name of the species" being a third and separate option, and also with the phrase "in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer" separate from the three paragraphs.[13] The European Communities also argues that the minutes of the meeting of the Codex Alimentarius Commission at which Codex Stan 94 was definitively adopted show that the text of paragraph 6.1.1, prepared and discussed in steps 1 to 7 of the elaboration

[11] The French text reads: 6.1.1 (ii) "Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce en conformité des lois et usages du pays où le produit est vendu, de manière à ne pas induire le consommateur en erreur.

[12] The Spanish text reads: 6.1.1(ii) "Sardina X" de un país o una zona geográfica, con indicación de la especie o el nombre común de la misma, en conformidad con la legislación y la costumbre del país en que se venda el producto, expresado de manera que no induzca a engaño al consumidor.

[13] The text of paragraph 6.1.1 submitted to the Commission by the technical Committee reads:
The name of the product shall be:
(i) "Sardines" (to be reserved exclusively for Sardina pilchardus (Walbaum)); or
(ii) "X sardines", where "X" is the name of a country, a geographic area, or the species; or
(iii) the common name of the species;
in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

procedure, was amended editorially at the meeting. It recalls that this change is described in the minutes as "editorial"; thus, for the reasons explained in paragraph 4.34 above, the European Communities claims that it was not intended to change the substance of the provision but to reconcile the fact that the word "sardines" by itself was reserved exclusively for *Sardina pilchardus* with the last paragraph requiring that any name must be in accordance with the law and custom of the country in which the product is sold. For this reason, the European Communities concludes that the text as proposed to the Codex Alimentarius Commission is a good guide to the intended meaning of the standard.

4.49 The European Communities contends that the Vienna Convention is not applicable to the interpretation of Codex standards. The relatively low importance attached to preparatory documents under the Vienna Convention is due to the fact that treaties are legal texts which are considered and adopted by formal ratification procedures and preparatory documents are not. The European Communities is of the opinion that this rationale does not apply to Codex standards and suggests that if the Panel has any doubt on the interpretation of paragraph 6.1.1(ii) of the Codex Stan 94, the Panel should ask the Codex Alimentarius Commission to provide its view of the meaning of this text.

4.50 The European Communities argues that even if Peru's interpretation were valid in that the term "sardines" must be used with a qualification for species other than *Sardina pilchardus*, Article 2.4 of the TBT Agreement would still not require that such name be used. The European Communities contends that Article 2.4 requires a relevant international standard to be used as a basis for the technical regulation and claims that Article 2.4 requires WTO Members to use an existing relevant international standard as *a* basis for drawing up their technical regulations when they decide that these are required and not as *the* basis for the technical regulation. Article 2.4 does not require Members to follow these standards or comply with them. Furthermore, the European Communities argues that Article 2.4 expressly states that a Member may only use the relevant parts of the international standard — that is the parts that are related to the objective pursued by the required technical regulation.

4.51 The European Communities recalls that the Appellate Body has already ruled, in the context of the SPS Agreement, that "based on" cannot be interpreted as meaning "conform to" and therefore reversed a panel ruling that was based on such an interpretation and that found that a European Communities' measure was not "based on" a Codex standard because it did not conform to it. The Appellate Body reasoned in particular that "specific and compelling language" would be needed to demonstrate that sovereign countries had intended to vest Codex standards, which were "recommendatory in form and language", with obligatory force. According to the European Communities, there is no such intention expressed in Article 2.4 of the TBT Agreement. In fact, the text of this provision indicates an even weaker requirement to take a standard into account than was the case with the SPS Agreement.

4.52 Therefore, the European Communities claims that it has "complied with" the text of the Codex Stan 94, because Article 2 of the EC Regulation follows the guidance it provided. Article 2.4 of the TBT Agreement allows WTO Members flexibility and requiring preserved sardine-type products to use the names under which they are known in the European Communities' member States falls within this margin of flexibility.

4.53 **Peru** disagrees with the European Communities' interpretation of paragraph 6.1.1(ii) of the Codex Stan 94. Peru is of the view that this provision clearly states that the name of the sardines other than *Sardina pilchardus* shall be "X sardines". Peru argues that both sub-paragraphs of paragraph 6.1.1 indicate the name to be given to sardines in inverted commas. Peru contends that it would therefore not be valid to conclude from the comma before the words "or the common name of the species" that "X" does not apply to this alternative.

4.54 Peru argues that the official languages of the FAO and WHO are English, French and Spanish and that the French text makes it absolutely clear that the Codex Stan 94 was not meant to permit countries to choose between "X Sardines" and the common name of the species. Translated word for word, Peru states that the French text would read in English: "'X sardines', 'X' designating a country, a geographic area, the species or the common name of the species". Peru claims that the French text thus leaves no doubt that the common name is not an option separate from the "X Sardines" option but is one of the four designators defined by "X". According to Peru, the Spanish text is also clear on this point; translated word for word, the Spanish text would read in English: "Sardines X" from a country or a geographic area, with an indication of the species or the common name of the species. Peru asserts that the Spanish text thus clarifies that the drafters of the Codex Stan 94 meant to create the option of adding the common name to the word "sardines", not the option of replacing the word "sardines" with a common name.

4.55 Contrary to the assertion of the European Communities, Peru argues that the drafting history of the Codex Stan 94 confirms that its final version was not meant to give countries the choice between "X Sardines" and the common name of the species. Concerning the separate third option of the text as submitted to the Codex Alimentarius Commission, Peru argues that this option was explicitly deleted at the session during which the current standard was adopted. This therefore confirms the drafters' intention.

4.56 With reference to the European Communities' argument that the change in draft was editorial in nature, Peru submits that since the drafters of the final version of Codex Stan 94 described the change from the earlier version as "editorial", rather than substantive, they were obviously of the view that the earlier version had already expressed what they intended to state in the final version, albeit imperfectly. Peru submits that the reference to the editorial nature of the change therefore clearly implies that, in the view of the drafters, both versions were meant to express the same idea but that the final version expressed it more clearly. The European Communities' suggestion that the Panel rely on the earlier version as a better expression of the meaning of the final version therefore lacks a logical basis.

4.57 Peru recalls that according to Article 32 of the Vienna Convention, the meaning of a treaty may be determined by having recourse to the preparatory work if, and only if, an interpretation based on the text leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Peru argues that while Article 32 of the Vienna Convention is not directly applicable to Codex standards because they are not treaties, the basic legal principle reflected in this provision is nevertheless relevant to the interpretation of those standards as well. Peru argues that Governments must be able to rely on the Codex standards as drafted. Only if their meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, can they be expected to have recourse to supplementary means of interpretation. According to Peru, Codex standards could simply not fulfil their function if governments always had to examine their drafting history in order to determine their meaning. Peru therefore argues that the reference to "international standards" in Article 2.4 of the TBT Agreement can therefore only be understood to be a reference to those standards as drafted, except in the situations referred to in Article 32 of the Vienna Convention.

4.58 Peru contends that the terms "in accordance with the law and custom" qualify the immediately preceding terms "of a country, a geographic area, the species, or the common name of the species". This means that selection of the country, area, species or common name may be made in accordance with the domestic law and custom. However, there is nothing in the wording of paragraph 6.1.1(ii) to suggest that the whole of the standard set out in this provision applies only if, and as long as, there is no contrary law and custom. The provision gives four options as to the designator (the "X") with which the term "sardines" may be combined (country, area, species, common name) and leaves it to each country to choose among those options in accordance with its laws and customs. Peru argues that there is no logic in the European Communities' claim that, because it may apply Codex Stan 94 in accordance with its law and custom, it may not apply it at all. In Peru's view, an internationally

agreed technical standard would be meaningless if domestic laws and customs could be invoked to justify a deviation. Peru argues that it would be absurd, and hence contrary to the established principles of interpretation, to impute that intention to the drafters of paragraph 6.1.1(ii).

3. Whether Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation

(a) Whether the EC Regulation fulfils a legitimate objective

4.59 **Peru** submits that the purpose of the TBT Agreement is to prevent unnecessary obstacles to international trade and to further the objectives of the GATT 1994. Peru argues that the objectives of creating obstacles to trade and of affording protection to domestic producers are therefore clearly not "legitimate" objectives within the meaning of Article 2.2 of the TBT Agreement. Beyond this, Peru argues that the TBT Agreement contains no normative guidance as to the range of policy objectives that WTO Members may pursue with technical regulations. Peru claims that the TBT Agreement is essentially an agreement regulating *how* Members should pursue their policy objectives, not *which* policy objectives they should pursue.

4.60 The **European Communities** argues that the objectives pursued by Article 2 of the EC Regulation are consumer protection, market transparency and fair competition and that these are separate but interdependent objectives. It further explains that the legitimate objectives of the entire EC Regulation are the following: (a) to keep products of unsatisfactory quality off the market; (b) to facilitate trade relations based on fair competition; (c) to ensure transparency of the market; (d) to ensure good market presentation of the product; and (e) to provide appropriate information to consumers. According to the European Communities, the first objective only relates to preserved *Sardina pilchardus*. This is pursued through the prohibition of the marketing of products of substandard quality. The European Communities further argues that the third objective pursues consumer protection and the promotion of fair competition, and that the promotion of fair competition is in the interest of consumers but also serves wider economic objectives.

4.61 The European Communities argues that all objectives of WTO Members can be presumed to be legitimate and that this is a corollary of the principle that States must be presumed to act in good faith. In its view, if the objective is legitimate, WTO Members have the right to choose the level of protection they consider appropriate, as it is recognized in the preamble to the TBT Agreement. The European Communities also notes that the Appellate Body has confirmed that the WTO Agreements do not restrict the right of Members to fix the level of protection for their legitimate objectives. Quoting a passage in the preamble to the SPS Agreement similar to that in the TBT Agreement, the European Communities notes for example that the Appellate Body in *EC — Hormones* held that: "this right of a Member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement is an autonomous right". The European Communities notes that the Appellate Body made similar statements in *EC — Asbestos, Korea — Various Measures on Beef,* and *Australia — Salmon*.

4.62 The European Communities argues that its Regulation must be examined in the framework of the system of rules concerning labelling of foodstuffs in the European Communities. The objectives of EC Directive 2000/13 are to protect consumers and prevent distortions of competition. These objectives are fulfilled by laying down detailed and precise requirements as to how products should be labelled. The European Communities points out that EC Directive 2000/13 states that labelling must not mislead purchasers and establishes the principle that there should be a single correct name for a given foodstuff. The hierarchy of rules for determining the correct name for a foodstuff is: the name laid down in European Communities legislation; the name provided for in the laws, regulations and administrative provisions applicable in the member States in which the product is sold; the name customary in the member State in which the product is sold; and a description of the foodstuff, and if

necessary, of its use which is clear enough to let the purchaser know its true nature and distinguish it from other products with which it might be confused.

4.63 In response to a question of the Panel, the European Communities submits that Article 7(c) of its Regulation refers to "preparations using homogenized sardine flesh" and that those products are "pastes", "pâtés" and "mousses". It argues that the consumers are informed about the content of the above products because: as stated in the first paragraph of article 7(c), "the trade description must indicate the specific nature of the culinary preparation"; and according to article 3.1.2 and 3.1.3 of EC Directive 2000/13, the list of ingredients and the quantity of certain ingredients or categories of ingredients must be indicated on the labelling.

4.64 The European Communities further submits that, according to Article 7(c) of the Regulation at issue, a can containing at least 25% of homogenised *Sardina pilchardus* flesh and the remainder containing "the flesh of other fish which have undergone the same treatment" can be marketed as "sardine paste", "sardine pâté", or "sardine mousse" only if the content of the flesh of any other fish is less than 25%. The European Communities explains that Article 7(c) does not derogate from Article 2, first indent, of the EC Regulation, which means that such a preparation must still be covered by CN code ex 1604 20 50. The European Communities therefore submits that according to Note 2 to the introduction of chapter 16 of the European Communities Combined Nomenclature, in cases where "the preparation contains two or more of the products mentioned above, it is classified within the heading of chapter 16 corresponding to the component or components which predominate by weight".

4.65 Therefore, the European Communities submits that if the predominant weight is, for instance, mackerel, the corresponding heading would be that corresponding to mackerel and not to *Sardina pilchardus*. The European Communities argues that such a product could not be marketed under the trade description "sardines" but would have to be marketed under the name provided for in the laws, regulations and administrative provisions applicable in the member State in which the product is sold, in accordance with Directive 2000/13. The European Communities also submits that the term "other fish" in Article 7(c), second paragraph, refers to any other fish species, including but not limited to both *Sardinops sagax* and any other non-sardine-type fish species.

4.66 **Peru** notes that there is no disagreement with the European Communities that the objectives that it claims to pursue with its Regulation are legitimate objectives within the meaning of both Article 2.2 and 2.4 of the TBT Agreement. However, Peru submits that the objective to "improve the profitability of sardine production in the Community" as stated in the preambular part of the EC Regulation is not a "legitimate" objective within the meaning of the TBT Agreement. Peru argues that even though the TBT Agreement does not define the term "legitimate", its purpose is to further the objectives of the GATT 1994 and to avoid restrictions on international trade disguised as technical regulations. Peru argues that the TBT Agreement regulates how Members should pursue their policy objectives, not which policy objectives they should pursue.

4.67 Peru submits that when the European Communities notified its Regulation in 1989 to the Parties of the Tokyo Round Standards Code, it indicated that the objective and rationale of the EC Regulation was "consumer protection". However, Peru observes that the EC Regulation lays down minimum quality standards only for products made from *Sardina pilchardus*. Peru contends that if the concerns of consumers had been at the origin of the EC Regulation, the European Communities would not have limited its application to the species of sardines that populates European waters but would have adopted a regulation which also covers like products made from sardines harvested in the waters of other WTO Members.

4.68 In support of its reasoning, Peru first submits an opinion on the quality and the appropriate commercial name of Peruvian sardines prepared by a German food inspection institute, the Nehring Institute, and by the Federal Research Centre for Fisheries, Institute of Biochemistry and Technology of Germany which states that "the characteristics in taste and smell [of the product made

from *Sardinops sagax*] are very similar to the products of *Clupea pilchardus* which come from Europe and North-Africa". Peru also submits that according to an open letter addressed by the Consumers' Association to the Advisory Centre on WTO Law, and whose facts and arguments Peru requests to be considered as part of its submission to the Panel, the EC Regulation "does nothing to promote the interests of European consumers".

4.69 Peru also argues that, according to Article 7(c) of the EC Regulation, fish processors could market fish paste using the name "sardines" provided that they add flesh from *Sardina pilchardus* to the flesh from *Sardinops sagax*. Therefore Peru contends that this part of the EC Regulation promotes the market opportunities of European sardine producers. Peru also notes the European Communities' argument that, in spite of the permission to use the term "sardines" for products of which up to one half is not prepared from *Sardina pilchardus*, the consumer would be adequately informed because the list of ingredients would have to indicate the quantities of each of the ingredients used. Peru contends that this argument cannot be reconciled with the European Communities' claim that the use of the term "sardines" for a product made from *Sardinops sagax* must be prohibited to protect the European consumer even if the list of ingredients indicates that it was made from *Sardinops sagax*.

4.70 Concerning the objective of maintaining market transparency, Peru argues that there is no rational connection between the objective of ensuring market transparency and the monopolization of the name "sardines" for fish of a species found mainly off the coasts of the European Communities and Morocco. Peru claims that the effect of monopolizing the name "sardines" for one species of sardines is that importers of Peruvian sardines are prevented from informing the European consumers in commonly understood terms of the content of hermetically sealed containers. As a result, market transparency is reduced. Peru argues that if cans with products prepared from Peruvian sardines were labelled as "Pacific Sardines" market transparency would be ensured.

4.71 The **European Communities** argues that the provisions of its Regulation laying down minimum quality standards, harmonizing the ways in which the product may be presented and regulating the indications to be contained on the label, all serve to facilitate comparisons between competing products. It further submits that some of these objectives are pursued by the Regulation at issue in conjunction with EC Directive 2000/13. The European Communities argues that this is particularly true of the name; accurate and precise names allow products to be compared with their true equivalents rather than with substitutes and imitations whereas inaccurate and imprecise names reduce transparency, cause confusion, mislead the consumer, allow products to benefit from the reputation of other different products, give rise to unfair competition and reduce the quality and variety of products available in trade and ultimately for the consumer.

4.72 The European Communities submits that Peru and some third parties misinterpret the second recital of the preamble to its Regulation. It argues that while the objectives of its Regulation are expressed in clear terms by using the expression "in order to …", the second recital simply indicates what the legislator thought could be one of the consequences of the Regulation ("…is likely to…"). In the view of the European Communities, it seems obvious that, as regards preserved sardine products, a law that ensures market transparency and fair competition, that guarantees the quality of the products and that appropriately informs the consumer of this, will most likely result in an improvement of the profitability of sardine production in the European Communities.

4.73 Concerning the Nehring Institute, the European Communities contends that its opinion is not reliable as regards the name of the product. The Nehring Institute is a private company and its opinion was not based on any kind of consumer research. It relied on a wrong interpretation of the EC Regulation and indirectly reported oral statements from government officials (which the Nehring Institute cautioned needed to be confirmed). With respect to the letter from the Consumers' Association, the European Communities argues that it provides no evidence of what consumer expectations are and that all the facts refered to in the letter are incorrect. Concerning the objective of market transparency, the European Communities contends that contrary to Peru's

argument, it is obvious that there is a "rational connection" between the legitimate objective of market transparency (and that of consumer protection) and the need to ensure that products are sold under their correct trade descriptions.

(b) Whether Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation

4.74 The **European Communities** argues that, in this case, the use of Codex Stan 94, even if deemed relevant, would be inappropriate to fulfil the legitimate objectives pursued by its Regulation. The prohibition on the use of the term "sardines" is necessary to allow different products to be distinguished. The European Communities notes that one of the legitimate objectives recognized by Article 2.2 of the TBT Agreement is the prevention of deceptive practices. It also argues that the use of the term "X Sardines" where the "X" indicates the name of a country or geographic area would not achieve these objectives in the European Communities since the use of the word "sardines" would suggest to the consumer that the products are the same but originate from different countries or geographic areas. Furthermore, the need to prevent deceptive practices is also a requirement of the Codex Stan 94, which requires that whichever formula is used for sardine-type products, it has to be drafted in such a way so as not to mislead the consumer.

4.75 The European Communities submits that the wording of Codex Stan 94 clearly makes a distinction throughout its text between sardine and sardine-type products and expressly reserves the term "sardines" exclusively for *Sardina pilchardus* without any qualification. In most parts of the European Communities, especially in the producer countries, the term "sardines" has historically made reference only to *Sardina pilchardus*. Therefore, the European Communities claims that the use of the term "sardine-type" demonstrates that "sardines" is not considered a generic term.

4.76 The European Communities argues that the various publications refered to by Peru prove nothing about European consumers' understanding of the term "sardines". These publications list the dozens of common names existing for each fish in different languages in order to identify the proper scientific name of each one (as is the case of FishBase) or provide literal translation of all fish names even if these are not know in the country where the language is spoken (as in the case of the European Communities Multilingual Dictionary).

4.77 The European Communities contends that the Regulation at issue does not exist in a vacuum, but is part of its legitimate policy to ensure precision in the names of foodstuffs and in doing so to preserve quality, product diversity and consumer protection. It points out that it has a system in which each food product must bear a precise trade description on which the consumer can rely as a guarantee of the nature and characteristics of the product. It argues further that one result of its legitimate policy is to prevent the names of foodstuffs becoming generic; that is why "sardines" is not a generic term in the European Communities. This situation has now created uniform consumer expectations throughout the European market, the term "sardines" referring only to a preserved product prepared from *Sardina pilchardus*. Therefore, the European Communities argues that an unrestricted use of the term "sardines" even within a country will certainly create confusion as to the exact nature of the product being sold.

4.78 According to the European Communities, this system allows consumers to rely on the name of the product as providing reliable information about the nature and identity of a foodstuff and serves the objective of consumer protection, market transparency. Furthermore, the system allows for competition between manufacturers and producers based on the quality and price of their products and not on attempting to make consumers believe that they are buying something they are not. The European Communities contends that requiring precise names for foodstuffs also ensures that certain reputation can be associated with each particular name and that this is an important element for maintaining high quality and product diversity. Therefore, the European Communities is of the opinion that under a system where names are more flexible and a greater range of foodstuffs can be

sold under each name, there is a natural tendency for all producers to use the cheapest ingredients that qualify for the name and allow the associated reputation to be exploited. This would lead to a smaller range of products being made available on the market and a lowering of quality and choice – often referred to as "levelling down".

4.79 The European Communities further argues that consumers in most of its member States have always associated the word "sardines" exclusively with *Sardina pilchardus*. They have also come to know canned *Sardinops sagax* under trade descriptions such as "Pacific pilchards" in the United Kingdom or "Sardinops Pilchard" in Belgium. The European Communities disputes Peru's assertion that European consumers associate *Sardinops sagax* with the trade description "sardines" and claims, to the contrary, that its consumers associate *Sardinops sagax* with trade descriptions such as "Pacific pilchards" and changing these trade descriptions would cause disruption and confusion. This would not be an effective or appropriate means for the fulfilment of the three legitimate objectives mentioned above.

4.80 The European Communities also recalls that, even before the EC Regulation entered into force, European Communities law required the products to be sold under the trade names determined by the laws of the relevant member States, and these laws did not allow the use of the trade description "prepared sardines" to be used for what Peru terms "all species of sardines". The European Communities refers to Council Directive 79/112/EEC of 18 December 1978, the predecessor to EC Directive 2000/13 which states:

> The name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the member state where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused.

4.81 The European Communities submits that, in France for instance, Article 1 of "Arrêté Ministériel du 16 mars 1982 pour les poissons marins" prescribed the name "Sardine commune" for the *Sardina pilchardus*, and the name "Sardinops du Chili" or "Sardinops" for the *Sardinops sagax*. Similarly, in Spain, the name "Sardina" has been reserved for *Sardina pilchardus* since at least 1964. In 1984, Article 30.1 of "Real Decreto 1521/1984" of 1 August 1984, in combination with its Annex I, reiterates the attribution of the name "Sardina" to the *Sardina pilchardus*. Moreover, the European Communities notes that United Kingdom's regulations have required the name "Pacific pilchards" for *Sardinops sagax* since at least 1980, well before the adoption of the EC Regulation.

4.82 In conclusion, the European Communities argues that any name for what are considered "sardine-type products" that contains the word "sardines" would not be in accordance with the law and the custom of its member States and would mislead the European consumers.

4.83 **Peru** claims that the European Communities has failed to substantiate its assertion that Codex Stan 94 is an ineffective or inappropriate means for the fulfilment of its legitimate objectives. According to Peru, paragraph 6.1.1(i) of Codex Stan 94 takes into account the legitimate objective pursued by the European Communities, consumer protection, because the term "sardines" without any qualification is reserved for *Sardina pilchardus*. Peru notes that paragraph 6.1.1(ii) of Codex Stan 94 prescribes that products prepared from fish of the species not found in Europe are to be labelled as sardines from a country or geographic area or of a species or their common name. Therefore, even assuming that the European consumers indeed associate the word "sardines" exclusively with *Sardina pilchardus*, they would not be misled if sardines of the species *Sardinops sagax* were marketed as Pacific sardines. Peru argues that the European consumer offered a can labelled "Pacific

sardines" or "Peruvian sardines" is not misled because the consumer is clearly informed that the product is not prepared from sardines caught in European waters. It is the use of a term without the word "sardines", such as the term "pilchard", to describe products made from sardines of the species *Sardinops sagax* that would confuse consumers. In this regard, Peru notes that the word "pilchard" is one of the common names for fish of the species *Sardina pilchardus*.

4.84 Peru claims that the name "sardines" is a generic term used to describe fish belonging to a large group of clupeid marine fish sharing the characteristics of young pilchards, and that until the adoption of the EC Regulation in 1989, all species of sardines could be marketed under European Communities law as sardines. Peru submits that the common names of *Sardinops sagax* in European countries are identical to the names to be used for that species according to Codex Stan 94 and argues that the European Communities cannot claim convincingly that the naming of a product, in accordance with linguistic conventions that the European Communities' authorities themselves found to exist in Europe, could mislead the European consumer.

4.85 In support of this claim, Peru argues that various publications prepared by the European Communities, international organizations and specialised institutions confirm that in all European countries at least one of the common names for fish of the species *Sardinops sagax* consists of the word "sardines" (or its equivalent in the national language) qualified by one of the countries or the geographic area in which this species is found, such as "Peruvian sardine" in English; "Sardine du Pacifique" in French; "Sardinha" in Portuguese. Amongst those publications, Peru mentions the "Multilingual Illustrated Dictionary of Aquatic Animals and Plants" - produced by the European Commission in co-operation with the member States of the European Communities and national fishery institutes; the electronic publication known as "FishBase", a publication which was prepared with the support of, *inter alia*, the European Commission, which lists about 110,000 common names for fish; and the Multilingual Dictionary of Fish and Fish Products prepared by the Organisation for Economic Cooperation and Development (OECD).

4.86 Peru claims that the Codex Stan 94 enhances market transparency and that the alternative suggestions of the European Communities have exactly the opposite effect. In the view of Peru, this demonstrates that the European Communities is ready to sacrifice market transparency in order to confer upon its producers the privilege of using the generic term "sardines". It is not apparent to Peru how the European Communities could possibly justify the deviation from the standard set out in paragraph 6.1.1(ii) of Codex Stan 94 in terms of market transparency when the very purpose of the labelling regulations set out in Codex Stan 94 for sardines of species other than *Sardina pilchardus* is to ensure market transparency.

4.87 Peru argues that it is legitimate for a government to adopt regulations giving each food product a precise and specific trade description that does not mislead the consumer. However, Peru argues that it is not legitimate to reserve the use of a generic term for a locally produced product and that the EC Regulation does not implement the legitimate policy of preserving specific and precise trade descriptions for food; it establishes minimum quality standards for products prepared from *Sardina pilchardus* and reserves the commercial benefit of this guarantee to products prepared from sardines originating from European waters. As explicitly recognised in the Preamble to the EC Regulation and further explained in the European Communities' first submission, Peru argues that this is meant to "improve the profitability of sardine production in the Community". According to Peru, it is not meant to ensure that products made from *Sardina pilchardus* are marketed only under one trade name. Peru argues that there are also no other European Communities regulations that establish specific and precise trade descriptions for the other species of sardines covered by the Codex Stan 94.

4.88 Peru argues that Codex Stan 94 does not prevent the European Communities from requiring that each product made from sardines bear a precise trade description on which the consumer can rely. Peru argues that if, for instance, canned fish of the species *Sardina pilchardus* are labelled "sardines"

and canned fish of the *Sardinops sagax* are marketed as "Pacific sardines", each of the two products has a precise trade description and the consumers' expectations are protected and Codex Stan 94 is met.

4.89 Peru contends that it is possible that European consumers, when offered a can labelled "sardines" without any qualification expect to buy a product made from sardines of the species that populate European waters. Peru argues, however, that paragraph 6.1.1(i) of Codex Stan 94 takes this element into account because the term "sardines" without any qualification may be reserved for that species. Peru argues that when European consumers are offered a can labelled "Pacific sardines", they are not misled because they are clearly informed that the product is not prepared from sardines caught in European waters. Therefore, even assuming that European consumers do associate the word "sardines" exclusively with *Sardina pilchardus*, they would not be misled if sardines of the species *Sardinops sagax* are marketed as Pacific sardines. Based on these reasons, Peru concludes that the European Communities did not substantiate its assertion that the Codex Stan 94 is an ineffective or inappropriate means for the fulfilment of its legitimate objectives.

4.90 Peru notes that paragraph 6.1.1(i) of Codex Stan 94 accords the European Communities a privilege enjoyed by no other WTO Members in that it permits an unqualified use of the term "sardines" to the particular species of sardines found off the European coasts. Peru notes that it would be inconsistent with Codex Stan 94 if Peru were to reserve the unqualified use of the term "sardines" for products prepared from *Sardinops sagax* but it must ensure that its domestic food labelling regulation permits the marketing of *Sardina pilchardus* as sardines without any qualification as to their origin. In Peru's view, the European Communities cannot claim that an international standard that was drafted with European Communities' particular situation and interest in mind and accords such a privilege is an ineffective or inappropriate means for the fulfilment of its legitimate objectives.

E. ARTICLE 2.2 OF THE TBT AGREEMENT

1. Whether the EC Regulation is "more trade restrictive than necessary"

(a) Trade-restrictive effects

4.91 The **European Communities** argues that neither Peru, nor the third parties, have attempted to show that there is a barrier to trade at all – let alone an "unnecessary" one. It considers that Peru is obviously of the view that it could sell more of its *Sardinops sagax* products – or perhaps get a better price for them – if they could be called "sardines" rather than use their proper names of *Pilchards* or *Sardinops.* The European Communities contends that Peru's belief is not proof.

4.92 The European Communities submits that, in order to establish that Article 2 of the EC Regulation violates Article 2.2 of the TBT Agreement, both Peru and Canada limit themselves to analysing one of the many recitals of the EC Regulation and to asserting that this Regulation, having a clear protectionist intent, constitutes an obstacle to trade. It contends that Peru's and Canada's arguments constitute a tautology, unacceptable in legal proceedings where the complainant has the burden of proving a *prima facie* case. It argues that, Peru, in order to establish that Article 2 of the EC Regulation is applied "with a view to or with the effect of creating unnecessary obstacles to international trade", would have to demonstrate trade-restrictive effects; identify correctly the legitimate objectives pursued; and finally, establish that these restrictive effects are more trade-restrictive than necessary, taking into account the benefits to be expected from the realisation of the legitimate objectives. The European Communities claims that Peru fails to establish any of these requirements for a violation of Article 2.2 of the TBT Agreement.

4.93 **Peru** argues that under Article 2.2 of the TBT Agreement, it does not have to demonstrate that the EC Regulation has trade-restrictive effects. Peru submits that the drafters of the TBT Agreement proceeded on the assumption that all technical regulations, including those imposed

for legitimate reasons, inevitably have trade-restrictive effects. Peru contends that each regulation prescribing the characteristics that an imported product (or process or production method related to that product) must meet imposes burdens that producers and distributors have to comply with and therefore inevitably has trade-restrictive effects. This is reflected in the wording "more trade-restrictive than necessary" in the text of Article 2.2.

4.94 Peru considers that it would not be consistent with established GATT and WTO jurisprudence if Peru were found to be legally required to provide statistical or other evidence demonstrating that the EC Regulation adversely affected its exports. Peru refers to the Appellate Body report on *India — Patents (US)* in support of this view.[14] Peru contends that the TBT Agreement obliges the European Communities to maintain certain conditions of competition for imported products; it is therefore sufficient for Peru to demonstrate that its products are not accorded those conditions of competition. Peru further submits that in interpreting the term "trade-restrictive" in Article 2.2 of the TBT Agreement, the Panel should take into account (a) that the basic provisions of the GATT on restrictive trade measures have been interpreted both in GATT and WTO jurisprudence as provisions establishing conditions of competition and (b) that one of the purposes of the TBT Agreement is to further the objectives of the GATT 1994.

4.95 In support of the above, Peru recalls that the GATT panel on *EC — Oilseeds I* states:

> The CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition. Thus they decided that an import quota constitutes an import restriction within the meaning of Article XI:1 whether or not it actually impeded imports and that a tax on imported products does not meet the national treatment requirement of Article III whether or not the tax is actually applied to imports.[15]

4.96 Peru also recalls that the Appellate Body noted this jurisprudence approvingly in *Japan — Alcoholic Beverages II* and ruled that "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products" and that "it is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent".[16]

4.97 Peru argues that, according to the above-mentioned panels, the rationale for interpreting Articles III and XI of the GATT 1994 as provisions prescribing the establishment of conditions of competition is obvious: the basic provisions of the GATT 1994 on restrictive trade measures are not only to protect current trade but also to create the predictability needed to plan future trade. They must therefore be interpreted to apply to the regulatory framework governing both current and future trade. Furthermore, Peru submits that it is generally not possible to foresee or control with precision the impact of trade policy measures on import volumes; if the WTO-consistency of a restrictive trade measure were to depend on its actual trade impact, the question of whether a WTO Member is violating its obligations would depend on factors it can neither foresee nor control. Peru further points out that if that were the case, adversely affected WTO Members could only bring a complaint against such a measure after it has been proven to cause damage. Moreover, Peru submits that changes in trade volumes result not only from government policies but also other factors and, in most

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[14] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, para. 40.

[15] GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins* ("*EEC – Oilseeds I*"), adopted 25 January 1990, BISD 37S/130, para. 150.

[16] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*") WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 110.

circumstances, it is therefore not possible to establish with certainty that a decline in imports following a change in policies is attributable to that change.

4.98 Peru contends that the above considerations apply also to the interpretation of the term "trade-restrictive" in Article 2.2 of the TBT Agreement and concludes that any measure adversely affecting the conditions of competition for imported products must be deemed to be "trade-restrictive" within the meaning of Article 2.2, irrespective of its actual trade impact.

4.99 According to the **European Communities**, Peru interprets Article 2.2 of the TBT Agreement to incorporate concepts from Article III:4 of the GATT 1994. It notes that Peru claims that Article 2.2 is concerned with conditions of competition rather than unnecessary restrictions on trade. The European Communities argues that, contrary to Peru's contention, it is not possible to derive from the decisions of the Appellate Body a principle "under GATT and WTO jurisprudence that the basic provisions governing international trade protect expectations on conditions of competition, not on export volumes".

4.100 The European Communities submits that the Appellate Body, in the case cited by Peru in support of its original contention, *India — Patents (US)*, chided the panel for pronouncing a "general interpretative principle" according to which "legitimate expectations" concerning in particular the protection of conditions of competition must be taken into account in interpreting the TRIPS Agreement. The European Communities refers to the Appellate Body's statement that "[t]he legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself" and notes that just as in the case of the TRIPS Agreement considered in *India — Patents (US)*, there is no basis for importing into the TBT Agreement concepts that are not there. It argues that the TBT Agreement expressly recognises the right of WTO Members to adopt the standards they consider appropriate to protect, for example, human, animal or plant life or health, the environment, or to meet other consumer interests. The European Communities argues that all technical regulations inevitably affect conditions of competition and claims that if such an effect were sufficient to establish an "obstacle to trade" contrary to Article 2.2 of the TBT Agreement, there would have been no need for the Members to refer, in the TBT Agreement, to *unnecessary* obstacles to trade.

4.101 **Peru** argues that contrary to the assertion of the European Communities, the Appellate Body did *not* chide the panel in *India — Patents (US)* for having endorsed the principle of conditions of competition. In the view of Peru, what the Appellate Body did was to chide the panel for having merged and therefore confused the concepts of "reasonable expectations" and "conditions of competition". Peru respectfully submits that the European Communities does the same in its argumentation.

(b) More trade-restrictive than necessary

4.102 **Peru** recalls that one of the purposes of the TBT Agreement is to further the objectives of the GATT 1994, and argues that according to consistent GATT and WTO jurisprudence, a measure cannot be justified as "necessary" under Article XX(b) and (d) of the GATT 1994 if an alternative measure is reasonably available that is not inconsistent with, or is less inconsistent with, other GATT provisions. Peru argues that the jurisprudence of the GATT and the WTO on the term "necessary" in Article XX(b) and (d) of the GATT 1994 is therefore relevant to the interpretation of the terms "more trade-restrictive than necessary" in Article 2.2 of the TBT Agreement. In Peru's view, a measure should therefore be deemed to be more trade restrictive than necessary within the meaning of Article 2.2, if there is a reasonably available, less trade-restrictive alternative measure that fulfils the Member's legitimate objective and that is consistent with, or less inconsistent with, the TBT Agreement.

4.103 In Peru's view, the considerations on the basis of which the Appellate Body determined in *Korea — Various Measures on Beef* the meaning of the term "necessary" in Article XX(d) of the

GATT 1994 are of general application and should therefore guide the Panel in determining the meaning of the term "necessary" in Article 2.2 of the TBT Agreement, it being understood that the different context in which the term appears in the two provisions would need to be taken into account.

4.104 According to Peru, this means that the Panel should begin by examining whether the measure at issue makes a contribution to the realisation of the two ends that the European Communities claims to pursue (specific trade names and consumer protection). If the Panel reaches the conclusion that the measure does so, it must weigh the importance of the common interests or values realised by the measure against its impact on trade. On the other hand, If the Panel reaches the conclusion that the measure fails to make a contribution to the ends the European Communities claims to pursue, the question of weighing the common interests or values realised against its impact on trade will not arise.

4.105 Peru submits that the prohibition of the term "sardines" for *Sardinops sagax* in combination with the name of a country, geographical area or species or the common name does not make any contribution to the ends that the European Communities claims to pursue. Peru is therefore of the view that the Panel need not engage in a process of weighing up the three elements as conducted by the Appellate Body in *Korea — Various Measures on Beef.*

4.106 According to Peru, in the context of Article XX of the GATT 1994 the term "necessary" qualifies the term "measures", and the necessity test must consequently be applied by the panel to the measure it previously found to be inconsistent with another provision of the GATT 1994 and therefore requires justification under Article XX. However, in the context of Article 2.2 of the TBT Agreement, the term "necessary" qualifies the terms "not more trade-restrictive than", and what must thus essentially be determined to be "necessary" is the obstacle to trade created by the measure challenged by the complainant.

4.107 In the view of Peru, the EC Regulation is more trade restrictive than necessary because there is a less trade-restrictive alternative, namely Codex Stan 94, that is reasonably available, that is consistent with the TBT Agreement and that would fulfil the European Communities' objective. Peru argues that the objective of consumer protection that the European Communities claims to pursue with its Regulation can be met in a less trade-restrictive manner by allowing species other than *Sardina pilchardus* to be marketed as preserved sardines in accordance with the Codex Stan 94; that is, by including designations that inform consumers of the "country, geographic area, the species or the common name of the species in accordance with the law and custom of the country in which the product is sold," for example "Pacific Sardines" or "Peruvian Sardines". By adopting such a measure, Peru contends that the European Communities could provide European consumers with the most precise information possible and reserve the use of the term "sardines" without any descriptor for products made from *Sardina pilchardus*. Peru argues that this alternative is reasonably available, consistent with the TBT Agreement and would permit the European Communities to fulfil its stated objectives while at the same time being less restrictive of trade in preserved sardines.

4.108 Peru also submits, quoting a letter from the Consumers' Association whose arguments Peru presents as part of its submission to the Panel, that

> …[t]here is no good reason to restrict sardines marketed within the [European Communities] to the specie *Sardina pilchardus* Walbaum. The equivalent Regulation for common marketing standards for tuna and bonito is not similarly restrictive, but permits, inter alia, Atlantic or Pacific bonito, Atlantic little tuna, Eastern little tuna, black skipjack "and other species of the genus Euthynnus". If a permissive and wide range of tuna or bonito species can be marketed in the Community under a common standards regime designed "to improve the profitability of tuna production in the Community" and to protect "consumers as regards the contents of packages" of tuna, it is difficult to understand why sardines should be marked out for a particularly restrictive regulatory regime.

4.109 The **European Communities** argues that even if Peru were to demonstrate that the EC Regulation is trade restrictive, it would still have to show that it is more trade restrictive than necessary in the light of the risks addressed by Article 2 of the EC Regulation.

4.110 With regard to the word "necessary" in Article 2.2 of the TBT Agreement and in Article XX(d) of GATT 1994, the European Communities argues that it is not used in the same context. First, it argues that Article XX(d) of GATT 1994 defines an exception and Article 2.2 of the TBT Agreement an obligation, and, second, Article XX(d) of GATT 1994 requires the measure to be "necessary to secure compliance" and Article 2.2 of the TBT Agreement, on the other hand, provides that the effects of the measure shall be "not more trade-restrictive than necessary". According to the European Communities, Article 2.2 does not strictly require that the measure is "necessary" to fulfil the legitimate objective – only that its effects not be more trade restrictive than necessary. Such a measure could be merely a helpful measure that, alone or perhaps together with other measures, helps in achieving the objective that the government pursues, even if possibly this objective could as well be accomplished in other ways than through the technical regulation in question. Accordingly, the only requirement in its view is that the measure should not be more trade restrictive than necessary, meaning that among two equally effective measures, the less trade restrictive should be chosen.

4.111 The European Communities consequently submits that the first criterion of the Appellate Body in *Korea — Various Measures on Beef* for Article XX(d) (the contribution made by the measure to the realisation of the end pursued) is not relevant for the analysis under Article 2.2 of the TBT Agreement, except that, if one measure is more effective in achieving the objective than another measure, it can be chosen, even if the less effective measure is less trade-restrictive.

4.112 The European Communities argues that the second criterion of the Appellate Body in *Korea — Various Measures on Beef* for Article XX(d) (importance of the common interest) suggests that the degree of permissible trade restriction would vary according to the importance of the objective pursued. According to the European Communities, however, this criterion is used by the Appellate Body to determine whether the measure is "indispensable" to fulfil the objective or whether it is simply "making a contribution". The European Communities considers that this does not seem relevant for an analysis under Article 2.2 since this provision simply requires a comparison of the trade effect of one measure with that of an alternative that also achieves the same objective, at least at the same level of protection. In providing a non-exhaustive list of legitimate objectives, the TBT Agreement deliberately refrains from setting out any choices as to the relative importance of one objective compared to another.

4.113 The European Communities argues that it is only the third criterion of the Appellate Body in *Korea — Various Measures on Beef* (impact of the measure on imports or exports) that is in one sense relevant to the analysis under Article 2.2. In its view, this follows from the very concept of "not more trade restrictive than necessary". However, the Appellate Body uses this criterion for a purpose that it is not relevant under Article 2.2 for the reasons seen above. The European Communities argues that under Article 2.2, one has to compare the trade effects of two measures, not the necessity of one measure.

4.114 The European Communities disagrees with Peru's assertion that a less restrictive measure would be to provide that preserved *Sardinops sagax* be called Peruvian or South American sardines. The European Communities finds that there is no answer to its argument that such a provision would not achieve its legitimate objective at the level of protection that the it seeks and that the EC Regulation, including its rules on names, does not create an obstacle to trade, but promotes it. Moreover, the European Communities contends that the quote from the Consumers' Association does not advance a single new element of fact but simply repeats facts that the European Communities had demonstrated to be wrong.

2. Taking account of the risks non-fulfilment would create

4.115 According to **Peru**, the phrase "taking account of the risks non-fulfilment would create" is preceded by a comma and therefore refers not only to the term "necessary" but to the whole of the obligation set out in the preceding phrase. Peru contends that if the phrase were to be interpreted to refer to the adverse consequences of a failure to apply the technical regulation, it would add nothing to the necessity test because these consequences would have to be taken into account in any case to determine whether the regulation meets that test. In Peru's view, the phrase was probably added to make clear that a technical regulation merely preventing risks (rather than predictable outcomes) may be both "legitimate" and "necessary", hence making explicit what is implicit in the necessity test set out in Article XX(b) and (d). According to Peru, this issue does not arise in the case before the Panel because neither party claimed that the EC Regulation serves to prevent risks.

4.116 The **European Communities** considers that the words "taking account of the risks non-fulfilment would create" make clear that the question of whether measures are alternatives or not can only be assessed once it has been established whether the alternative, allegedly less trade-restrictive measure, achieves the legitimate objectives of a level of protection at least as high as that achieved by the contested measure. In its view, the "downside" of not meeting the chosen level of protection is clearly an essential element in this consideration. According to the European Communities, it is the "mirror image" of the positive evaluation of whether the measure is capable of meeting the chosen level of protection, and it is only by looking at both sides of the picture that it is possible to compare properly the effectiveness of the two measures. It argues that the quoted words are thus an integral part of the test set out in Article 2.2 of the TBT Agreement (which it considers to be more a "comparison test" than a "necessity test") and that they were intended to preserve, not reduce, the right of WTO Members to determine their appropriate level of protection. The European Communities submits that the reason why these words do not occur in Article XX(b) or (d) of the GATT 1994 is the fact that the tests to be applied in Article XX(b) or (d) of the GATT 1994 are not the same as in Article 2.2 of the TBT Agreement.

4.117 According to the European Communities, the non-fulfilment of the objectives in this case would lead to the marketing of lower quality products, the use of disparate and confusing presentations, labelling and names, unfair competition, the elimination of higher cost and higher quality products from the market, the reduction in the quality and range of products available to the consumer and finally reduction in the reputation and consumption of preserved fish products in the European Communities, to the detriment of all economic operators in the sector and consumers.

F. ARTICLE 2.1 OF THE TBT AGREEMENT AND ARTICLE III:4 OF THE GATT 1994

1. The relationship between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994

4.118 **Peru** argues that the national-treatment requirements set out in Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 are identically worded and have the same objective, i.e., to ensure that internal regulations are not applied so as to afford protection to domestic production. Peru considers that Article 2.1 of the TBT Agreement introduces into the TBT Agreement the national-treatment and the most-favoured-nation principles set out in Articles I:1 and III:4 of the GATT 1994. Peru is of the opinion that the two provisions differ only in their scope: while Article III:4 of the GATT 1994 is broadly worded to cover all regulations affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products, Article 2.1 of the TBT Agreement is limited to technical regulations as defined in Annex 1 of the TBT Agreement; in Peru's view, the regulations covered by Article 2.1 at issue are therefore a sub-set of the regulations covered by Article III:4 of the GATT 1994. For this reason, Peru argues that the jurisprudence developed by the Appellate Body for Article III:4 should be taken into account when interpreting Article 2.1 of the TBT Agreement.

4.119 In Peru's view, its arguments under Article 2.1 of the TBT Agreement on the less favourable treatment of Peruvian sardines and on the likeness of the species *Sardinops sagax* and *Sardina pilchardus* therefore apply equally to Article III:4 of the GATT 1994. Peru is consequently of the view that the EC Regulation is also inconsistent with this provision.

4.120 The **European Communities** contends that Peru's arguments under Article 2.1 of the TBT Agreement refer to its arguments under Article III:4 of the GATT 1994. It explains that it will therefore deal with them in its discussion of Peru's claim under Article III:4 of the GATT 1994.

4.121 Neither the European Communities nor Peru contests that the EC Regulation is a "a law, regulation or requirement affecting the internal sale, offering for sale, purchase, distribution or use" within the meaning of Article III:4 of the GATT 1994.

2. Whether domestic products prepared from *Sardina pilchardus* and imported products prepared from *Sardinops sagax* are "like" products

4.122 Both **Peru** and the **European Communities** submit that the Appellate Body, in its rulings on *EC — Asbestos*, explained how a treaty interpreter should proceed in determining whether products are "like" under Article III:4 and that it also pointed out that the determination has to be made on a case-by-case basis, employing four criteria in analyzing "likeness":

> … (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products. We note that these four criteria comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes. These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the "likeness" of particular products on a case-by-case basis.

4.123 **Peru** claims that imported products prepared from fish of the species *Sardinops sagax* and the domestic products prepared from fish of the species *Sardina pilchardus* are "like". In support of its claim, Peru argues that the report it submitted - "*La Sardina Peruana (Sardinops sagax sagax) y la Sardina Europea (Sardina pilchardus)*" - demonstrates that the two species of fish are physically very similar and that there is no scientific or technical reason that would justify a commercial distinction. Peru further submits that according to the opinion of the Nehring Institute and the Federal Research Centre for Fisheries, Institute of Biochemistry and Technology, the characteristics in taste and smell of the product from *Sardinops sagax* are very similar to the products of *Clupea pilchardus* which originate from Europe and North Africa.

4.124 Peru also argues that the process of inclusion of new fish species in Codex Stan 94, as described by Canada in its third party submission, confirms that products made from *Sardina pilchardus* and those made from *Sardinops sagax* are "like", because for the proposed fish species to be included in Codex Stan 94, reports must be submitted from at least three independent laboratories stating that the organoleptic properties, such as texture, taste and smell of the proposed species, after processing, conform with those characteristics of the species already included in the standard. Once a species has been found to meet these criteria, the Codex Alimentarius Commission takes its decision. Therefore, Peru submits that this process ensures that only species that are like from the consumers' perspective are included in Codex Stan 94. Thus, Peru claims that the two

products at issue must be considered to be "like" products within the meaning of Article 2.1 of the TBT Agreement.

4.125 Peru thus argues that the physical properties of these products are very similar, and as a result of these similarities, they are capable of serving the same or similar end-uses, and that consumers perceive and treat the products as alternative means to satisfy the demand for preserved sea food. Peru refers in this respect to the Appellate Body's statement in *EC — Asbestos*, where it emphasised that:

> Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace.

4.126 According to Peru, a comparison of the physical properties of the two products at issue cannot but lead to the conclusion that the differences between them are of interest to biologists but not to the consumer and therefore do not influence the competitive relationship between them in the market place. The two products therefore must therefore be considered to be "like" products within the meaning of Article 2.1 of the TBT Agreement.

4.127 As to the fourth criterion that has been used for determining likeness – the international classification of the products for tariff purposes – Peru does not consider that this fourth criterion can provide useful guidance in this case. Nevertheless, Peru points out that the Harmonized System does not distinguish between sardines of different species and that WTO Members generally distinguish in their customs tariffs between fresh, frozen and canned sardines but not between sardines of different species.

4.128 Peru notes that the European Communities submitted extensive evidence on the biological differences between *Sardinops sagax* and *Sardina pilchardus*, but argues that it did not submit any evidence to the Panel demonstrating that the differences in physical properties of the two products at issue are such as to influence the competitive relationship between products in the marketplace. Peru further submits that the objection of the European Communities that any products which are in a competitive relationship would have to bear the same name if Peru's argument were to be accepted, would only be valid if all products found to be "like" products had to be treated identically under the national-treatment provisions of the TBT Agreement and the GATT 1994. However, national treatment does not mean identical treatment. It means no less favourable treatment. A GATT panel therefore correctly found that:

> The mere fact that imported products are subject … to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment.[17]

The same panel noted that:

> there may be cases where application of formally identical provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded to them is in fact no less favourable.[18]

[17] BISD 36S/386.
[18] *Ibid*.

These rulings make clear that the national-treatment provisions are not violated if two like products are subject to different naming regulations. In such cases, it has to be assessed whether the different regulations accord imported products less favourable treatment than that accorded to the like domestic product.

4.129 The **European Communities** submits that with regard to living organisms, different species cannot be regarded as "like" for the purposes of being granted the same name because species represent the basic units of biological classifications outside which organisms cannot interbreed and produce viable offspring. European consumers do not consider different species to be so "like" that they should bear the same name. It also submits that from a scientific and biological point of view there is currently only one species of the genus *Sardina*, which is *Sardina pilchardus*, and *Sardinops sagax* belongs to another genus, the genus *Sardinops*. According to the European Communities, both genera belong to the same family *Clupeidae* as do other genera such as *Sardinella, Clupea, Sprattus*. Therefore, sardines (*Sardina pilchardus*), sardinops (*Sardinops sagax*), round sardinella (*Sardinella aurita*), herring (*Clupea harengus*) and sprat (*Sprattus sprattus*) belong to the same family but to different genera.

4.130 The European Communities also contests Peru's argument that consumers' tastes and habits can be inferred from the fact that two products are "similar". If this were the case, it argues that the Appellate Body would not have considered this as a separate criterion. Consumers' tastes and habits need to be proved with reference to the market concerned, namely the European market. The European Communities is of the opinion that, although not bearing the burden of proof, it has provided the Panel with evidence that European consumers do have the habit of choosing among different, although similar products to satisfy their varied tastes.

4.131 The European Communities also argues that the *Clupeidae* family is composed of 216 species of fish distributed in 66 genera and that if the extension of the use of the denomination "sardines" to *sardinops* was admitted, any of the other 216 species of the same family could be given the same name. In other words, the European Communities considers that if Peru's logic was adopted, namely that two fish can be considered "like" on the basis that they are "physically very similar"; and that they are capable of serving the same or similar end-uses, then, not only the 216 fish belonging to the family *Clupeidae* could be called sardines, but also all preserved sea food.

4.132 In light of the above, the European Communities considers that the "likeness" required of products for the purposes of naming them is much more stringent than it would be for the same products for the purposes of, for example, taxation. For the purposes of naming a product, not all products which are in a competitive relationship are "like" under Article III of the GATT 1994. It argues that if vodka and shochu can be considered "directly competitive or substitutable" for the purpose of internal taxation, it would be hard to say that their "likeness" goes as far as imposing that they be referred to in the same way. If this was the case, apples and oranges, or chicken and turkeys, because they are in a competitive relationship, should bear the same name. According to the European Communities, identical products can have the same name; like products must not.

4.133 The European Communities rejects the opinion of the Nehring Institute and the Federal Research Centre for Fisheries, Institute of Biochemistry and Technology, that Peru put forward to support the organoleptic similarities of products prepared with *Sardina pilchardus* and *Sardinops sagax.*

3. Whether the prohibition to market products prepared from *Sardinops sagax* under the name "sardines" accords a less favourable treatment

4.134 **Peru** reiterates its argument that the effect of monopolizing the name "sardines" for products made from fish of the species *Sardina pilchardus* is that European consumers of Peruvian preserved sardines cannot be informed that the hermetically sealed containers in which these products are

marketed contain sardines, whereas the consumers of products made from *Sardina pilchardus* may be given this information. Peru argues that if the *Sardina pilchardus* is better known in a particular member State of the European Communities under a name other than "sardines" (for instance, under the name "pilchard") and products made from *Sardina pilchardus* could therefore be marketed more successfully under that name, the seller would be permitted to choose that name. By contrast, Peru argues, the seller of products made from *Sardinops sagax* is not given that choice. Peru therefore claims that the monopolization of the term "sardines" for products prepared from *Sardina pilchardus* accords competitive conditions to those products that are more favourable than those accorded to products prepared from *Sardinops sagax*. Consequently, in Peru's view, the "treatment" that the EC Regulation accords to Peruvian sardines is "less favourable" than that accorded to European sardine products.

4.135 In contrast, Peru contends that it would not be inconsistent with the national treatment requirement if the trade description for Peruvian sardines was "Pacific sardines" and the trade description "sardines" was reserved for European sardines, because this difference would not accord Peruvian sardines less favourable treatment. Peru submits that what renders the EC Regulation inconsistent with the national treatment requirement is not that it treats imported products differently but that the difference in treatment entails less favourable conditions of competition for imported products.

4.136 The **European Communities** argues that within its member States, each different fish of the family *Clupeidae* is sold under its proper correct name, thus benefiting from the specific market and reputation that each of them has developed. It states that it does not understand how this can amount to a measure that "accords to the group of 'like imported products' 'less favourable treatment' than the one it accords to the group of 'like domestic products'". The European Communities submits that the product canned sardines has to meet the standards contained in the EC Regulation whether imported or domestically prepared. Similarly, all other prepared fishes are subject to the same rule whether imported or domestically produced.

4.137 The European Communities argues that "according national treatment" means according a product its correct name, not granting to a different product a competitive opportunity represented by the use of another product's name. It further submits that Peru merely assumes that calling a product "sardines" is an advantage. The European Communities does not see why any of the names used for preserved *Sardinops sagax* should be considered less favourable than the use of the term "preserved sardines" for preserved *Sardina pilchardus*.

4.138 The European Communities contends that the reason why Peru appears not to be selling its product in the member States of the European Communities is not due to the non-existence of a market for *sardinops* or that *sardinops* are treated less favourably. It argues that Peru should have more confidence in the high level of quality of its preserved sardinops and should be devoting its energies to improving the reputation of its products for reliability and quality, rather than seeking to exploit the reputation of another product.

G. JUDICIAL ECONOMY

4.139 **Peru** requests the Panel to address its subsidiary claims on Articles 2.1 and 2.2 of the TBT Agreement only if it were to reach the conclusion that the EC Regulation is consistent with Article 2.4 of the TBT Agreement; and to examine the consistency of the EC Regulation with Article III:4 of the GATT 1994 only if it were to conclude that it is consistent with the TBT Agreement. Peru requests that the Panel avoid developing interpretation of the TBT Agreement that are not required to resolve the dispute.

4.140 Peru notes that, with respect to the principle of judicial economy, the Appellate Body stated:

> The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and to 'secure a positive solution to a dispute'. To provide only a partial resolution of the dispute would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members".[19]

4.141 Peru argues that the Panel would complete its task if it resolves the dispute as defined by the claims that Peru has submitted and refers to *US — Cotton Yarn* in which the Appellate Body refused to make a finding on an issue on the grounds that the findings it had already made "resolve[d] the dispute as defined by Pakistan's claims before the Panel".

4.142 The **European Communities** makes no arguments on the issue of judicial economy.

H. EUROPEAN COMMUNITIES' ARGUMENT THAT PERU REFORMULATED ITS CLAIMS

4.143 The European Communities also contends that Peru's "reformulation" of its claims as reproduced in paragraph 3.1 (a) above constitutes a widening of the claims presented in its first written submission and is therefore inadmissible. The European Communities argues that Peru is claiming in its second written submission that the European Communities and its member States cannot use a common name of the species *Sardinops sagax* according to the relevant law and customs to designate the preserved product unless it is accompanied by the word "sardines". The European Communities argues that since Peru has limited its complaint to Article 2 of the EC Regulation, the Panel's mandate only relates to the compatibility of that provision with the provisions of the covered agreements that have been invoked.

4.144 The European Communities further contends that Peru's formulation of its request for findings seeks to obtain a declaratory judgment that would require the European Communities to take certain specific action rather than simply remove any inconsistency and this would request the Panel to go beyond its mandate and is inadmissible. The European Communities also argues that Peru's reformulation of its claim is a consequence of the fact that Peru failed to properly research the common names of *Sardinops sagax* in the European Communities prior to commencing this dispute.

V. ARGUMENTS OF THIRD PARTIES

A. CANADA

1. Introduction

5.1 Canada submits that it has a substantial trade interest in the dispute with respect to its export of Canadian preserved sardines of the species *Clupea harengus harengus* to the **European Communities**, and a systemic interest in the interpretation of the TBT Agreement and the GATT 1994.

5.2 Canada argues that the EC Regulation permits only fish of the species *Sardina pilchardus* to be marketed in the European Communities as "sardines", impairing therefore the marketability of imported preserved sardines of species other than *Sardina pilchardus.* Canada further argues that the EC Regulation laying down common marketing standards for preserved sardines is a technical regulation within the meaning of the TBT Agreement and that it is inconsistent with the

[19] *Australia – Measures Affecting the Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, para. 223.

European Communities' obligations under Articles 2.4, 2.2 and 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.

2. Retroactive application of the TBT Agreement

5.3 Canada disagrees with the European Communities' contention that Articles 2.2 and 2.4 of the TBT Agreement are not applicable to measures that were imposed before the entry into force of the TBT Agreement and notes that this contention is inconsistent with both the case law and Article XVI:4 of the WTO Agreement. Canada points out that the Appellate Body in *EC — Hormones* made clear that, regardless of when a measure came into force, as long as it remains in force after 1 January 1995, it is subject to the disciplines of the SPS Agreement. In the view of Canada, the Appellate Body's reasoning is equally applicable in this case. If the negotiators had wanted to exempt the numerous technical regulations in existence on 1 January 1995 from the disciplines of the TBT Agreement, they would have explicitly done so. Thus, Canada claims that if the Panel were to accept the European Communities' argument, a situation would arise in which it would be impossible to ensure the conformity with WTO obligations of technical regulations enacted prior to 1 January 1995, and which continue to be in force.

5.4 Canada also notes that the issue of the application of a WTO Agreement to a measure that was imposed before the entry into force of the Agreement was addressed by the Appellate Body in *Brazil — Measures Affecting Desiccated Coconut.* Canada notes that the Appellate Body stated with reference to Article 28 of the Vienna Convention:

> Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force.

5.5 Canada asserts that after the entry into force of the TBT Agreement, the EC Regulation at issue did not "cease to exist", and that the TBT Agreement, including Articles 2.2 and 2.4, applies to measures that were enacted before 1 January 1995 and which continue to be in force.

5.6 With regard to this matter, Canada makes the final point that while the TBT Agreement was not in force at the time of the enactment of the EC Regulation, the Tokyo Round Standards Code, to which the European Communities was a party, was in force and its Article 2.2 contained provisions substantially similar to Article 2.4 of the TBT Agreement. Thus, even at the time the EC Regulation was enacted, the European Communities was under an obligation to use relevant international standards, such as the Codex Standard, as the basis for the Regulation at issue.

3. Article 2.4 of the TBT Agreement

5.7 Canada submits that it is well established that it is for the party asserting the fact, claim or defence, to bear the burden of providing proof thereof. Thus, in Canada's view and with respect to Article 2.4 of the TBT Agreement, Peru has to demonstrate that a relevant international standard exists or that its completion is imminent; and that the measure in question is not based on this standard. Canada argues that the burden then shifts to the defending party to refute the claimed inconsistency or to prove why the standard is ineffective or inappropriate to meet its legitimate objective.

5.8 Canada considers that for the purposes of the TBT Agreement, Codex Stan 94 is a relevant international standard, in that it applies to the same product category as the EC Regulation, namely, preserved sardines and, like the EC Regulation, relates to the marketing of that product. Canada also affirms that the European Communities is incorrect when it states that Codex Stan 94 is not relevant because "it did not exist and its adoption was not 'imminent' when the EC Regulation was adopted". In any event, whether or not Codex Stan 94 was in existence at the time the EC Regulation was

adopted is irrelevant to the European Communities' obligation under Article XVI:4 of the WTO Agreement, to ensure that the EC Regulation is consistent with Article 2.4 of the TBT Agreement.

5.9 Furthermore, Canada is of the view that standards adopted by the Codex Alimentarius Commission are the internationally agreed global reference point for consumers, food producers and processors, national food control agencies and the international food trade. Moreover, Canada is of the view that Codex Stan 94 complies with the six principles (e.g., principles of transparency, openness, impartiality and consensus) and procedures set out by the Decision of the TBT Committee.

5.10 With regard to the development and adoption of Codex Stan 94, Canada notes that member States of the European Communities were actively involved in this process and that the European Communities acted as an observer. Canada further recalls that a multilateral consensus-based approach was applied in this process. In addition, Canada argues that the inclusion of species in the Codex Stan 94 is made pursuant to a two-step process: first, a proposed species must meet the rigorous, scientific criteria set out by the Codex Alimentarius Commission; then, once a species has been found to meet these criteria, the Codex members make the final decision on its inclusion. According to Canada's submission under the Codex process, the scientific criteria require that members proposing the inclusion of an additional species communicate to the Commission all relevant information on taxonomy, resources, marketing, processing technology and analysis. Canada points out that this information must include reports from at least three independent laboratories stating that the organoleptic properties, such as texture, taste and smell, of the proposed species after processing conform with those of the species currently included in the Codex Stan 94.

5.11 Canada submits that, in accordance with Article 31(1) of the Vienna Convention, the ordinary meaning of the term "as a basis for" in Article 2.4 of the TBT Agreement is synonymous with "based on", and that the Appellate Body has stated that "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter." In this context, Canada argues that the EC Regulation is not "founded", "built" upon or "supported by" Codex Stan 94. Canada notes that paragraph 6.1.1 of the Codex Stan 94 permits preserved sardines of 20 species other than *Sardina pilchardus* to use the name "sardines" along with a designation indicating the country, geographical area, species or the common name of the species. Therefore, Canada affirms that Codex Stan 94 is sufficiently flexible to allow the country of sale to choose the appropriate listed designator to accompany the name "sardines" and that the European Communities is incorrect when it argues that a measure that prohibits the use of the word "sardines" in conjunction with the designator for the 20 listed species other than *Sardina pilchardus* is based on Codex Stan 94.

5.12 Canada also submits that the European Communities misinterprets the meaning of "in a manner not to mislead the consumer" in paragraph 6.1.1 of Codex Stan 94. Canada argues that, read in context, this phrase refers back to "X sardines" and more specifically, prescribes that the designator "X" must not be presented in a manner that misleads the consumer. Canada contends that the European Communities' argument that consumers would be confused by the use of the word "sardines" along with the appropriate designator is refuted by the research conducted by the Codex Committee in the development of Codex Stan 94. Canada submits that the Codex Committee researched the common names of the species listed in paragraph 2.1.1 of Codex Stan 94 and in examining the results of this research came to a consensus that allowing species other than *Sardina pilchardus* to be labelled as "sardines" with the appropriate designator does not confuse consumers. Canada therefore agrees with Peru that the EC Regulation at issue is inconsistent with Article 2.4 of the TBT Agreement because it is not based on Codex Stan 94.

5.13 Canada argues that the European Communities failed to prove that Codex Stan 94 is ineffective or inappropriate for the fulfilment of its objective. Canada submits that "sardines" is a

generic term[20], widely recognized, including under the Codex Stan 94, as applying to many different species of pelagic, saltwater fish that are prepared and packed in a certain way. In addition, Canada maintains that the fact that species other than *Sardina pilchardus* have been successfully marketed as "sardines" in the European Communities for some time indicates that European consumers recognize and accept that the term "sardines" does not apply exclusively to *Sardina pilchardus* and therefore it indicates that Codex Stan 94 is not inappropriate or ineffective. For example, the Canadian sardines, *Clupea harengus harengus* had, in 1990, been successfully marketed as "sardines" in the United Kingdom for over forty years and in the Netherlands for over thirty years. Furthermore, Canada states that throughout this period, Canada exported, and continues to export, products made of the species *Clupea harengus harengus*: preserved small juvenile *Clupea harengus harengus*, and preserved adult *Clupea harengus harengus.* Canada argues that until the adoption of the EC Regulation, the juvenile product was marketed as "sardines" in the European Communities - as provided for in Codex Stan 94 - while the adult product was marketed as herring. According to Canada, it continues to market preserved small juvenile *Clupea harengus harengus* as "sardines" in markets other than the European Communities.

4. Article 2.2 of the TBT Agreement

5.14 Concerning Article 2.2 of the TBT Agreement, Canada argues that the wording of this provision contains two separate and independent obligations which indicate that a Member cannot prepare, adopt or apply a technical regulation with a view to and with the effect of creating an unnecessary obstacle to trade. Canada submits that the preamble to the EC Regulation at issue states that it is "likely to improve the profitability of sardine production in the Community, and the market outlets therefor…". Canada claims that such language reveals that the EC Regulation has been adopted with a view to creating an unnecessary obstacle to international trade and that it is therefore inconsistent with Article 2.2 of the TBT Agreement.

5.15 Moreover, Canada claims that the EC Regulation has been adopted with the effect of creating an unnecessary obstacle to international trade. In support of this claim, Canada argues that it can be inferred from the text of Article 2.2 of the TBT Agreement that in order for a measure to be consistent with that provision, the following should occur:

(a) The objective of the technical regulation must fall within the range of legitimate objectives set out in Article 2.2 of the TBT Agreement;

(b) the technical regulation must fulfil the objective; and

(c) the technical regulation must not be more trade restrictive than necessary, taking account of the risks non-fulfilment would create.

5.16 With regard to the two first elements mentioned above, Canada notes that according to the European Communities, the labelling requirement in Article 2 of its Regulation has the objective of "ensuring consumer protection through market transparency and fair competition". Canada further notes that the European Communities argues that the Regulation at issue intends to protect consumers' expectations that in purchasing sardines they are purchasing *Sardina pilchardus*, as they associate sardines with this particular species. In reply to this last argument, Canada contends that there is no evidence that this is the expectation of European consumers. Canada claims that, to the contrary, preserved sardines other than *Sardina pilchardus* have been successfully marketed as "sardines" in the European Communities market for over fifty years until the adoption of the EC Regulation. Canada considers this as evidence that in their perceptions and behaviour, European consumers have

[20] *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993, defines "sardine" as "a young pilchard or similar small usu. clupeid marine fish, esp. when cured, preserved, and packed for use as food".

recognized these products as sardines and that they expect the term "sardines" to include species other than *Sardina pilchardus*.

5.17 Canada also asserts that consumers' expectations relate to the culinary and nutritional characteristics of the processed products. They are concerned with the organoleptic properties of the canned products such as flesh quality, taste and smell as well as nutritional content and its suitability for particular uses. Canada argues that in all relevant attributes, the product of various species, including *Clupea harengus harengus* and *Sardinops sagax*, is indistinguishable from *Sardina pilchardus*, as confirmed independently by their inclusion as "sardines" under the Codex Stan 94.

5.18 Moreover, Canada argues that market transparency is normally associated with the provision of accurate information that is relevant to consumers to assist them in making informed purchasing decisions and that the generic term "sardines" is understood by European consumers to refer to a range of species that are prepared and packed in a certain way and when preserved, are similar as to flavour, texture and end use. In Canada's view, the word "sardines" conveys meaningful information that allows consumers to identify these products and, by forcing products that had previously been identified by European consumers as sardines to use a different trade description, the EC Regulation itself misleads and confuses consumers.

5.19 Canada further submits that while the European Communities does not explicitly define the term "fair competition", it indicates that the Regulation at issue is intended to prevent producers of one product from unfairly benefiting from the reputation associated with another product. Canada argues that the European Communities' rationale is based on the false premise that the term "sardines" is only associated with the species *Sardina pilchardus* and that the European Communities has also failed to offer any evidence that the reputation associated with *Sardina pilchardus* is better than that associated with other species commonly known as sardines.

5.20 Thus, Canada asserts that the EC Regulation not only fails to fulfil any credible objective of consumer protection through market transparency and fair competition, but also actively undermines it.

5.21 With regard to the last element mentioned above, Canada argues that, even if the EC Regulation did fulfil the objective of consumer protection through market transparency and fair competition, the EC Regulation is more trade restrictive than necessary, taking account of the risks non-fulfilment would create. The language and jurisprudence of the GATT offer guidance to the interpretation of the TBT Agreement, including Article 2.2. Under Article 2.2, a measure will be more trade restrictive than necessary if there is a reasonably available, less trade restrictive alternative measure that fulfils the Member's legitimate objective and is consistent with the TBT Agreement. The European Communities' objective can be met in a less trade restrictive manner by allowing species other than *Sardina pilchardus* to be marketed as preserved sardines in accordance with the Codex Standard; that is, by including designations that inform consumers of the "country, geographic area, the species or the common name of the species in accordance with the law and custom of the country in which the product is sold" (for example "Pacific Sardines", "Peruvian Sardines" or "Canadian Sardines"). Canada recalls that the Appellate Body stated that one aspect of the determination of whether a WTO-consistent alternative measure is reasonably available is the extent to which it "contributes to the realization of the end pursued"; that is, the fulfilment of the stated objective. Canada argues that the Appellate Body also found that the more vital or important the common interests or values pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends. In Canada's view, the exercise of "taking account of the risks non-fulfilment [of a legitimate objective] would create" when assessing the necessity of a measure under Article 2.2 of the TBT Agreement can be seen as similar to evaluating the necessity of a measure under Article XX(b) or (d) of the GATT 1994 in part by considering the importance of the objective

being pursued. Canada argues that the greater the importance of the objective, the greater the risks non-fulfilment would create.

5.22 Canada claims that in the present case, the EC Regulation is more trade restrictive than necessary because there is a less trade restrictive alternative, namely Codex Stan 94, that is reasonably available, consistent with the TBT Agreement and that would fulfil the European Communities' objective. Canada argues that a less trade restrictive alternative would be to allow species other than *Sardina pilchardus* to be marketed as preserved sardines in accordance with Codex Stan 94; that is, by including designations that inform consumers of the "country, geographic area, the species or the common name of the species in accordance with the law and custom of the country in which the product is sold"(for example "Pacific Sardines", "Peruvian Sardines" or "Canadian Sardines").

5.23 Canada concludes that, whether or not the stated objective of consumer protection is a legitimate objective, the EC Regulation does not fulfil its objective and is, therefore, an unnecessary obstacle to trade, contrary to Article 2.2 of the TBT Agreement. Further, the EC Regulation is inconsistent with Article 2.2 in that it is more trade restrictive than necessary to fulfill a legitimate objective and has the effect of creating an unnecessary obstacle to international trade.

5. Article 2.1 of the TBT Agreement

5.24 Canada submits that the EC Regulation violates Article 2.1 of the TBT Agreement by according less favourable treatment to Peruvian preserved sardines of the species *Sardinops sagax,* and other like products, than that accorded to domestic and imported preserved sardines of the species *Sardina pilchardus*.

5.25 In this connection, Canada considers that Peruvian preserved sardines of the species *Sardinops sagax*, and Canadian preserved sardines of the species *Clupea harengus harengus* are "like" domestic and imported preserved sardines of the species *Sardina pilchardus*:

- They are saltwater, pelagic fish belonging to the taxonomic family *Clupeidae* and when preserved, are of similar size, weight, texture, flavour and nutritional value;
- They share the same end-use; they are prepared, served and consumed interchangeably; and
- Peruvian preserved sardines of the species *Sardinops sagax*, and Canadian preserved sardines of the species *Clupea harengus harengus* have, for some time, been successfully marketed in the European Communities as "sardines".

5.26 In the view of Canada, the different and discriminatory marketing requirement imposed by the EC Regulation disrupts the conditions of competition between these like products in favour of domestic and imported preserved sardines of the species *Sardina pilchardus*. Canada argues that exporters have identified their products as sardines in the European Communities for some time and have developed customer loyalty for their products; thus, by forcing these products to be marketed under a different description, the EC Regulation denies them the traditional identity and image associated with the term "sardines" and causes confusion among consumers. In addition, Canada argues that by prohibiting the use of the term "sardines" for all species other than *Sardina pilchardus*, the European Communities has altered the conditions of competition in the European Communities market for preserved sardines and created a monopoly under that name for its own domestic species and that of a few other countries, such as Morocco, where the European Communities has made a significant investment in sardine production.

6. Articles I:1 and III:4 of the GATT 1994

5.27 Canada claims that if the Panel finds that the EC Regulation is not a "technical regulation" for the purposes of the TBT Agreement, and thus does not violate Article 2.1 of that Agreement, the EC Regulation is nevertheless inconsistent with Articles I:1 and III:4 of the GATT 1994 because it accords less favourable treatment to Peruvian preserved sardines of the species *Sardinops sagax* and other like products such as Canadian preserved sardines of the species *Clupea harengus harengus*, than that accorded to like sardines of European Communities origin and those of certain other countries such as Morocco. Canada argues that the foregoing analysis of "like product" and "less favourable treatment" under the TBT Agreement applies equally to an analysis under Articles I:1 and III:4 of the GATT 1994.

7. Remarks on implementation

5.28 Finally, Canada contends that if the Panel agrees and finds that the EC Regulation violates the European Communities' obligations under the TBT Agreement or the GATT 1994, the Panel should not accept Peru's request that, pursuant to Article 19.1 of the DSU, it suggests that the European Communities implements its recommendation by extending the use of the term "sardines" only to *Sardinops sagax*. According to Canada, panels in other disputes have consistently declined to suggest ways in which Members found to be acting inconsistently could implement their recommendations and have deferred instead to the discretion of Members to decide how best to bring themselves into conformity. Canada claims that there is no reason in this case why the Panel should be any less deferential.

5.29 Moreover, Canada argues that even if the Panel did decide to make a suggestion regarding implementation, any such suggestion would have to be consistent with the WTO Agreement. A recommendation that the European Communities extends the use of the term "sardines" to *Sardinops sagax* alone would be inconsistent with Articles 2.4, 2.2 and 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. If the Panel did choose to suggest ways in which the European Communities should bring the Regulation into conformity with the WTO Agreement, Canada contends that the suggestion would have to be based on the Codex Standard and sufficiently broad to encompass all like products, including the Canadian sardines of the species *Clupea harengus harengus.*

B. CHILE

1. Introduction

5.30 Chile submits that it has a direct trade interest in the dispute as a sardine producer and exporter of marine products to the European Communities, and that it has a systemic interest in the proper interpretation and implementation of the WTO Agreements, in particular the TBT Agreement.

5.31 Chile further submits that its request to join the consultations was rejected by the European Communities, which contended that Chilean exports of *Sardinops sagax* were equivalent to only 0.3 per cent of total European Communities' imports over the last three years. However, Chile notes with considerable concern that, in one of its written submissions, the European Communities points out that FAO figures show that Chilean catches of *Sardinops sagax* were the largest in the world, even larger than those of Peru. Chile recalls that Article 4.11 of the DSU indicates that "Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held ... such Member may notify the consulting Members and the DSB…". This provision adds further that "Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded". Thus, Chile considers that it has a trade interest in the case brought by Peru before the DSB, given that, were Peru's arguments to be upheld, part of the Chilean

production could gain access to the European market in conditions which are presently denied. Moreover, Chile considers that this interest is, in practice, related to the fact that it is one of the main producers of one species of sardines, as recognized by the European Communities. In Chile's view, a Member has a substantial trade interest when its exports are affected, whether positively or negatively, by the measure at issue. In most cases, such a measure results in the absence of exports, which is neither equivalent to nor the same as having no trade interest. To the contrary, the European Communities seems to consider that, to have a substantial trade interest in this matter, a Member must be marketing its sardines on the European market, i.e., not be affected by the ban established by the regulation at issue. On this premise, all Members which, as a result of the EC Regulation, are prevented from marketing their sardines on the European market would be excluded from the consultations.

5.32 Chile argues that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the TBT Agreement, as well as with Articles I and III of the GATT 1994.

2. Retroactive application of the TBT Agreement

5.33 With regard to whether a Member is required to bring its technical regulations into conformity with international standards where they exist, Chile argues that the harmonization commitment must clearly be fulfilled in respect not only of future technical regulations but also of those that Members "have … adopted". Moreover, Article 2.4 of the TBT Agreement covers both the case in which a relevant international standard exists and that in which its completion is imminent. Although certain changes were not in force at the time the EC Regulation came into effect, Article 2.3 of the TBT Agreement indicates that a regulation shall not be maintained if the objective "can be addressed in a less trade-restrictive manner".

5.34 With regard to the European Communities' argument that the TBT Agreement, and in particular Article 2, does not apply to the EC Regulation inasmuch as the latter predates the entry into force of the WTO Agreements, including the TBT Agreement, Chile refers to the content of Article XVI:4 of the WTO Agreement. Chile also submits that nothing restricts this provision to laws, regulations and administrative procedures passed subsequent to the entry into force of the WTO Agreement.

5.35 In addition, Chile submits that member States of the European Communities, by consenting to the development of Codex Stan 94, must have been aware of the existence of the EC Regulation at issue, which should have been brought into conformity with the Codex Stan 94. Therefore, Chile considers that following the logic of Article 2.4 of the TBT Agreement, the EC Regulation must be based on relevant international standards, namely those adopted by member States of the European Communities in the Codex Alimentarius Commission. Interpreting Article 2.4 of the TBT Agreement in any other way would render Article XVI:4 of the WTO Agreement ineffective and redundant. As a final point on this particular issue, Chile argues that Article 2 of the TBT Agreement is based on the previous Tokyo Round Standards Code, which contained similar obligations.

3. Article 2.4 of the TBT Agreement

5.36 Chile contends that the international nature of the Codex Alimentarius Commission cannot be questioned, especially since it is an entity attached to the FAO and the WHO, both of which are international organizations par excellence. Furthermore, the standards developed by the Codex Alimentarius Commission comply with the principles of transparency, openness, impartiality, relevance and consensus set out in the Decision of the TBT Committee. Chile also argues that all the member States of the European Communities (which are also members of the Codex Alimentarius Commission) contributed, by way of consensus, to the development of Codex Stan 94.

5.37 Chile states that Codex Stan 94 applies to around 20 types of sardines, including *Sardinops sagax.* Chile argues that, pursuant to paragraph 6.1.1 of this internationally accepted standard, it can market its sardines on the European market under the following names:

- Sardina chilena (Chilean sardine)
- Sardina de Chile (Sardine from Chile)
- Sardina del Pacífico (Pacific sardine)
- Sardina *Sardinops sagax* (*Sardinops sagax* sardine)

5.38 Chile disagrees with the interpretation of the European Communities of Article 2.4 of the TBT Agreement and argues that the reference in Article 2.4 to "as a basis for" affords each Member the possibility of adapting an international standard to its own reality or specific individual circumstances, without altering the objectives of that international standard, unless it (or its components) is an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, and in such case the Member should justify why this is so. The question that arises here is whether Codex Stan 94 is an effective and appropriate means for the fulfilment of the objectives pursued by the European Communities. Chile notes that the aim of the EC Regulation at issue is "to keep products of unsatisfactory quality off the market" and to ensure the "correct information and protection of the consumer". Chile argues that these are also the objectives of the Codex Stan 94 which is an effective and appropriate means to fulfil the objectives set out in the EC Regulation.

4. Article 2.2 of the TBT Agreement

5.39 Chile also claims that the EC Regulation is an unnecessary obstacle to trade. Chile argues that reserving a trade name exclusively for one particular species gives it a competitive advantage over other like products because it imposes the use of names with negative connotations, thus bringing down their prices and triggering an adverse reaction on the part of the consumers.

C. COLOMBIA

1. Introduction

5.40 Colombia submits that it has a systemic interest in important issues of principle and in the legal debate introduced by Peru with regard to the TBT Agreement.

5.41 Colombia agrees with Peru that the limits of competence of any Panel are its terms of reference pursuant to Article 7 of the DSU. However, Colombia argues that these terms of reference should be understood in the light of Articles 10 and 11 of the DSU, which require the Panel to determine the applicability of the covered agreements, a function which should be fulfilled on the basis of the arguments put forward by all parties to the dispute, including those put forward by third parties. In this respect, any attempt to restrict the rights of third parties to a dispute would not only be inappropriate for the multilateral trading system but also contrary to the DSU.

2. Retroactive application of the TBT Agreement

5.42 Concerning the European Communities' argument that in pursuance of Article 28 of the Vienna Convention, Codex Stan 94 would not be a relevant international standard because Codex Stan 94 did not exist at the time the EC Regulation was enacted, Colombia submits that such an argument lacks any real legal basis and would have serious implications for the fulfilment of multilateral commitments. In this connection, Colombia supports Canada's submission concerning the retroactive application of the TBT Agreement and asserts that, if the interpretation put forward by the European Communities were to be accepted, the scope of WTO commitments would be arbitrarily restricted.

5.43 Moreover, Colombia submits that the adoption of Codex Stan 94 subsequent to the date of entry into force of the EC Regulation does not affect its status as an international standard given that the obligation established in the TBT Agreement does not provide for any form of exemption from which a differentiation of Members' obligations, as of the time when a national technical regulation comes into effect, can be inferred.

3. Article 2.4 of the TBT Agreement

5.44 In Colombia's opinion, the EC Regulation is inconsistent with Article 2.4 of the TBT Agreement. Colombia further submits that the Codex Alimentarius Commission is a competent international standardizing body within the meaning of Articles 1.1 and 2.6 of the TBT Agreement and that Codex Stan 94 is an international standard.

5.45 Colombia considers that the identification of the elements which would exempt a country from implementing an international standard because it is an ineffective or inappropriate means to fulfill a legitimate objective must be drawn upon the examples set out in Article 2.4 of the TBT Agreement. It is Colombia's view that Article 2.4, by mentioning climatic or geographical factors, clearly restricts such exemption from the implementation of an international standard to objective elements.

5.46 Colombia contends that under Article 2.4 of, and the preamble to, the TBT Agreement, WTO Members are not authorized to hinder the market entry of a product by arguing that its quality characteristics are not identical to those of the products to which its consumers are accustomed. Colombia recognizes the right of WTO Members to take appropriate measures to prevent consumers from being misled. However, Colombia argues that the possibility of enacting a regulation to address such a concern is limited by the TBT Agreement which states that a regulation should not be discriminatory and should not constitute a disguised restriction on trade.

4. Article 2.2 of the TBT Agreement

5.47 With respect to Article 2.2 of the TBT Agreement and the elements that must be established for there to be a violation, Colombia argues that the determination of whether a technical regulation is more trade-restrictive than necessary should not be contingent upon a demonstration of trade-restrictive effects, such as the absence of the product on a given market. In the view of Colombia, the reading of Article 2.2 of the TBT Agreement in conjunction with Article 2.4 covers cases where no international standards exist or where they exist but prove to be ineffective or inappropriate.

5. Remarks on implementation

5.48 Colombia notes that a particularly significant aspect of the dispute will be the recommendation on the way in which the decision is to be implemented. If the arguments advanced by Peru on the inconsistency of the measure with the TBT Agreement prove successful, it is Colombia's understanding that the Panel report will have to be implemented through a measure consistent with the multilateral agreements.

D. ECUADOR

1. Introduction

5.49 Ecuador has trade and systemic interests in this dispute because its sardine exports are adversely affected by the EC Regulation and because it considers that this case offers an opportunity to clarify important aspects of the proper application of the TBT Agreement.

5.50 Ecuador argues that the fundamental incompatibility of the EC Regulation with Article 2.4 of the TBT Agreement leads to additional discrimination that in turn is inconsistent with Article 2.2 and 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.

2. Retroactive application of the TBT Agreement

5.51 Ecuador disagrees with the European Communities' argument that Codex Stan 94 is not relevant because the measure set forth in the Regulation at issue predates the entry into force of Codex Stan 94. Ecuador argues that on the strength of such an argument, any WTO Member could be exempted from countless obligations on the grounds that WTO-incompatible measures predating the entry into force of international rules or the WTO Agreements themselves need not be amended or adjusted to new international commitments. Ecuador contends that if the EC Regulation was not compatible at the time the TBT Agreement came into force, the European Communities was under the obligation to bring it in line with all WTO Agreements, in pursuance of Article XVI of the WTO Agreement.

3. Article 2.4 of the TBT Agreement

5.52 Ecuador argues that WTO Members have the obligation to comply with Article 2.4 of the TBT Agreement and are therefore required to bring their technical regulations into conformity with international standards where they exist and are relevant.

5.53 With regard to the burden of proof, Ecuador submits that the initial burden of proof lies with the complaining party to establish if the measure which is challenged presents a case of inconsistency with Articles 2.4 and 2.2 of the TBT Agreement. Ecuador submits that Peru has demonstrated that an international standard exists (the Codex Stan 94), that it is relevant and that the European Communities is not using this standard. Therefore, the European Communities has the obligation to base the application of its technical regulation on Codex Stan 94. Ecuador contends that the European Communities has, in turn, to respond to Peru's arguments and justify why the international standard has not been used. Ecuador notes that the European Communities has provided no evidence that the standard in question was irrelevant. Hence, Ecuador sees no justification for the European Communities' failure to apply a relevant international standard.

5.54 Ecuador further argues that Codex Stan 94 is adequate to fulfil the legitimate objectives pursued by the EC Regulation, because it does not mislead the consumers. Ecuador notes that Codex Stan 94 clearly stipulates that sardines of species other than *Sardina pilchardus* shall be described as "X" sardines; this would be the case of the name "Pacific sardine" used for sardines of the species *Sardinops sagax*. Moreover, Ecuador asserts that the text of the Codex Stan 94 in Spanish is quite clear in that countries can choose to use the denomination "sardines X", where "X" is the country of origin or a geographical area, with the name of the species or the common name.

4. Article 2.2 of the TBT Agreement

5.55 Ecuador argues that the EC Regulation creates an unnecessary obstacle to trade, contrary to Article 2.2 of the TBT Agreement.

5.56 In Ecuador's view, the EC Regulation serves protectionist purposes with trade-distorting effects beyond those already affecting the sector as a result of fisheries subsidies in the form of Community aid to offset marketing costs for products such as sardines. Ecuador notes the European Communities' argument that its Regulation has the "aim of ensuring consumer protection through market transparency and fair competition". In practice, Ecuador argues, this aim is not being met; indeed, the EC Regulation allows no competition in that it excludes from the market other types of sardines that would be able to compete effectively under an "X" trade description affording the

consumer freedom of choice and the transparency that a label based on a relevant international standard such as the Codex Stan 94 could provide.

5. Article 2.1 of the TBT Agreement

5.57 With regard to Article 2.1 of the TBT Agreement, Ecuador argues that the EC Regulation is inconsistent with the national-treatment principle because sardines of a trade description other than *Sardina pilchardus* are accorded less favourable treatment by differentiating between the species of fish and between the origin of the product. According to Ecuador, Peru is correct in arguing that these are "like" products, primarily because canned sardines of the species *pilchardus* and of the species *sagax sagax* are identical products in terms of their physical characteristics – especially flavour, texture and nutritional value – and because they are interchangeable in terms of use and consumption. In Ecuador's view, this is borne out by the fact that sardines of species other than *Sardina pilchardus* were successfully marketed in the European Communities prior to the entry into force of the EC Regulation, as demonstrated by both Peru and Canada and also by the statistics provided by the European Communities.

6. Articles I:1 and III:4 of the GATT 1994

5.58 Finally, Ecuador considers that the foregoing analysis proving discrimination by the European Communities within the context of the TBT Agreement is also applicable for the determination of inconsistency of the EC Regulation with Articles I:1 and III:4 of the GATT 1994.

7. Final remarks

5.59 In the light of the above considerations, Ecuador submits that the Panel must find that the EC Regulation is in violation of the European Communities' obligations under WTO Agreements and recommend that the European Communities bring its measure into conformity with those obligations.

E. UNITED STATES

1. Introduction

5.60 The United States indicates that there are a number of sardine species that are harvested in the United States, but that are not exported to the European Communities because of the restrictive labeling requirements in the European Communities. They are, however, sold to many parts of the rest of the world. These species include *Clupea Harengus, Sardinops caeruleus, Sardinops Sagax, Harengula jaguana, Sardinella* and *Sardinella longiceps*. The United States has no regulations requiring the use of specific names for these fish species. There is, however, a general requirement that labels should not be false or misleading. All of these fish either can be, or actually are, marketed in the United States under the name "sardines", among other names.

5.61 The United States endorses Peru's request that the Panel exercise judicial restraint upon finding that the EC Regulation breaches Article 2.4 of the TBT Agreement, and not reach Peru's other claims. According to the United States, panels should address those claims necessary to resolve the dispute, and, as Peru recognizes, that can be accomplished through consideration of Article 2.4 alone.

5.62 Concerning the burden of proof, the United States submits that, as recognized by the Appellate Body in *US — Wool Shirts and Blouses, EC — Hormones* and other reports, the complaining party has the burden of presenting evidence and arguments sufficient to make a *prima facie* demonstration of each claim that the measure at issue is inconsistent with a provision of a

covered agreement.[21] This burden is not shifted to the responding party simply because the obligation identified is characterized as an "exception".[22] However, the responding party would have the burden with respect to an "affirmative defense" that a breach of an obligation is justified by a separate provision that would excuse the breach.[23]

2. Application of the TBT Agreement

5.63 The United States argues that the TBT Agreement applies in full to technical regulations in place on or after 1 January 1995, regardless of whether the regulation was put in place before that date. It further argues that labeling requirements that are "mandatory" and "apply to a product, process or production method" constitute "technical regulations."

3. Article 2.4 of the TBT Agreement

5.64 The United States argues that the EC Regulation is inconsistent with Article 2.4 of the TBT Agreement and that it is not based on the Codex Stan 94, an international standard for purposes of the TBT Agreement. It notes that although Codex Stan 94 specifically provides for the label "X sardines", the EC Regulation specifically prohibits that label, with no plausible justification for contradicting the standard.

5.65 Concerning the question of whether Codex Stan 94 is a relevant international standard, the United States notes that relevancy does not refer to the timing of the international standard, but only to its subject matter - i.e., whether an international standard is apposite, pertinent or germane to the issue for which the technical regulation is required. The United States argues that the reference to "their completion is imminent" in Article 2.4 of the TBT Agreement in relation to "relevant international standards" makes clear that the question of relevance is separate from the question of the date on which the international standard came into existence.

5.66 Concerning the requirement of Article 2.4 of the TBT Agreement, that Members "shall use [relevant international standards] as a basis for" their technical regulations, the United States recalls Canada's argument that the phrase "as a basis for" should be construed consistently with "based on". The United States submits that the Appellate Body defined the term as "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter."[24] It argues that this statement by the Appellate Body does not mean that the technical regulation must "conform" to the terms of the relevant international standard, but it does mean that a Member's technical regulation must be founded upon or supported by the standard, insofar as the standard is "relevant," not "ineffective" and not "inappropriate."

5.67 The United States further argues that there is no reason why the application of Codex Stan 94, in particular permitting other species to be marketed as "X" sardines, would be an ineffective or inappropriate means for meeting the European Communities' stated objectives of consumer protection, transparency and fair competition. To the contrary, according to the United States there is ample evidence indicating that the Regulation at issue undermines the European Communities' objectives, since European consumers have in fact come to know the Peruvian product as a form of sardines and are likely to be confused by the use of other names. Indeed, the use of a proper descriptor prior to the term "sardines," as provided for in the international standard, appears to be a very effective means to assure transparency and protect the consumer.

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[21] *European Communities – Measures Concerning Meat and Meat Products* ("*EC – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, paras. 104 - 109.

[22] Appellate Body Report, *EC – Hormones*, para. 104.

[23] Appellate Body Report, *EC – Hormones*, para. 109.

[24] Appellate Body Report, *EC – Hormones*, para. 163.

5.68 In the view of the United States, Codex Stan 94 does not anticipate a country choosing between "X Sardines" and the common name of the species. Rather, under the standard, a country permits the named sardine species to be sold as "X Sardines", where "X" is a country, a geographic area, a species, or the common name of the species. The United States argues that under the standard, the product could be labelled, for example, "Peruvian sardines", "Pacific sardines", or "Atlantic herring sardines". The standard does not envision the "common name" as an alternative to "X sardines", only as an option for "X" in the name "X Sardines." This interpretation is clear in the English version of Codex Stan 94, but is even more clear in the French version, which states that species other than *Sardina Pichardus* shall be called "'X Sardines', 'X' designating a country, a geographic area, a species, or the common name".[25]

4. Article 2.2 of the TBT Agreement

5.69 Concerning Article 2.2 of the TBT Agreement, the United States argues that in order for a Member to show that a government's technical regulation is more trade-restrictive than necessary to fulfill a legitimate objective, it would need to show that there is another measure that is reasonably available, that would fulfill the regulating Member's legitimate objectives, and that is significantly less restrictive to trade.

5.70 The United States considers that in this case there are clear alternatives which meet these requirements. In addition to simply removing the technical regulation, allowing other species to be marketed as "X sardines" would fulfill the European Communities' objectives of consumer protection, transparency and fair competition. The alternative is reasonably available, since there are no impediments to such a change, nor would there be any disruption to markets where consumers are already accustomed to seeing the products at issue referred to as "sardines." Finally, the alternative would be significantly less trade restrictive, inasmuch as there is now a complete ban on the marketing of several species as "sardines," with or without a qualifier. Further, the United States argues that there is no requirement under Article 2.2 to demonstrate a trade restrictive effect as such; the only requirement is to show that a measure is more trade restrictive than necessary. With respect to this dispute, there is no doubt that a measure prohibiting the use of the term "sardines" in connection with sardine products is trade restrictive.

5. Remarks on implementation

5.71 Finally, the United States argues that the Panel should refrain from offering a specific suggestion on how the European Communities should comply in this case. This case is not unusual in this regard, and the European Communities, like other Members, has the right to determine how it will bring its measure into compliance.

F. VENEZUELA

1. Introduction

5.72 Venezuela submits that its participation as a third party in this dispute is based on a systemic interest relating to the correct interpretation of the TBT Agreement, in particular Article 2.4. Venezuela submits that it also has a genuine trade interest, inasmuch as the conditions for the marketing of canned sardines on the European market, as set out in the EC Regulation, are prejudicial to Venezuelan exports of sardines to that market, which is a major destination for Venezuela's export industry.

[25] "Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce …".

2. Remarks on the term "sardines"

5.73 Venezuela argues that from the standpoint of statistical data, the term "sardines", in the broad sense, has been used to cover species other than *Sardina Pilchardus*. Organizations such as the FAO classify under the same heading species of the genera *Sardina*, *Sardinops*, *Opisthonema*, *Clupea* and *Sardinella*, *inter alia.*[26] The FAO also groups sardines, sardinella and brisling or sprat production, import and export statistics in a single table, which is not confined to the species *Sardina Pilchardus.*[27] Likewise, the word "sardines" is used to identify various species, according to relevant European and international publications.[28] In the view of Venezuela, the above facts point to the universality of the term "sardines".

5.74 Venezuela also submits that the broad use of a name is not exclusive to sardines; on the contrary, there is a variety of other examples. Mussels, for instance, are known under the scientific names of *Mytilus edulus*, *Perna Perna* and *Perna viridis*, but "mussel" is the common trade description for all these species. Another example given by Venezuela is tuna, whose trade description includes bluefin tuna (*Tunnus thynnus*), yellowfin tuna (*Tunnus albacares*), bigeye tuna (*Tunnus obesus*) and skipjack tuna (*Katsuwonus pelamis*). Thus, Venezuela argues that the use of generic nomenclature to justify trade descriptions is not relevant and that probably the case of the European sardines is the only one where attempts have been made to match the trade description with the scientific name. Even where both terms obviously coincide, it is not possible to argue exclusivity in respect of a trade description, because this practice is not in universal use.

5.75 Venezuela further argues that scientific names of species may vary over time as a result of taxonomic revision. Thus, species of the genus *Sardinops* were initially named *Sardina spp*, as was the case of *Sardinops caeruleus*, which is a synonym for *Sardina sagax* and *Alausa californica*, and the species *Sardinops neopilchardus*, which is a synonym for *Sardinella neopilchardus*. Similarly, *Sardina pilchardus* and *Sardinella aurita* were initially described as belonging to the genus *Clupea* – the former in 1792 under the name *Clupea pilchardus* and the latter in 1810 under the name *Clupea allecia*, a term which is also used for the Australian sardine pilchard.

3. Article 2.4 of the TBT Agreement

5.76 Venezuela argues that the labelling requirements for preserved sardines laid down in the EC Regulation do not comply with Article 2.4 of the TBT Agreement because they disregard the relevant international standards. In its view, the EC Regulation, as a technical regulation, must not only recognize but also apply international standards such as those established in Codex Stan 94.

5.77 Venezuela argues that the term "as a basis" in Article 2.4 of the TBT Agreement should be interpreted to mean "shall be based on, in such a way as not to contradict any of its aspects". Therefore, Venezuela argues that the EC Regulation cannot be considered to "be based on" Codex Stan 94 because the EC Regulation does not provide for the possibility of canned products prepared from other species of sardines (other than *Sardina pilchardus)* to include the word "sardines" to indicate the species from which the canned product is prepared. On the contrary, Codex Stan 94 stipulates that the common name "sardines" may be used for products made from species other than *Sardina pilchardus*, provided that (a) the name is supplemented by an indication identifying the country of origin, the geographical area in which the species is to be found or the name of the species, or (b) the product is made under the common name in the language of the member State of the European Communities in which it is sold.

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[26] See FAO Yearbook of Fishery Statistics, Catches and Landings, Vol. 80, 1995, pp. 308 ff.
[27] See FAO Yearbook of Fishery Statistics, Commodities, Vol. 89, p. 102.
[28] See Multilingual Illustrated Dictionary of Aquatic Animals and Plants, and www.fishbase.org.

5.78 Venezuela submits that the Codex Alimentarius is the source of standards, codes of practice and internationally accepted guidelines that have become a global benchmark for food consumers, producers and manufacturers, national food control agencies and the international food trade. Venezuela also points out that Codex's contribution to the international harmonization of food standards, by providing for the protection of consumer health and guaranteeing fair practices, is indisputable.

5.79 Venezuela contends that species of different genera are marketed under the name "X sardines" in almost every country in the world, and points out that, in the past, the name was acceptable for describing different genera, including in some countries of the European Communities. In Venezuela's view, the European Communities' argument that if *Sardinops sagax* products were to be marketed as "X sardines", they would benefit from the reputation enjoyed by another product (namely sardines) and the customer would be misled, is without merit. Contrary to the European Communities' assumption that the term "sardines" is used exclusively at the European level, Venezuela indicates that Latin America and North America have given the name "sardines" to a finished product prepared from a different raw material which, however, possesses similar organoleptic characteristics. Moreover, in Venezuela, the term "sardines" is used to describe a product prepared essentially from the raw material *Sardinella aurita.* For example, in Venezuela's view, it would be hard to imagine consumers of caviar (i.e., a finished product), for example, being misled by the product's presentation under the name Iranian, Russian or American caviar, knowing as everyone does, that each involves a different type of sturgeon.

5.80 Venezuela argues that in view of the above-mentioned facts and, given the similarities between the species, all that would need to be done in order to distinguish one product from another from the standpoint of the objectives of the EC Regulation would be to use the common name "sardines", accompanied by a reference to its geographical area of origin – in other words, to use the name "X sardines", as provided for in the Codex Stan 94. Consumers purchasing products prepared from X sardines would thus know that these were made from sardines of a species other than the type found in European waters.

5.81 Venezuela also emphasizes that the legitimate objectives set forth in the TBT Agreement are to promote achievement of the goals of the GATT 1994 and to ensure that technical regulations and rules, including those relating to labelling, do not create unnecessary barriers to international trade. Venezuela argues that the objective of the EC Regulation is to enhance the profitability of sardine production in the Community, the market outlets therefor, as well as to facilitate disposal of its products, is not compatible with the above objectives.[29] Venezuela considers that, if it is a matter of fulfilling the objective laid down in the EC Regulation, there are other trade mechanisms, within the framework of the WTO, that can be used to that end, such as the application of tariff regimes and more specific tariff regulations.

4. Article 2.2 of the TBT Agreement

5.82 Venezuela submits that the objectives of the EC Regulation can be achieved by means of a less trade-restrictive measure. Venezuela argues that the EC Regulation has a restrictive impact given that it prevents countries that prepare products from fish of species similar to *Sardina pilchardus* from marketing such products under a name containing the word "sardines", although this is allowed by the relevant international standard. Venezuela is of the opinion that this diminishes the value of the products for the European customer, since their perceived value of a product using a scientific name as a commercial name bears no relation to the true quality of the product. This fact places those products at a disadvantage in competition with like European products. This type of measure is discriminatory in terms of where the sardines were caught, by reserving exclusivity of the trade description for products of European origin.

[29] Based on the introductory remarks to Council Regulation Nº 2136/89 of 21 June 1989.

5. Remarks on implementation

5.83 If the Panel decides to suggest any action to the European Communities, Venezuela requests that the European Communities should be required to bring its Regulation into line with the WTO Agreement and to agree that its Regulation be based on the Codex Alimentarius, in other words, that it be made sufficiently broad to include similar types of sardines, including the Venezuelan sardine *Sardinella aurita.*

VI. INTERIM REVIEW[30]

6.1 Our interim report was issued to the parties on 28 March 2002, pursuant to Article 15.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). On 5 April 2002, the European Communities requested us to review certain aspects of the interim report. Peru did not have any comments on the interim report. Neither of the parties requested us to hold an interim review meeting. When sending the interim report to the parties, we provided each party an opportunity to transmit in writing its comments on the other party's interim review comments, if no meeting was requested. In a letter dated 11 April 2002, Peru requested that we not consider the new evidence submitted by the European Communities. We carefully reviewed the arguments and issues presented by the European Communities and each issue is addressed below.

6.2 The European Communities requested a change to the summary of the European Communities' arguments in paragraph 4.73. We would like to point out that the European Communities' arguments are fully reflected in paragraphs 4.73 and 4.81.

6.3 The European Communities requested us to either change the heading of Chapter A of the findings from "Measure at issue" to "Product at issue", or to delete the two first paragraphs of Chapter A (7.1-7.2). We are of the view that the repetition, in the beginning of the findings section, of the basic characteristics of the two fish species at issue in the dispute is useful. As suggested by the European Communities, we have inserted paragraphs 7.1 and 7.2 under the newly created heading entitled "Products at issue".

6.4 The European Communities made the following comments on paragraphs 7.27 and 7.28 of the findings: "A regulator cannot set by legislative means the characteristics that are 'intrinsic' to a product. By definition, these are present in nature, they exist within the product and do not come from the outside. Consequently, it is an error to qualify as a 'product characteristic' the fact that preserved sardines must be prepared from fish of the species *Sardina*. The Codex Alimentarius, by reserving the term 'sardines' only to fish of the species *Sardina*, recognizes this fact". We do not agree with the notion that regulators cannot establish intrinsic product characteristics by legislative means and do not consider that it is an error to qualify as a "product characteristic" the fact that preserved sardines must be prepared from fish of the species *Sardina pilchardus.* The Appellate Body in *EC — Asbestos* unequivocally stated that "'product characteristics' include, not only features and qualities *intrinsic* to the product itself, but also related 'characteristics' such as the means of identification, the presentation and the appearance of a product" (emphasis added).[31] As we explained in our findings (paragraphs 7.26 and 7.27), various provisions of the EC Regulation lay down product characteristics that deal with features and qualities affecting composition, size, shape, colour and texture of preserved sardines. One product characteristic required by Article 2 of the EC Regulation is that preserved sardines must be prepared exclusively from fish of the species *Sardina pilchardus*. As we pointed out, this product characteristic must be met for the product to be "marketed as

[30] Pursuant to Article 15.3 of the DSU, "The findings of the final panel report shall include a discussion of the arguments made at the interim review stage". The following section entitled "interim review" therefore forms part of the findings.

[31] Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products* ("*EC — Asbestos*"), WT/DS135/AB/R, adopted 5 April 2001, para. 67.

preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. We considered that the requirement to use exclusively *Sardina pilchardus* is a product characteristic as it objectively defines features and qualities of preserved sardines for the purposes of their "market[ing] as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. For these reasons, we have not made any changes to paragraphs 7.26 and 7.27.

6.5 With respect to the section dealing with whether Codex Stan 94 is a relevant international standard, the European Communities claimed that we did not consider the fact that Codex Stan 94 had only been accepted by 18 countries, of which only four accepted it fully, and that neither Peru nor any member States of the European Communities were among these 18 countries. Therefore, the European Communities asked us to justify why we disregarded this argument. We did consider this argument but were not persuaded that this argument was relevant in determining whether Codex Stan 94 is an international standard. We note that the European Communities is referring to the Acceptance Procedure set by the Codex Alimentarius Commission which allows a country to accept a Codex standard in accordance with its established legal and administrative procedures. We recall that Annex 1.2 of the Agreement on Technical Barriers to Trade (the "TBT Agreement") defines a standard as a "document approved by a recognized body" and does not require that the standard be accepted by countries as part of their domestic law. Codex Stan 94 was adopted by the Codex Alimentarius Commission and we consider that this is the relevant factor for purposes of determining the relevance of an international standard within the meaning of the TBT Agreement.

6.6 With regard to paragraph 7.66 of the findings, the European Communities asserted that our reasoning did not accurately reflect the "conditional argument that … there would be less doubts about this [the status of the Codex Alimentarius Commission as an international standardization body] if the European Communities would be allowed to become a member". We note that all member States of the European Communities are parties to the Codex Alimentarius Commission and that the European Communities is an observer at the Commission. We stated in the findings that Annex 1.4 of the TBT Agreement defines an "international body" as a "[b]ody or system whose membership is open to the relevant bodies of at least all Members". According to Rule 1 of the Statutes and Rules of Procedures of the Codex Alimentarius Commission, "[m]embership of the joint FAO/WHO Codex Alimentarius Commission … is open to all Member Nations and Associate Members of the FAO and/or WHO". As membership to the Codex Alimentarius Commission is open to all WTO Members, we found that it is an international body within the meaning of Annex 1.4 of the TBT Agreement and the European Communities did not contest the status of the Codex Alimentarius Commission as an international standardization body for the purposes of the TBT Agreement. We have included in the descriptive part the European Communities' argument that the status of the Codex Alimentarius Commission as an international standardization body would come into doubt if the European Communities were not allowed to become a member of the Codex.

6.7 The European Communities commented on paragraphs 7.93 to 7.96 where it felt that its position on the understanding of the text of paragraph 6.1.1(ii) of Codex Stan 94 had not been adequately reflected. The European Communities requested us to justify why the European Communities' arguments about the editorial change were not persuasive. The European Communities also asserted that there were differences between the three linguistic versions of Codex Stan 94. Contrary to the European Communities' assertion, we dealt with the European Communities' arguments set out in paragraphs 4.34 and 4.48 and actually explained why we were not persuaded that the negotiating history supported the European Communities' interpretation that Codex Stan 94 allows Members to choose between "X sardines" on the one hand and the common name of the species in accordance with the law and custom of the country in which the product is sold on the other hand. Our reasoning on this issue was in threefold. First, the text of Codex Stan 94 is clear on its face that it provides Members with four alternatives. Second, the deletion of the third alternative and the adoption of the current text indicate that the latter reflects the true intentions of the drafters. Third, that the change is referred to as "editorial" in the minutes of the meeting suggests that both the earlier version and the final text expressed the same view but the final text did so more

succinctly. Moreover, we considered that Codex standards are adopted in a procedurally correct manner and were not persuaded that Codex Stan 94 was not adopted in a procedurally correct manner. Concerning the European Communities' argument in respect of the three different linguistic versions, we stated, in paragraphs 7.108 and 7.109 of the findings, that there was no difference between the French and the English text, and that the Spanish version confirmed the view that the name of the species or common name must be added to the word "sardines" and not replace the word "sardines". Therefore, we reject the arguments made by the European Communities with respect to these paragraphs.

6.8 The European Communities reminded us of its requests that the Codex Alimentarius Commission be consulted on the meaning of the text of paragraph 6.1.1(ii). We recall the European Communities' statement at the Second Substantive Meeting that "[i]f the Panel should have any doubt that the interpretation of Article 6.1.1(ii) [of] Codex Stan 94 advanced by the European Communities is correct and considers that it will reach the question of the meaning of Article 6.1.1(ii) of Codex Stan 94, the European Communities invites the Panel to ask the Codex Alimentarius to provide its view of the meaning of this text". This request is reflected in paragraph 4.49 of the descriptive part. In accordance with Article 13 of the DSU, it is the right of the panel to seek or refuse to seek information.[32] In this regard, in *EC — Hormones*, the Appellate Body stated that Article 13 of the DSU "enable[s] panels to seek information and advice as they deem appropriate in a particular case".[33] Also, in *US — Shrimp*, the Appellate Body considered that "a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case…".[34] In this case, we determined that there was no need to seek information from the Codex Alimentarius Commission.

6.9 The European Communities requested that the adjective "European" in front of the word "sardines" in the seventh line of paragraph 7.124 be deleted, as well as the whole sentence that follows. The European Communities argued that "[i]t is, in fact, factually incorrect to state that 'if a hermetically sealed container is labelled simply as 'sardines' without any qualification, the European consumer would know that it contains European sardines". The EC Regulation, in fact, only requires that preserved sardines be made of *Sardina pilchardus*, irrespective of its origin of landing. Accordingly, what a European consumer knows when buying a hermetically sealed container labelled simply as 'sardines' is that it contains sardines, i.e. *Sardina pilchardus*; it does not know the origin of the fish". We recall a statement made by the European Communities in response to a question posed by Peru at the First Substantive Meeting: "The European consumers, when offered a can labelled 'sardines' expect to buy the product they know under this name, the European sardines, even if it has been caught in non-European waters." We were not persuaded that the European consumers would consider "sardines" combined with the name of a country or geographic area to be European sardines for the reasons set out in paragraphs 7.129 to 7.136 of the findings. We therefore decline to delete the word "European" and the sentence that follows.

6.10 The European Communities objected to the summary, in paragraph 7.127, of the European Communities' statement that the EC Regulation created "uniform" consumer expectations. The European Communities claimed that this assertion was used out of its context. We disagree with this claim and would like to recall the statement made by the European Communities in its entirety: "In most parts of the European Communities, especially in the production countries, the term 'sardine'

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[32] "Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter" (emphasis added).

[33] *European Communities – Measures Concerning Meat and Meat Products* ("*EC – Hormones*"), WT/DS26/AB/R and WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, para. 147.

[34] *United States — Import Prohibition of Certain Shrimp and Shrimp Products* ("*US — Shrimp*"), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, para. 104.

has historically made reference only to the *Sardina pilchardus*. [Footnote omitted] However, other species like sprats (*Sprattus sprattus*) were sold in tiny quantities on the European Communities market with the denomination 'brisling sardines'. In view of the confusion that this created in the market place, the European Communities has constantly tried to clarify the situation, both externally (note of 16/04/73 to Norway [footnote omitted]) and internally (Regulation 2136/89). This situation has now created uniform consumer expectations throughout the European Communities, the term 'sardine' referring only to a preserve made from *Sardina pilchardus*". This entire quote is set out in paragraph 7.125. In light of this, we reject the European Communities' claim that we used its argument "out of its context, that the EC Regulation artificially created 'uniform consumer expectations'".

6.11 The European Communities further requested the deletion of the adjective "trade restrictive" in front of the word "measure" in the following sentence (paragraph 7.127): "If we were to accept that a WTO Member can 'create' consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations in the existence of those 'created' consumer expectations, we would be endorsing the permissibility of 'self-justifying' regulatory trade barriers". The European Communities argued that the question of whether the measure at issue was trade-restrictive was an issue on which we had exercised judicial economy and therefore should "refrain from gratuitously qualifying the EC measure as 'trade-restrictive'". We used the expression "trade-restrictive" as part of the legal reasoning to state that if Members can create consumer expectations and then justify the trade restrictive measure, we would be endorsing the permissibility of self-justifying regulatory trade barriers. Therefore, we were justified in using the term "trade-restrictive". Moreover, in our examination of the EC Regulation, we were of the view that the EC Regulation was more trade-restrictive than the relevant international standard, i.e., Codex Stan 94. Our characterization of the EC Regulation as such is based on the fact that the EC Regulation prohibited the use of the term "sardines" for species other than *Sardina pilchardus* whereas Codex Stan 94 would permit the use of the term "sardines" in a qualified manner for species other than *Sardina pilchardus*.[35]

6.12 The European Communities objected to the use of dictionaries as proof of consumer expectations and rejected our assertion in paragraph 7.131 that "the European Communities acknowledged that one of the common names for *Sardinops sagax* is 'sardines' or its equivalent thereof in the national language combined with the country or geographical area of origin". Concerning the first comment, we are of the view that the use of the dictionaries referred to by both parties is *an* appropriate means to examine whether the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name that refers to species other than *Sardina pilchardus*, especially in light of the fact that the *Multilingual Illustrated Dictionary of Aquatic Animals and Plants* was published in cooperation with the European Commission and member States of the European Communities for the purposes of, *inter alia*, improving market transparency. We note that the electronic publication, *Fish Base*, was also produced with the support of the European Commission. In making our finding, not only did we consider carefully dictionaries referred to by both parties but also considered other evidence such as the regulations of several member States of the European Communities, statements made by the Consumers' Association and the trade description used by Canadian exporters of *Clupea harengus harengus* to the Netherlands and the United Kingdom. In our weighing and balancing of the totality of evidence before us, including the examination of the *Oxford Dictionary* referred to by Peru[36] and Canada as well as the *Grand Dictionnaire Encyclopédique Larousse* and *Diccionario de la lengua espanola* referred to by the

[35] In addition, we took note of the context provided by Article 2.5 of the TBT Agreement which states that if a technical regulation is in accordance with relevant international standards, "it shall be rebuttably presumed not to create an unnecessary obstacle to international trade." Because the EC Regulation was not in accordance with Codex Stan 94, we considered that it created an "unnecessary obstacle to trade", which, in our view, can be construed to mean more trade-restrictive than necessary.

[36] Peru's First Oral Statement, para. 4.

European Communities, we were persuaded, on balance, that the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name in the European Communities and that the consumers in the European Communities do not associate the term "sardines" exclusively with *Sardina pilchardus*.[37] For the sake of clarity, we inserted a sentence to reflect that Peru demonstrated that European consumers do not associate "sardines" exclusively with *Sardina pilchardus* by pointing out that the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name for *Sardinops sagax* in the European Communities. Concerning the second comment, we consider that the last sentence of paragraph 7.131 accurately reflects the statements made by the European Communities in its first written submission. For the sake of clarity, we have cited in Footnote 100 what the European Communities stated in paragraph 28 of its first written submission.

6.13 The European Communities made a number of comments with respect to paragraph 7.132. First, the European Communities stated that "[t]he assessment of the facts developed by the Panel in this paragraph to establish that sardines is a generic term in the territory of the European Communities is not objective". The European Communities makes this assertion based on the probative value we attached to the letter of the United Kingdom Consumers' Association and the use of "slid" and "herring" in addition to the use of the term "sardines" to market the Canadian *Clupea harengus harengus*. In addition, the European Communities argued that "the Panel completely ignores the evidence submitted … on the range and diversity of preserved fish products that the European consumers can find in any European supermarket and that responds to their expectations that each fish be called and marketed with its own name". As a claim that a panel has not made an objective assessment is very serious,[38] we will examine each of the European Communities' arguments.

6.14 With respect to the first argument that questions the probative value or the relative weight we ascribed to the Consumers' Association's letter, we note that the Appellate Body in *Korea — Dairy* stated:

> …under Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof … The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.[39]

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[37] We noted that *Grand Dictionnaire Encyclopédique Larousse* refers the term "sardine" to *Sardina pilchardus*. We also took note of the fact that the same dictionary states "[o]n trouve des espèces voisines dans le Pacifique (*Sardinops caerulea*), ainsi que sur les côtes du sud de l'Afrique (*S. sagax*) et d'Australie (*S. neopilchardus*)". *Diccionario de la lengua espanola* defines the term "sardina" as "pez teleósteo marino fisóstomoto, de 12 a 15 centímetros de largo, *parecido al arenque*, pero de carne más delicada, cabeza relativamente menor, la aleta dorsal muy delantera y el cupero más delicada y el cuerpo más fusiforme y de color negro ayulado por encima, dorado en la cabeza y peteado en los costados y vientre." (emphasis added) These two dictionaries referred to by the European Communities support the view that the term "sardines" is not limited to just *Sardina pilchardus* but includes other species, including *Sardinops sagax*.

[38] The Appellate Body in *European Communities — Measures Affecting the Importation of Certain Poultry Products* ("*EC — Poultry*"), WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, stated that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' … is a very serious allegation". Para. 133.

[39] Appellate Body Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea — Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, para. 137.

6.15 We are also mindful that we are not "required to accord to factual evidence of the parties the same meaning and weight as do the parties".[40] We did consider the Consumers' Association letter in determining whether the European consumers associate the term "sardines" exclusively with *Sardina pilchardus* but, as stated above, this was not the sole basis on which we made the determination as other evidence was considered in the overall weighing and balancing process. We therefore do not agree with the European Communities' argument that our approach was partial.

6.16 The European Communities submitted additional evidence, i.e., letters it had received lately from other European consumers' associations on the same issue. In a letter dated 11 April 2002, Peru requested that the new evidence submitted by the European Communities not be considered. In this regard, Peru referred to Article 12 of the Panel's Working Procedures which did not provide for the submission of new evidence at this stage of the Panel proceedings. Article 12 of the Panel's Working Procedures reads as follows: "Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, answers to questions or comments on answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate". We are obliged to point out that Peru submitted the letter from Consumers' Association as a part of its rebuttal submission. In light of this, it is our view that the European Communities should have submitted the evidence at the second substantive meeting or at least not later than at the time it submitted answers to the questions posed by the Panel. Further, the European Communities did not request an extension of time-period to rebut the letter from Consumers' Association. Nor did the European Communities demonstrate the requisite "good cause" which must be shown by the party submitting the new evidence. We do not consider that the interim review stage is the appropriate time to introduce new evidence. Therefore, we decline to consider the new evidence submitted by the European Communities.

6.17 With respect to the letter from an exporter submitted by Canada, on balance we found the argument that the juvenile product of *Clupea harengus harengus* was marketed as sardines in the European Communities credible and therefore considered it as a part of the overall evidence in determining whether the European consumers associate the term "sardines" exclusively with *Sardina pilchardus*. With respect to the European Communities' argument that "the real use of the word 'sardines' for Canada's product was for sales to Surinamese in the Netherlands of a Canadian product they had got to know in Suriname", we do not see how this detracts from the fact that Canada exported *Clupea harengus harengus* as "Canadian sardines" to the Netherlands for thirty years until 1989. The fact that the majority of consumers of Canadian sardines in the Netherlands originates from Suriname does not affect the relevance of the evidence.

6.18 Finally, the European Communities claimed that in paragraph 7.132 we "completely ignor[ed] the evidence submitted by the European Communities on the range and diversity of preserved fish products that the European consumers could find in any European supermarket and that responds to their expectations that each fish be called by and marketed under its own name". Again, we did not ignore any evidence and we took note of the fact that there is diverse range of fish products that are available in European supermarkets. However, we were not persuaded that the existence of diverse preserved fish products in the European market suggested that the European consumers associate the term "sardines" exclusively with *Sardina pilchardus*. We therefore reject the European Communities' argument that we "completely ignored" the evidence it submitted.

6.19 In light of the above, we reject the European Communities' argument that our assessment was not objective and decline to change our views set out in paragraph 7.132. We have, however, for the sake of clarity, revised the last sentence to state that the term "sardines", either by itself or combined with the name of a country or geographic area is a common name for *Sardinops sagax* in the

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[40] Appellate Body Report, *Australia – Measures Affecting the Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, para. 267.

European Communities. We are obliged to point out, in response to the European Communities' comment that "[t]he assessment of the facts developed by the Panel … to establish that sardines is a *generic* term in the territory of the European Communities is not objective", that we stated in Footnote 107 of the findings: "With respect to parties' argument about whether the term 'sardines' is generic, we do not consider it necessary to make a determination on this particular issue".

6.20 The European Communities argued that we incorrectly described Article 7 of the EC Regulation in Footnote 104 of the findings. Concerning the composition of "sardine mousse", the European Communities argued that the EC Regulation referred to at least 25% *Sardina pilchardus* of the net weight of the product and that these products could not materially be composed of 100% fish. The European Communities further noted that these products consisted of 40% to 50% of the net weight of sardine meat, whilst the rest were non-fish ingredients which are necessary to give the product its particular texture and taste. We have made changes to Footnote 104 to accurately reflect Article 7 of the EC Regulation in light of the European Communities' argument.

6.21 Finally, the European Communities contested "the partial and random use made by the Panel of the evidence submitted by the parties on the negotiating history of the Codex Stan 94, which is considered unnecessary in certain parts and is selectively relied upon in others". With regard to paragraph 7.136, the European Communities further recalled a statement by France in the 1969 Synopsis of Governments' Replies on the Questionnaire on Canned Sardines: "the use of country of origin as a prefix is confusing, because several species would have the same trade name and a single species would be given several names according to the country where it is caught or processed". We would like to emphasize again that we considered the totality of the evidence before us. We considered the text of Codex Stan 94 in determining that the language provided therein took into account the issue of consumer protection in countries producing preserved sardines using *Sardina pilchardus*. We resorted to the negotiating history only to confirm that Codex Stan 94 takes into account the European Communities' concern that consumers might be misled if a distinction were not made between *Sardina pilchardus* and other species.

6.22 For the sake of clarity, we have inserted a sentence at the end of paragraph 7.99 and added paragraph 7.139 which summarizes our findings by way of an overall conclusion, which is reflected in paragraph 8.1, with respect to Article 2.4 of the TBT Agreement.

VII. FINDINGS

A. PRODUCTS AT ISSUE

7.1 This dispute concerns *Sardina pilchardus Walbaum* ("*Sardina pilchardus*") and *Sardinops sagax sagax* ("*Sardinops sagax*"), two small fish species which belong, respectively, to genus Sardina and Sardinops of the *Clupeinae* subfamily of the *Clupeidae* family; fish of the *Clupeidae* family populate almost all oceans. *Sardina pilchardus* is found mainly around the coasts of the Eastern North Atlantic, in the Mediterranean Sea and in the Black Sea, and *Sardinops sagax* is found mainly in the Eastern Pacific along the coasts of Peru and Chile. Despite the various morphological differences that can be observed between them, such as those concerning the head and length, the type and number of gillrakes or bone striae and size and weight, *Sardina pilchardus* and *Sardinops sagax* display similar characteristics: they live in a coastal pelagic environment, form schools, engage in vertical migration, feed on plankton and have similar breeding seasons.

7.2 Both fish, as well as other species of the *Clupeidae* family, are used in the preparation of preserved and canned fish products, packed in water, oil or other suitable medium.

B. MEASURE AT ISSUE[41]

7.3 Regulation (EEC) 2136/89 laying down common marketing standards for preserved sardines (the "EC Regulation") was adopted on 21 June 1989.[42] The EC Regulation defines the standards governing the marketing of preserved sardines in the European Communities.

7.4 Article 2 of the EC Regulation provides that only products prepared from fish of the species *Sardina pilchardus* may be marketed as preserved sardines. Article 2 reads as follows:

> Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:
>
> – they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
>
> – they must be prepared exclusively from the fish of the species '*Sardina pilchardus* Walbaum";
>
> – they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
>
> – they must be sterilized by appropriate treatment.

C. THE CODEX ALIMENTARIUS COMMISSION STANDARD FOR CANNED SARDINES AND SARDINE-TYPE PRODUCTS (CODEX STAN 94 –1981 REV.1 – 1995)

7.5 The Codex Alimentarius Commission of the United Nations Food and Agriculture Organization ("FAO") and the World Health Organisation ("WHO") ("Codex Alimentarius Commission") adopted, in 1978, a standard ("Codex Stan 94") for canned sardines and sardine-type products.[43] Article 1 of Codex Stan 94 states that this standard applies to "canned sardines and sardine-type products packed in water or oil or other suitable packing medium" and that it does not apply to speciality products where fish content constitutes less than 50% m/m of the net contents of the can.

7.6 Article 2.1 of Codex Stan 94 provides that canned sardines or sardine-type products are prepared from fresh or frozen fish from a list of 21 species, amongst them *Sardina pilchardus* and *Sardinops sagax*.[44]

7.7 Article 6 of Codex Stan 94 reads as follows:

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[41] Pertinent parts of the European Communities measure at issue and Codex Stan 94 set out in the descriptive part are reproduced in this part of the Report.

[42] The EC Regulation in its entirety is attached as Annex 1.

[43] Codex Stan 94 was amended in 1979 and 1989 by adding more species and revised in 1995. CodexStan 94 is attached in its entirety as Annex 2.

[44] Article 2.1.1 lists the following species:

– *Sardina pilchardus*
– Sardinops melanostictus, S. neopilchardus, S. ocellatus, S. sagax S. caeruleus
– Sardinella aurita, S. brasiliensis, S. maderensis, S. longiceps, S. gibbosa
– Clupea harengus
– Sprattus sprattus
– Hyperlophus vittatus
– Nematalosa vlaminghi
– Etrumeus teres
– Ethmidium maculatum
– Engraulis anchoita, E. mordax, E. ringens
– Opisthonema oglinum

6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following specific provisions shall apply:

6.1 NAME OF THE FOOD

The name of the products shall be:

6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or

(ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

D. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

7.8 Peru makes the following requests:

(a) Peru requests the Panel to find that the measure at issue, the EC Regulation, prohibiting the use of the term "sardines" to be used in combination with the name of the country of origin ("Peruvian Sardines"); the geographical area in which the species is found ("Pacific Sardines"); the species ("Sardines — *Sardinops sagax*"); or the common name of the species *Sardinops sagax* customarily used in the language of the member State of the European Communities in which the product is sold ("Peruvian Sardines" in English or "Südamerikanische Sardinen" in German) is inconsistent with Article 2.4 of the TBT Agreement because the European Communities did not use the naming standard set out in paragraph 6.1.1(ii) of Codex Stan 94 as a basis for its Regulation even though that standard would be an effective and appropriate means to fulfil the legitimate objectives pursued by the Regulation.

(b) If the Panel were to find that the EC Regulation is consistent with Article 2.4 of the TBT Agreement, Peru requests the Panel to find that the EC Regulation is inconsistent with Article 2.2 of the TBT Agreement because it is more trade-restrictive than necessary to fulfil the legitimate objective of market transparency that the European Communities claims to pursue.

(c) If the Panel were to find that the EC Regulation is consistent with Articles 2.2 and 2.4 of the TBT Agreement, Peru requests the Panel to find that the measure is inconsistent with Article 2.1 of the TBT Agreement because it is a technical regulation that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus.*

(d) If the Panel were to find that the measure at issue is consistent with the TBT Agreement, Peru requests the Panel to find that it is inconsistent with Article III:4 of the GATT 1994 because it is a requirement affecting the offering for sale of imported sardines that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.

7.9 Peru requests the Panel to recommend that the Dispute Settlement Body ("DSB") request the European Communities to bring its measure into conformity with the TBT Agreement. Peru specifically requests the Panel to suggest that the European Communities permit Peru, without any further delay, to market its sardines in accordance with a naming standard consistent with the TBT Agreement.

7.10 The European Communities requests the Panel to reject Peru's claims that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

E. GENERAL INTERPRETATIVE ISSUES

1. Rules of interpretation

7.11 The TBT Agreement constitutes an integral part of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). As such, the TBT Agreement is one of the "covered agreements" and is therefore subject to the DSU. Article 3.2 of the DSU provides that panels are to clarify the provisions of "covered agreements" in accordance with customary rules of interpretation of public international law.

7.12 In *US — Gasoline*, the Appellate Body stated that the fundamental rule of treaty interpretation as set out in Articles 31 and 32 of the Vienna Convention on the law of Treaties (the "Vienna Convention")[45] had "attained the status of a rule of customary or general international law" and "forms part of the 'customary rules of interpretation of public international law'".[46] Pursuant to Article 31(1) of the Vienna Convention, the duty of a treaty interpreter is to determine the meaning of a term in accordance with the ordinary meaning to be given to the term in its context and in light of the object and purpose of the treaty.

7.13 If, after applying the rule of interpretation set out in Article 31(1), the meaning of the treaty term remains ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, Article 32 allows the treaty interpreter to have a recourse to "supplementary means of interpretation, including the preparatory work on the treaty and the circumstances of its conclusion".[47] We will apply the principles enunciated by the Appellate Body in the *US — Gasoline* to interpret the relevant provisions of the TBT Agreement in this Report.

2. Order of analysis of the claims

7.14 Peru requests that we examine its claim under Article 2.4 of the TBT Agreement first and then examine its claims in the order of Articles 2.2 and 2.1 of the TBT Agreement only if we were to determine that the EC Regulation is not inconsistent with Article 2.4. If we were to determine that the EC Regulation is not inconsistent with the provisions of the TBT Agreement invoked by Peru, it requests that we examine its claims in respect of Article III:4 of the GATT 1994.

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[45] Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; (1969) 8 International Legal Materials 679.

[46] Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline* ("*US — Gasoline*"), adopted 20 May 1996, DSR 1996:I, p. 16. See also Appellate Body Report, *Japan — Taxes on Alcoholic Beverages* ("*Japan — Alcoholic Beverages II*") WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 104; Appellate Body Report, *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India — Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, para. 46; *European Communities — Customs Classification of Certain Computer Equipment* ("*EC — Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, para. 84; and *US — Shrimp*, para. 114.

[47] Appellate Body Report, *EC — Computer Equipment*, para. 86.

7.15 In addressing the issue of the order of analysis, we have taken into account earlier considerations of this question. We recall the Appellate Body's statement in *EC — Bananas III* which stated that the panel "should" have applied the Licensing Agreement first because this agreement deals "specifically, and in detail" with the administration of import licensing procedures. The Appellate Body noted that if the panel had examined the measure under the Licensing Agreement first, there would have been no need to address the alleged inconsistency with Article X:3 of the GATT 1994.[48] The Appellate Body suggests that where two agreements apply simultaneously, a panel should normally consider the more specific agreement before the more general agreement.

7.16 Arguably, the TBT Agreement deals "specifically, and in detail" with technical regulations. If the Appellate Body's statement in *EC — Bananas III* is a guide, it suggests that if the EC Regulation is a technical regulation, then the analysis under the TBT Agreement would precede any examination under the GATT 1994. Moreover, Peru, as the complaining party, requested that we first examine its claim under Article 2.4 of the TBT Agreement followed by Article 2.2 if we find that the EC Regulation is consistent with Article 2.4. And similarly, only if we were to find that the EC Regulation is consistent with Article 2.2 does Peru ask us to consider its cla im under Article 2.1. In the event that we were to find that the EC Regulation is consistent with the TBT Agreement, Peru requests that we examine its claim under Article III:4 of the GATT 1994. We note that the European Communities did not contest Peru's request regarding this sequencing analysis.

7.17 These requests by Peru on sequencing of claims thereby oblige us to consider whether there is an interpretative methodology that compels panels to adopt a particular order which, if not followed, would constitute an error of law.[49] We recall the Appellate Body's statement in *US – FSC* in relation to the US argument that the panel erred by commencing its analysis with Article 3.1(a) rather than footnote 59 of the Subsidies and Countervailing Measures Agreement. The Appellate Body stated:

> In our view, it was not a legal error for the Panel to begin its examination of whether the FSC measure involves export *subsidies* by examining the general definition of a "*subsidy*" that is applicable to export *subsidies* in Article 3.1(a). In any event, whether the examination begins with the general definition of a "subsidy" in Article 1.1 or with footnote 59, we believe that the outcome of the European Communities' claim under Article 3.1(a) would be the same. The appropriate meaning of both provisions can be established and can be given effect, irrespective of whether the examination of the claim of the European Communities under Article 3.1(a) begins with Article 1.1 or with footnote 59.[50]

7.18 In our view, if the EC Regulation is a technical regulation, it would not constitute an error of law to start the examination of the consistency of the EC Regulation with Article 2.4 followed by Articles 2.2 and 2.1 of the TBT Agreement as necessary since such sequential examination would not affect the interpretation of the other provisions.

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[48] Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas* ("*EC — Bananas III*"), WT/DS27/R, adopted 25 September 1997, DSR 1997:II, para. 204.

[49] In *US — Shrimp*, for example, the Appellate Body considered the sequence of analysis important in examining whether the U.S. measure protecting sea turtles was justifiable under Article XX of the GATT 1994. It held that the panel erred by looking at the chapeau of Article XX and then subsequently examining whether the U.S. measure was covered by the terms of Article XX(b) or (g) because "[t]he task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter … has not first identified and examined the specific exception threatened with abuse". Appellate Body Report, *US — Shrimp*, para. 120.

[50] Appellate Body Report, *United States — Tax Treatment for "Foreign Sales Corporations"* ("*US — FSC*"), WT/DS108/AB/R, adopted 20 March 2000, para. 89.

7.19 Accordingly, the order of examination will follow the order of the claims set out in Peru's submission. That is, claims will be examined in the following order: Articles 2.4, 2.2, 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

F. APPLICABILITY OF THE TBT AGREEMENT

1. Consideration of the EC Regulation as a technical regulation

7.20 Peru, as the complaining party, invoked paragraphs 1, 2 and 4 of Article 2 of the TBT Agreement as the legal basis of its claim to argue that the EC Regulation is inconsistent with those provisions. We note that the substantive provisions of the TBT Agreement have not been construed by either panels or the Appellate Body[51] and that the provisions of the Tokyo Round Agreement on Technical Barriers to Trade (the "Tokyo Round Standards Code") which preceded the TBT Agreement have also not been addressed by any panel. As the drafters of the TBT Agreement intended to further the objective of the GATT 1994 with a specialized legal regime that applies only to a limited class of measures, it is necessary to commence our analysis by examining whether the EC Regulation constitutes a technical regulation within the meaning of the TBT Agreement. Only if it is established that the EC Regulation constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, will we then proceed to consider the consistency of the EC Regulation with the substantive obligations set out in Articles 2.4, 2.2 and 2.1 of the TBT Agreement.

7.21 Peru notes that paragraph 1 of Annex 1 of the TBT Agreement defines the term "technical regulation" as a document which lays down product characteristics with which compliance is mandatory and submits that the EC Regulation lays down "common marketing standards for preserved sardines". Peru argues that the EC Regulation constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement because it lays down characteristics which preserved sardines must possess if they are to be "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. In particular, Peru submits that Article 2 of the EC Regulation sets out characteristics preserved sardines must possess in order to market them in the European Communities under the name "sardines" and notes that one such characteristic is that the product in question must be prepared from the fish of species *Sardina pilchardus*. Peru also argues that the language of Article 9 of the EC Regulation which provides that the EC Regulation "shall be binding in its entirety and directly applicable in all Member States" makes compliance with the measure mandatory.

7.22 The European Communities does not contest that the EC Regulation is a technical regulation for the purposes of the TBT Agreement. Nevertheless, the European Communities does not accept that the measure identified by Peru is a technical regulation because the EC Regulation deals with naming, not labelling, and the definition of technical regulation refers to labelling of products and not to naming of products. The European Communities also argues that the Regulation does not lay down mandatory labelling requirements for fish of species other than *Sardina pilchardus*, i.e., *Sardinops sagax*.

7.23 The term "technical regulation" is defined in Annex 1.1 of the TBT Agreement and states:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

[51] The panel and the Appellate Body examined whether the measure at issue was a technical regulation in Appellate Body Report, *EC — Asbestos*.

7.24 Based on the textual reading of the definition as set out in Annex 1.1 of the TBT Agreement, a measure constitutes a "technical regulation" if the measure lays down product characteristics and compliance is mandatory. We note that the key part of the definition is that the document has to lay down "product characteristics". In this regard, the Appellate Body in *EC — Asbestos* stated:

> [T]he "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".[52]

7.25 The Appellate Body provides a comprehensive definition of "characteristics" of a product and adds that a technical regulation, if it is to be enforceable, must be applicable to an identifiable product, or group of products. In support of this view, the Appellate Body states that compliance with Article 2.9.2 of the TBT Agreement, which imposes an obligation on Members to notify other Members "of the products to be covered" by a proposed technical regulation, calls for identification of the product coverage of a technical regulation.[53] By this logic, if a technical regulation applies to a group of products or products generally, the product need not be expressly named, identified or specified in the regulation.

7.26 In determining whether the EC Regulation is a technical regulation, we first note that it identifies a product, namely preserved sardines. In its preambular language, the EC Regulation alludes to "the adoption of [common marketing standards] for preserved sardines". In addition to identifying the product, the EC Regulation lays down certain product characteristics, both intrinsic and related, that preserved sardines must possess in order for them to be "marketed as preserved sardines and under the trade description refered to in Article 7" of the EC Regulation. The definition provided in Annex 1.1 of the TBT Agreement indicates that a technical regulation can require one or more product characteristics. This is confirmed by the Appellate Body's finding that the use of the word "exclusively" with the disjunctive word "or" indicates that a technical regulation may lay down one or a few product characteristics. Thus, it is plausible that a technical regulation may contain just one product characteristic or several product characteristics, whether they be intrinsic and/or related characteristics of the product.

7.27 Various provisions of the EC Regulation lay down product characteristics that deal with features and qualities affecting composition, size, shape, colour and texture of preserved sardines. For instance, one product characteristic required by Article 2 of the EC Regulation is that preserved sardines must be prepared exclusively from fish of the species *Sardina pilchardus*. This product characteristic must be met for the product to be "marketed as preserved sardines and under the trade

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[52] Appellate Body Report, *EC — Asbestos*, para. 67.
[53] *Ibid*., para. 70.

description referred to in Article 7" of the EC Regulation. We consider that the requirement to use exclusively *Sardina pilchardus* is a product characteristic as it objectively defines features and qualities of preserved sardines for the purposes of their "market[ing] as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. Article 2 of the EC Regulation lays down additional product characteristics for a product to be "marketed as preserved sardines and under the trade description referred to in Article 7", e.g., the product must be pre-packaged with any appropriate covering medium in a hermetically sealed container and sterilized by appropriate treatment. In addition to these product characteristics laid down in Article 2, the EC Regulation contains other product characteristics of preserved sardines.

7.28 Article 3 states that sardines must be "appropriately trimmed of the head, gills, caudal fin and internal organs other than ova, milt and kidneys, and according to the market presentation concerned, backbone and skin". Article 4 sets out the presentation of preserved sardines and Article 5 deals with the covering media. Article 6 requires, *inter alia*, that sardines be uniform in size and must not have significant breaks in the abdominal wall; comprise flesh of normal consistency with light or pinkish color; and retain the odour and flavor characteristics of the species *Sardina pilchardus*. Article 7, in addition to dealing with trade description, covers the ratio between the weight of the sardines and covering media. We find that these provisions of the EC Regulation also lay down product characteristics.

7.29 The second requirement for a measure to be a technical regulation is that compliance must be mandatory. With regard to this requirement, the Appellate Body stated:

> A "technical regulation" must, in other words, regulate the "characteristics" of products in a binding or compulsory fashion. It follows that, with respect to products, a "technical regulation" has the effect of *prescribing* or *imposing* one or more "characteristics" – "features", "qualities", "attributes", or other "distinguishing mark".[54]

7.30 With respect to the requirement that compliance with the technical regulation must be mandatory, Article 9 of the EC Regulation states that the requirements contained therein are "binding in its entirety and directly applicable in all Member States". Thus, the EC Regulation fulfils the mandatory compliance aspect of the definition set out in Annex 1.1 of the TBT Agreement.

7.31 Although the European Communities does not contest that its Regulation is a technical regulation, it argued that Peru has taken one aspect of the measure, i.e., Article 2 of the EC Regulation, isolated that provision and classified the Regulation as a technical regulation. The European Communities argued that it is not possible to single out one aspect of a measure and analyze it as a technical regulation and that Article 2 has to be interpreted in the context of the entire Regulation.

7.32 In *EC — Asbestos*, in determining whether French Decree No. 96-1133 concerning asbestos and products containing asbestos constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, the Appellate Body stated that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole" and concluded that the measure at issue had to be examined as an "integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it".[55] We note that Peru did not argue that it was taking Article 2 of the EC Regulation in separation from the whole regulation and classifying only that provision as a technical regulation. Peru argued that it considers the EC Regulation in its entirety to be a technical regulation because it lays down characteristics for sardines to be marketed in

[54] Appellate Body Report, *EC — Asbestos*, para. 68.
[55] *Ibid*., para. 64.

the European Communities as preserved sardines but Peru challenges only the WTO-consistency of the requirement set out in Article 2 of the EC Regulation.[56]

7.33 Moreover, Peru indicated that the other elements of the EC Regulation were relevant in considering whether the requirement set out in Article 2 of the EC Regulation is consistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement. Indeed, examining Article 2 of the EC Regulation for the purposes of determining the trade description would necessarily entail examining Article 7 which in turn refers to Articles 4 and 5 of the EC Regulation. Peru refers to other provisions of the EC Regulation, i.e., objectives of the regulation as set out in the preamble and the provision relating to the binding nature of the Regulation, in its claim that the EC Regulation is inconsistent with Article 2 of the TBT Agreement.

7.34 We do not consider that, under the DSU, a complaining party is required to list all provisions of a measure it deems inconsistent and can instead identify and challenge only those offending provisions of the measure it deems central to its interest in resolving the dispute. Peru decided in this case to focus on Article 2 of the EC Regulation and its decision to narrow the scope of the examination to Article 2 does not suggest that Peru considers only Article 2 to be a technical regulation in isolation from the rest of the provisions of the EC Regulation. We therefore reject the European Communities' argument that the measure identified by Peru is not a technical regulation because it did not take into account the whole of the EC Regulation but only Article 2 of the EC Regulation.

7.35 Based on the reasons set out above and subject to review below of the arguments advanced by the European Communities, we find that the EC Regulation is a technical regulation as it lays down product characteristics for preserved sardines and makes compliance with the provisions contained therein mandatory.

2. Consideration of the European Communities' arguments that its Regulation does not contain a labelling requirement and does not concern preserved *Sardinops sagax*

7.36 Although the European Communities accepts that the EC Regulation is a technical regulation for the purposes of the TBT Agreement because it lays down marketing standards for preserved *Sardina pilchardus*, the European Communities argues that its Regulation does not contain a labelling requirement and does not lay down marketing standards for preserved *Sardinops sagax*.

(a) The European Communities' argument that its Regulation is not a technical regulation because it deals with naming rather than labelling of a product

7.37 The European Communities claims that its Regulation does not constitute a technical regulation because the definition of technical regulation as set out in Annex 1 of the TBT Agreement covers labelling of products, not naming of products. The European Communities argues that it is Directive 2000/13 on the laws of the European Communities' member States relating to the labelling, presentation and advertising of foodstuffs for sale to the final consumer ("EC Directive 2000/13"), in conjunction with Article 2 of the EC Regulation, that requires preserved *Sardina pilchardus* to be labelled "preserved sardines".

7.38 We reject the European Communities' argument on two grounds. First, we do not consider that the EC Regulation, even if it were to contain a "naming" rather than "labelling" requirement, could no longer be a technical regulation within the meaning of the TBT Agreement. Second, we do not consider that the distinction between "naming" and "labelling" as applied by the European Communities to its Regulation is meaningful.

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[56] Peru's Rebuttal Submission, para. 25.

7.39 First, we recall the Appellate Body's statement that a "technical regulation" may be confined to laying down only one or a few "product characteristics" and we have already found that the EC Regulation lays down product characteristics that preserved sardines must possess, i.e., they must be prepared from fish of species *Sardina pilchardus* only and meet certain requirements dealing with weight, organoleptic aspects and the covering medium. Consequently, even if it were determined that the EC Regulation does not contain a labelling requirement, it cannot detract from our conclusion that the EC Regulation constitutes a technical regulation because that conclusion is based on our finding that it lays down certain product characteristics we have already identified. A finding to the effect that the EC Regulation does not contain a related product characteristic in the form of a labelling requirement does not negate the existence of other product characteristics set out in the EC Regulation.

7.40 Second, we fail to see the basis on which a distinction can be drawn between a requirement to "name" and a requirement to "label" a product for the purposes of the TBT Agreement. The ordinary meaning of the term "label" is "name" and vice versa.[57] Moreover, these two concepts denote the means of identification of a product. The Appellate Body in *EC — Asbestos* referred to "terminology, symbols, packaging, marking or labelling requirements" as constituting "*the means of identification*, the presentation and the appearance of a product". The ordinary meaning of the term "label" is "[a]n affixation to or marking on a manufactured article, giving information as to its nature or quality, or the contents of a material, package or container, or the name of the maker"[58] and the term "marking" in turn is defined as "write a word or symbol on (an object), typically for *identification*".[59] The ordinary meaning of the term "naming" is "*identify* by name".[60] Based on the ordinary meaning, we consider that labelling and naming requirements are essentially "means of identification" of a product and as such, they come within the scope of the definition of "technical regulation".

7.41 In any event, the distinction which we have been asked to draw between "naming" and "labelling" requirements is not supported by the text and structure of the EC Regulation. Article 2 of the EC Regulation states that only products meeting the requirements contained therein may be marketed as preserved sardines and under the trade description referred to in Article 7. Article 7 of the EC Regulation in turn stipulates that the trade description must correspond to the presentation of sardines on the basis of corresponding designation set out in Article 4 of the EC Regulation which allows the marketing of preserved sardines as simply "*sardines*", "sardines without bones", "sardines without skin or bones", "sardine fillets", "sardine trunks" or any other form that is distinguishable from the five presentations mentioned above. Article 7 of the EC Regulation also requires that the designation of the covering medium, which is addressed in Article 5, must form an integral part of the trade description. Article 5 allows olive oil, other refined vegetable oils, tomato sauce, natural juice, marinade and any other covering medium that is distinguishable from the five covering media mentioned above. Based on the foregoing reading of the EC Regulation, the label would have to indicate the term "sardines" accompanied by the corresponding designation for presentation and the covering medium. The European Communities confirmed this interpretation of its Regulation when it stated, in response to the Panel's question whether the EC Regulation requires that the label indicate that the product is preserved sardines, that Article 7 of the EC Regulation, in conjunction with Articles 4 and 5, require "the description of the product on the labels will bear the indication 'sardines' and will have to reflect these two requirements". [61] In light of the ordinary meaning of the term "label" and based on the European Communities' response, Article 2 of the EC Regulation, in conjunction with Articles 4, 5 and 7, also constitutes a related product characteristic in the form of a

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[57] *The Cassell Thesaurus Dictionary*, (Mackays of Chatham PLC, 1998), pp. 387 and 453.
[58] *Black's Law Dictionary*, (West Publishing Company, 1979, fifth edition), p. 786.
[59] *The New Oxford Dictionary of English*, (Clarendon Press, Oxford, 1998), p. 1132.
[60] *Ibid.*, p. 1229.
[61] EC's Response to Panel Question 7. We note that the label on a sample of sardines submitted as evidence by the European Communities states "Sardines MAROCAINES SANS PEAU& SANS ARÊTES — À L'HUILE D'OLIVE".

labelling requirement as it comes within the ambit of "[an] affixation to or marking on a manufactured article, giving information as to its nature or quality, or the content of a material, package or container, or the name of the maker". Finally, the fact that the European Communities may have another domestic regulation deemed to be a labelling regulation does not vitiate our conclusion that the EC Regulation contains a labelling element within the meaning of the TBT Agreement.[62]

7.42 For the reasons stated above, we reject the European Communities' argument that its Regulation does not constitute a technical regulation on the basis that it deals with naming, not labelling.

(b) The European Communities' argument that its Regulation does not lay down mandatory labelling requirement for products other than preserved *Sardina pilchardus*

7.43 The European Communities argues that although Article 2 of the EC Regulation provides that the term "sardines" can only be used for preserved *Sardina pilchardus*, it does not mean that the EC Regulation lays down mandatory labelling requirement for preserved *Sardinops sagax* or any species other than *Sardina pilchardus*.[63]

7.44 The European Communities' argument goes to the issue of whether its Regulation is the relevant technical regulation. This argument, in our view, disregards the notion that a document may prescribe or impose product characteristics in either a positive or negative form — that is, by inclusion or by exclusion.[64] In discussing the form in which a document may regulate a product, the Appellate Body held in *EC — Asbestos* that a document may require positively that a product contain certain characteristics or it may require negatively that the product not possess certain characteristics.[65] In the case at hand, Article 2 of the EC Regulation states that '*only* the products meeting the … requirements [set out in that Article] may be marketed as preserved sardines and under the trade description referred to in Article 7". This formulation thereby makes a distinction between those product characteristics that are included in the measure versus those that are excluded.

7.45 By this logic, the language contained in Article 2 of the EC Regulation requires positively that preserved sardines possess the product characteristic of using only fish of the species *Sardina pilchardus*. The negative implication that follows from this requirement is that preserved sardines cannot possess the product characteristic of using fish of species other than *Sardina pilchardus*. That is, a product containing fish of the species *Sardinops sagax*, or any species other than *Sardina pilchardus* for that matter, cannot be "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. Therefore, by requiring the use of only the species *Sardina pilchardus* as preserved sardines, the EC Regulation in effect lays down product characteristics in a negative form, that is, by excluding other species, such as *Sardinops sagax*, from being "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. It is for this reason that we do not accept the European Communities' argument that the EC Regulation is not a technical regulation for preserved

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[62] We note in this regard that the fifth preamble of Directive 2000/13 states that "[r]ules of specific nature which apply vertically only to particular foodstuff should be laid down in provisions dealing with those products".

[63] EC's Rebuttal Submission, para. 12.

[64] The positive and negative formulation stemmed from the facts of *EC — Asbestos*, where the measure was a ban on asbestos and products containing asbestos fibres.

[65] The Appellate Body stated in paragraph 69:

> "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain "characteristics", or the document may require, negatively, that products *must not possess* certain "characteristics". In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.

Sardinops sagax. This argument would be persuasive only if technical regulations were to lay down product characteristics in a positive form.

7.46 If only characteristics set out in a positive form of an identifiable product can be taken into account in determining whether it constitutes a technical regulation without considering the negative implications stemming therefrom, it would be possible to circumvent the obligations contained in the TBT Agreement. It would be possible to argue that a measure is not the relevant technical regulation on the basis that it does not positively set out product characteristics of the identifiable product although such product would be affected by the negative implications of the technical regulation. Yet, the European Communities makes this argument when it claims that because the EC Regulation lays down product characteristic of preserved *Sardina pilchardus*, it is not a labelling requirement for preserved *Sardinops sagax* and that "the fact that the name 'sardines' cannot be used for products other than preserved *Sardina pilchardus* is in fact simply the logical consequence of the fact that this name is reserved for … products produced exclusively from preserved *Sardina pilchardus*".[66] In our judgement, if only product characteristics set out in a positive form can be considered in examining a technical regulation, such interpretation could render the TBT Agreement meaningless and it is unlikely that the drafters of the TBT Agreement envisaged such situation.

7.47 Based on the foregoing reasons, we reject the European Communities' argument that the EC Regulation does not lay down mandatory labelling requirements for products other than preserved *Sardina pilchardus* and that its Regulation is not a technical regulation for preserved *Sardinops sagax*.

G. CONSISTENCY OF THE EC REGULATION WITH ARTICLE 2.4 OF THE TBT AGREEMENT

1. Burden of proof

7.48 The issue of burden of proof has been repeatedly examined in WTO jurisprudence. The Appellate Body stated in *US — Wool Shirts and Blouses* that:

> … the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[67]

7.49 Once the Panel determines that the party asserting the affirmative of a particular claim or defence has succeeded in raising a presumption that its claim is true, it is incumbent upon the Panel to assess the merits of all the arguments advanced by the parties and the admissibility, relevance and weight of all the factual evidence submitted with a view to establishing whether the party contesting a particular claim has successfully refuted the presumption raised. In the event that the arguments and the factual evidence adduced by the parties remain in equipoise, the Panel must, as a matter of law, find against the party who bears the burden of proof.

7.50 Under the well-established principle concerning burden of proof, it is for the complaining party to establish the violation it alleges; it is for the party invoking an exception or an affirmative defence to prove that the conditions contained there are met; and it is for the party asserting a fact to prove it.[68] Applying this principle in the context of Article 2.4 of the TBT Agreement, it is Peru, as

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[66] EC's Rebuttal Submission, para. 12.

[67] Appellate Body Report, *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US — Wool Shirts and Blouses*"), WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, p. 335.

[68] Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* ("*Turkey — Textiles*"), WT/DS34/R, as modified by the Appellate Body Report, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, para. 9.57.

the complaining party, that bears the burden of establishing a *prima facie* case by demonstrating that a relevant international standard exists and that this standard was not used as a basis for the technical regulation. At this point, should the European Communities make an assertion to rebut Peru's claims, it carries the burden of establishing that assertion. We note that the European Communities asserted that Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation. According to the Appellate Body, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".[69] Thus, in line with the principle enunciated by the Appellate Body, the burden of proof rests with the European Communities, as the party "assert[ing] the affirmative of a particular claim or defence", to demonstrate that the international standard is an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the EC Regulation.[70]

7.51 Moreover, we are concerned that a complaining party, if it were to be required to determine, as part of the *prima facie* case it has to establish, what the "legitimate" objectives pursued by the respondent are and what factors may render the international standard "inappropriate" in light of the respondent's specific conditions, may not be in a position to do so. A complainant cannot in our view be required to spell out the "legitimate" objectives pursued by a technical regulation. Only the respondent Member can do so. Similarly, we consider that the assessment of whether a relevant international standard is "inappropriate" includes considerations which may be distinct from those underlying an "effectiveness" assessment, and may extend to considerations which are proper to the Member adopting or applying a technical regulation. As indicated below, whereas the "effectiveness" of an international standard bears upon the *result* of the means employed, the "appropriateness" of that international standard bears upon the *nature* of the means employed. Consequently, when a Member challenges a technical regulation under Article 2.4, it cannot in our view be required to second-guess what those considerations of "appropriateness" are which underlie the respondent's decision not to use a relevant international standard as a basis. A complainant would then be required to explain why a relevant international standard is not "inappropriate", without knowing on what basis the respondent considers the relevant international standard "inappropriate".[71]

7.52 For the reasons stated above, it is for Peru, as the complaining party, to establish *prima facie* that the EC Regulation is a technical regulation within the meaning of the TBT Agreement; that relevant international standards exist; and that such standards were not used as a basis for the technical regulation. The burden rests with the European Communities, as the party "assert[ing] the affirmative of a particular claim or defence", to demonstrate that the international standard is an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the Regulation.

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[69] Appellate Body Report, *US — Wool Shirts and Blouses*, p. 335.

[70] We are cognizant of the Appellate Body's finding in *EC — Hormones* that, in reference to Articles 3.1 and 3.3 of the SPS Agreement, the latter provision, which allows Members to establish their own level of sanitary protection, does not constitute an exception to the general obligation of Article 3.1, and that the burden of the complaining party to establish a *prima facie* case of inconsistency "is not avoided by simply describing that provision as an 'exception'". However, we consider that the Appellate Body's finding in *EC — Hormones* does not have a direct bearing on the matter before us.

[71] We are aware that Members, pursuant to Article 2.5 of the TBT Agreement, upon the request of another Member, "shall explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4 [of Article 2]". It cannot be excluded, however, that a Member, while acting in good faith, does not provide all the information required in sufficient detail for the respondent to determine with accuracy what the "legitimate" objectives pursued are and, if applicable, what considerations of "inappropriateness" underlie the Member's decision not to use the international standard as a basis. Lack of such information could frustrate a complainant's efforts to meet its burden of proof regarding the ineffectiveness or inappropriateness of an international standard.

2. Application of the TBT Agreement to measures adopted before 1 January 1995

7.53 The European Communities argues that Article 2.4 of the TBT Agreement is not applicable to measures that were adopted before 1 January 1995. Referring to Article 28 of the Vienna Convention, the European Communities claims that the adoption of its Regulation was an "act … which took place … before the date of entry into force of the treaty" and since there is no expression of contrary intention, Article 2.4 does not apply to the Regulation.

7.54 Article 2.4 of the TBT Agreement states:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

7.55 Peru claims that the expression "[w]here technical regulations are required" indicates that Article 2.4 applies in the situations in which technical regulations are required and not merely at the point in time when the decision to adopt them was taken. Peru argues that the European Communities' argument cannot be reconciled with Article XVI:4 of the WTO Agreement, which provides that "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided for in the annexed agreements" or with Article 28 of the Vienna Convention, pursuant to which a treaty does apply to situations that continue to exist after its entry into force. Peru points out that the European Communities made a similar claim in the context of the SPS Agreement in *EC — Hormones* which the Appellate Body rejected by stating that "if negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 … it appears reasonable to us to expect that they would have said so explicitly".

7.56 The general principle of international law embodied in Article 28 of the Vienna Convention is that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." In *Brazil — Desiccated Coconut*, the Appellate Body stated that, in reference to Article 28 of the Vienna Convention, "[a]bsent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force".[72] We note that the EC Regulation was adopted on 21 June 1989 and the TBT Agreement entered into force on 1 January 1995. In this regard, the EC Regulation is a situation which has not ceased to exist after the date of the entry into force of the TBT Agreement but is a continuing situation. Therefore, absent a contrary intention, the TBT Agreement applies to the EC Regulation.

7.57 The TBT Agreement itself does not reveal any such contrary intentions. The TBT Agreement does not contain a transition period and there are provisions that indicate that the TBT Agreement was intended to apply to technical regulations that were adopted before the entry into force of the TBT Agreement. We note, for instance, that Article 2.2 states that "Members shall ensure that technical regulations are not prepared, adopted or *applied* with a view to or with the effect of creating unnecessary obstacles to international trade"; Article 2.3 states that "[t]echnical regulations shall not be *maintained* if the circumstances or objectives giving rise to their adoption no longer exists…"; and Article 2.6 states that a "Member preparing, adopting or *applying* a technical regulation which may have a significant effect on trade of other Members shall … explain justification for that technical regulation" (emphasis added).

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[72] Appellate Body Report, *Brazil — Measures Affecting Desiccated Coconut* ("*Brazil — Desiccated Coconut*"), WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, pp. 179-180.

7.58 Although the temporal issue has not been considered by panels or the Appellate Body in the context of the TBT Agreement, an analogous temporal issue has been considered in the context of the SPS Agreement. The Appellate Body in *EC — Hormones* examined whether the SPS Agreement applies to certain SPS measures that were enacted before the entry into force of the SPS Agreement on 1 January 1995 and held that, under Article 28 of the Vienna Convention, the SPS Agreement is applicable to such measures:

> We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement* does not contain any provision limiting the temporal application of the *SPS Agreement*, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, it cannot be assumed that central provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter.[73]

7.59 The factual aspect of the current dispute is not dissimilar to the one in hand in *EC — Hormones* in that, like the 1981 and 1988 Directives, the EC Regulation is a "situation or measure that did not cease to exist" and the TBT Agreement does not reveal a contrary intention to limit the temporal application of the TBT Agreement to measures adopted after 1 January 1995.

7.60 Therefore, Article 2.4 of the TBT Agreement applies to measures that were adopted before 1 January 1995 but which have not ceased to exist.

3. Whether Codex Stan 94 is a relevant international standard

(a) Consideration of Codex Stan 94 as a relevant international standard

7.61 Peru argues that Codex Stan 94 is a relevant international standard as it was adopted by the Codex Alimentarius Commission which is an internationally recognized standard setting body that develops standards for food products. Referring to the definition of "standard" set out in Annex 1 of the TBT Agreement, Peru argues that it is an international standard that was adopted by consensus. Peru claims that Codex Stan 94 is also a relevant international standard that applies to sardines and sardine-type products that are prepared from the fish of 21 different species, including *Sardina pilchardus* and *Sardinops sagax*.

7.62 Although the European Communities does not contest that the Codex Alimentarius Commission is an internationally recognized standard setting body, the European Communities claims that the requirement to use relevant international standards as a basis set out in Article 2.4 of the TBT Agreement does not apply to existing measures. The European Communities also argues that Codex Stan 94 is not a relevant international standard on the basis that it did not exist and its adoption was not imminent when the EC Regulation was adopted. Furthermore, the European Communities also takes issue with several procedural features surrounding the development of Codex Stan 94. The European Communities argues that the standard was not adopted by consensus and that the prior, non-final draft of Codex Stan 94 indicates that the use of the common name for the species other than

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[73] Appellate Body Report, *EC — Hormones*, para. 128. In *Canada — Term of Patent Protection* ("*Canada — Patent Term*"), WT/DS170/R, adopted 12 October 2000, as upheld by the Appellate Body Report, WT/DS170/AB/R, the panel held that the TRIPS Agreement was applicable to patents that were granted before the date of entry into force of the TRIPS Agreement (1 January 1996 for developed Members) because the subject matter of the patent that was granted protection is ongoing and continues past 1 January 1996 and to the extent that the protection of the subject matter continues beyond that date, it is a situation that has not ceased to exist and the TRIPS Agreement is therefore applicable.

Sardina pilchardus without the word "sardines" is an independent option and Peru's interpretation that it is not an independent option would render Codex Stan 94 invalid. The European Communities argues that if Peru's interpretation were accurate, it would render Codex Stan 94 invalid because the change in the language of the standard was made without a referral back to the Committee for its approval. According to the European Communities, under Codex rules, any substantive change in the process of developing an international standard requires the approval of the Committee. The European Communities finally argues that paragraph 6.1.1(ii) of Codex Stan 94 is not the relevant provision for the EC Regulation because the EC Regulation does not regulate products other than preserved *Sardina pilchardus*.

7.63 International standards are standards that are developed by international bodies. Our starting point of analysis, therefore, is whether Codex Stan 94 comes within the scope of the definition of "standard" provided in Annex 1.2 of the TBT Agreement and followed by whether the Codex Alimentarius Commission is an international body within the meaning set out in Annex 1.2 of the TBT Agreement.

7.64 The term "standard" is defined as:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

7.65 A standard comes within the definition set out in paragraph 2 of Annex 1 of the TBT Agreement if it provides "for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods"; compliance is not mandatory; and is approved by a "recognized body". We note that the parties are in agreement that Codex Stan 94 is a "standard" and see no reason to disagree with that assessment for the purposes of this dispute. We therefore find that Codex Stan 94 is a standard within the meaning of Annex 1.2 of the TBT Agreement.

7.66 With respect to whether the Codex Alimentarius Commission is an international body for the purposes of this dispute,[74] we note that "international body" is defined in Annex 1.4 of the TBT Agreement as a "[b]ody or system whose membership is open to the relevant bodies of at least all Members". According to Rule 1 of the Statutes and Rules of Procedures of the Codex Alimentarius Commission, "[m]embership of the joint FAO/WHO Codex Alimentarius Commission … is open to all Member Nations and Associate Members of the FAO and/or WHO." As membership to the Codex Alimentarius Commission is open to all WTO Members, it is an international body within the meaning of annex 1.4 of the TBT Agreement. Moreover, we note that Peru submitted that the Codex Alimentarius Commission was an internationally recognized standard setting body that develops standards for food products and the European Communities indicated, in a response to the Panel's question on the matter, that it did not "contest the status of the Codex Alimentarius Commission as an international standardization body for the purposes of the TBT Agreement".

7.67 Based on the reasons above, we find that Codex Stan 94 is an international standard for the purposes of this dispute.

7.68 Having determined that Codex Stan 94 is an international standard, the analysis turns to whether Codex Stan 94 is a "relevant" international standard in respect of the EC Regulation. We note that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in

[74] We note that the Codex Alimentarius Commission is explicitly referred to in Article 3.4 of the SPS Agreement.

hand; pertinent".[75] Based on the ordinary meaning, Codex Stan 94 must bear upon, relate to or be pertinent to the EC Regulation for it to be a relevant international standard.

7.69 The title of Codex Stan 94 is "Codex Standard for Canned Sardines and Sardine-type Products" and the EC Regulation lays down common marketing standards for preserved sardines. The European Communities indicated in its response that the term "canned sardines" and "preserved sardines" are essentially identical.[76] Therefore, it is apparent that both the EC Regulation and Codex Stan 94 deal with the same product, namely preserved sardines. The scope of Codex Stan 94 covers various species of fish, including *Sardina pilchardus* which the EC Regulation covers, and includes, *inter alia*, provisions on presentation (Article 2.3), packing medium (Article 3.2), labelling, including a requirement that the packing medium is to form part of the name of the food (Article 6), determination of net weight (Article 7.3), foreign matter (Article 8.1) and odour and flavour (Article 8.2). The EC Regulation contains these corresponding provisions set out in Codex Stan 94, including the section on labelling requirement.

7.70 Therefore, for the reasons set out above and subject to the consideration of European Communities' arguments below, we find that Codex Stan 94 is a relevant international standard.

(b) Consideration of European Communities' temporal argument and its arguments that Codex Stan 94 is not a relevant international standard

7.71 We noted that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent". The dictionary meaning indicates that relevance refers to the subject matter at issue, i.e., preserved sardines, and not to the temporal aspect of the international standard or procedural aspect of the adoption of the international standard. We will nevertheless consider the European Communities' argument that Codex Stan 94 is not a relevant international standard on the ground that it did not exist and its completion was not imminent when the European Communities adopted the Regulation.

(i) The European Communities' argument that the requirement to use relevant international standards as a basis does not apply to existing technical regulations

7.72 The European Communities advances the argument that the language of Article 2.4 of the TBT Agreement requiring that relevant international standards be used as a basis for drawing up technical regulations suggests that the obligation does not apply to existing measures. The European Communities argues that the requirement to use a relevant international standard for technical regulations exists prior to the adoption of the measure, not afterwards because international standards cannot be used as a basis when technical regulations have already been adopted. The European Communities argues that the use of the word "imminent" further confirms its interpretation. For these reasons, the European Communities argues that Article 2.4 of the TBT Agreement applies only to preparation and adoption and not to the application of technical regulations.

7.73 As noted earlier, Article 2.4 of the TBT Agreement states:

> Where technical regulations are required and relevant international standards *exist or their completion is imminent,* Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems. (emphasis added)

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[75] *Webster's New World Dictionary*, (William Collins & World Publishing Co., Inc., 1976), p. 1199.
[76] EC's Response to Panel Question 6.

7.74 Article 2.4 of the TBT Agreement starts with the language "where technical regulations are required". We construe this expression to cover technical regulations that are already in existence as it is entirely possible that a technical regulation that is already in existence can continue to be required. Considered in the context of Article 28 of the Vienna Convention, the existing technical regulation is a situation that has not ceased to exist but continues to exist and Article 2.4 that requires the use of relevant international standards for technical regulations would therefore apply to those existing technical regulations. Moreover, we note that the first part of the sentence of Article 2.4 is in the present tense ("exist") and not in the past tense — "[w]here technical regulations are required and relevant international standards *exist or their completion is imminent*", Members are obliged to use such international standards as a basis. This supports the view that Members have to use relevant international standards that currently exist or whose completion is imminent with respect to the technical regulations that are already in existence. We do not consider that the word "imminent", the ordinary meaning of which is "likely to happen without delay",[77] is intended to limit the scope of the coverage of technical regulations to those that have yet to be adopted. Rather, the use of the word "imminent" means that Members cannot disregard a relevant international standard whose completion is imminent with respect to their existing technical regulations. Therefore, a textual reading of Article 2.4 does not support the view that the requirement to use relevant international standards as a basis for technical regulations applies only to technical regulations that are to be prepared and adopted and is not applicable to existing technical regulations.

7.75 There is contextual support for the interpretation that Article 2.4 applies to technical regulations that are already in existence. The context provided by Article 2.5, which explicitly refers to Article 2.4, speaks of "preparing, adopting or *applying*" a technical regulation and is not limited to, as the European Communities claims, to preparing and adopting. A technical regulation can only be applied if it is already in existence. The first sentence imposes an obligation on a Member "preparing, adopting or applying" a technical regulation that may have a significant effect on trade of other Members to provide the justification for that technical regulation. The second sentence of Article 2.5 states that whenever a technical regulation is "prepared, adopted or *applied*" for one of the legitimate objectives explicitly set out in Article 2.2 and is in accordance with relevant international standards, it is to be rebuttably presumed not to create an unnecessary obstacle to trade. The use of the term "apply", in our view, confirms that the requirement contained in Article 2.4 is applicable to existing technical regulations.

7.76 Article 2.6 provides another contextual support. It states that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either "*adopted*, or expect to adopt technical regulations." Those Members that have in place a technical regulation for a certain product are expected to participate in the development of a relevant international standard. Article 2.6 would be redundant and it would be contrary to the principle of effectiveness, which is a corollary of the general rule of interpretation in the Vienna Convention, if a Member is to participate in the development of a relevant international standard and then claim that such standard need not be used as a basis for its technical regulation on the ground that it was already in existence before the standard was adopted. Such reasoning would allow Members to avoid using international standards as a basis for their technical regulations simply by enacting preemptive measures and thereby undermine the object and purpose of developing international standards.

7.77 Based on our examination of the ordinary meaning of the words contained in Article 2.4 of the TBT Agreement and the context provided by Articles 2.5 and 2.6, we are of the view that the requirement contained in Article 2.4 to use relevant international standards as a basis for technical regulations applies to technical regulations that are already in existence. We note, however, that the European Communities argued that while relevant international standards could be used as a basis for a technical regulation when it is amended, this issue was not before the Panel. The European Communities argued that the question at issue is whether Members have an obligation after

[77] *Webster's New World Dictionary*, *supra*, p. 702.

the WTO Agreement entered into force to revise their existing technical regulations to ensure that they have used relevant international standards as a basis. The European Communities argued that there is no obligation to review and amend existing technical regulations whenever an international standard is adopted or amended and that such obligation would turn standardisation bodies virtually into "world legislators". The European Communities noted that the Appellate Body stated with respect to "an obligation to use standards: We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than less burdensome, obligation…".

7.78 In our view, Article 2.4 of the TBT Agreement imposes an ongoing obligation on Members to reassess their existing technical regulations in light of the adoption of new international standards or the revision of existing international standards. We do not, however, share the concern expressed by the European Communities that the obligation to amend a technical regulation when a new international standard is adopted would turn standardization bodies into "world legislators" because the nature of the obligation agreed to by Members is circumscribed by four elements. First, the obligation applies only "where technical regulations are required". If a Member does not enact a technical regulation or determines that the technical regulation is no longer required, it need not consider the international standard. Second, the obligation exists only to the extent that the international standard is relevant for the existing technical regulation. Third, if it is determined that a technical regulation is required and the international standard is relevant, Members are to use that international standard "as a basis", which means that Members are to use a relevant international standard as "the principal constituent … or fundamental principle" [78] and does not mean that Members must conform to or comply with that relevant international standard. The requirement to use the relevant international standard as a basis does not impose a rigid requirement to bring the technical regulation into conformity with the relevant international standard.[79] This provides Members with a certain amount of latitude in complying with the obligation set out in Article 2.4 of the TBT Agreement. In our view, the reference to the term "use as a basis" in Article 2.4 of the TBT Agreement recognizes that there may be various ways in which Members can use the relevant international standard in the formulation of their technical regulations. Finally, Members are not obliged to use the relevant international standard if such international standard is ineffective or inappropriate to fulfil the legitimate objectives pursued by the technical regulation.[80] Thus, a judicious application of the obligations contained in Article 2.4 provides assurances against the over-reaching implied by the European Communities.

7.79 If Members did not have an ongoing obligation to examine their technical regulation in light of relevant international standards that are adopted or revised, the effect would be to create grandfather rights for those existing technical regulations that are at odds with those international standards as only the technical regulations enacted after the adoption or revision of the international standard would be subject to the international standard.[81] If we were to find that Members do not have an ongoing obligation to reassess their technical regulations, it would be possible to preempt obligations under Article 2.4 of the TBT Agreement by adopting technical regulations before relevant international standards are adopted. As we have examined above, the ordinary meaning and context, especially in the context of Article 2.6 of the TBT Agreement, do not support the view that Members do not have an ongoing obligation to reassess their technical regulations in light of new international standards that are adopted.

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[78] *Webster's New World Dictionary*, *supra*, p. 117.

[79] This reading of Article 2.4 of the TBT Agreement is consistent with the Appellate Body's finding in *EC — Hormones* that "based on" does not mean "conform to".

[80] A detailed discussion on the meaning of ineffective and inappropriate is set out in paragraph 7.116.

[81] We note in this regard that the Appellate Body stated that because the "WTO Agreement was accepted definitively by Members … there are no longer 'existing legislation' exceptions (so called 'grandfather rights')". *EC — Hormones*, para. 128.

7.80 There are other provisions that contextually support the view that the obligation under Article 2.4 is not a static obligation and that there is an ongoing obligation to reassess technical regulations in light of international standards that are adopted or revised. Article 2.3 of the TBT Agreement states:

> Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

7.81 The language of Article 2.3 suggests that Members are to eliminate technical regulations that no longer serve their purpose or amend them if the changed circumstances or objectives can be addressed in a less trade-restrictive manner. This requirement also applies to technical regulations that were enacted before the TBT Agreement came into force. Thus, Members would be under an obligation to periodically evaluate their technical regulations and either discontinue them if they no longer serve their objectives or change them if there is a less trade-restrictive manner in which to achieve the underlying objectives of the regulations. Such reading of Article 2.3 is supported by Article 2.8 of the TBT Agreement which states that, wherever appropriate, Members are to "specify technical regulations based on product requirements in terms of *performance* rather than design or descriptive characteristics". Performance, the ordinary meaning of which is "operation or functioning, usually with regard to effectiveness",[82] of products can change and technical regulations governing these products are to reflect these changes. The above interpretation is also consistent with the object and purpose of not creating unnecessary obstacles to international trade and one way to achieve that objective is to discontinue technical regulations that no longer serve their purpose or find a less trade-restrictive manner in which the objective can be fulfilled.

7.82 In support of its argument that Article 2.4 does not create an ongoing obligation to reassess technical regulations when international standards are adopted or amended, the European Communities referred to the Appellate Body's statement that "[w]e cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation…". The full sentence reads: "We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations". Thus, it is clear that the Appellate Body was distinguishing an obligation to conform to or comply with international standard from the language "based on". We have unequivocally stated that the term "use as a basis" does not mean conform to or comply with relevant international standards. It is our view, however, that, based on the reasons set out above, Members intended to impose an ongoing obligation to reassess their technical regulations in light of international standards that are adopted or revised and to use those relevant international standards as a basis for the technical regulations.

7.83 Based on the reasons set out above, we reject the European Communities' argument that Article 2.4 does not apply to existing technical regulations.

(ii) The European Communities' argument that the "predecessor standard" to Codex Stan 94 should have been invoked because Codex Stan 94 is not the relevant international standard as it did not exist and its adoption was not imminent when the EC Regulation was adopted

7.84 The European Communities argues that even if Article 2.4 were to have a retroactive effect, Codex Stan 94 is not a relevant international standard because "it did not exist and its adoption was not 'imminent' when the Regulation was adopted". The European Communities claims that Peru should have invoked the "predecessor standard" in arguing that the EC Regulation is inconsistent with the relevant international standard. The European Communities points out that "it did comply with

[82] *Webster's New World Dictionary, supra*, p. 1056.

the requirements of the Tokyo Round Standards Code when it adopted the Regulation and notified it to the GATT".[83]

7.85 We examined above the European Communities' temporal argument that Article 2.4 of the TBT Agreement does not apply to measures that were enacted prior to 1 January 1995 and found that, under Article 28 of the Vienna Convention, the EC Regulation is a situation that has not ceased to exist but continues to exist and Article 2.4 of the TBT Agreement therefore is applicable to the EC Regulation. Our conclusion becomes more apparent when the EC Regulation is considered from the perspective of the application rather than the adoption of the Regulation.[84]

7.86 Having determined that Article 2.4 is applicable to the EC Regulation, we note that Article 2.4 does not impose any temporal constraint in respect of relevant international standards that are to be used as a basis for technical regulations. Moreover, as we noted in paragraphs 7.78 to 7.82, Members have an ongoing obligation to reassess their technical regulations in light of relevant international standards that are adopted or revised. We do not agree with the European Communities' argument that Peru should have invoked the "predecessor standard", presumably the 1978 version of Codex Stan 94, for the reasons set out in paragraphs 7.56 to 7.60.[85]

7.87 Based on the reasons set out above, we reject the European Communities' argument that Codex Stan 94 is not a relevant international standard because it did not exist and its adoption was not imminent when the EC Regulation was adopted and that Peru should have invoked the predecessor standard.

(iii) The European Communities' argument that Codex Stan 94 is not a relevant international standard because it was not adopted by consensus

7.88 The European Communities argues that because there was no consensus in adopting Codex Stan 94, it is inconsistent with the principle of relevance contained in the Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement (the "Decision") and therefore is not a relevant international standard.

7.89 For the purposes of determining whether standards must be based on consensus, the controlling provision is paragraph 2 of Annex 1 of the TBT Agreement and its explanatory note. The explanatory note for paragraph 2 provides:

> Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

7.90 The first sentence reiterates the norm of the international standardization community that standards are prepared on the basis of consensus. The following sentence, however, acknowledges that consensus may not always be achieved and that international standards that were not adopted by consensus are within the scope of the TBT Agreement.[86] This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard.

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[83] EC's First Submission, para. 115.

[84] The European Communities argued that "[t]he adoption of the Regulation was an 'act' … which took place … before the date of the entry into force of the treaty and, since there is no expression of contrary intention Article 2.4 does not apply to it". EC's First Submission, para. 113.

[85] With respect to the European Communities' argument that it complied with the Tokyo Round Standards Code when it adopted the Regulation, we note that the Tokyo Round Standards Code was terminated pursuant to a decision taken by the Tokyo Round Committee on Technical Barriers to Trade.

[86] The record does not demonstrate that Codex Stan 94 was not adopted by consensus. In any event, we consider that this issue would have no bearing on our determination in light of the explanatory note of

7.91 The Decision to which the European Communities refers is a policy statement of preference and not the controlling provision in interpreting the expression "relevant international standard" as set out in Article 2.4 of the TBT Agreement. The controlling provision must be understood as paragraph 2 of Annex 1 of the TBT Agreement. As we have seen above, the explanatory note of Annex 1.2 states that standards covered by the TBT Agreement include those that were adopted by consensus and those that were not adopted by consensus.

7.92 Therefore, we reject the European Communities' argument that Codex Stan 94 is not a relevant international standard must be rejected.

(iv) The European Communities' argument that Codex Stan 94 is not a relevant international standard on the basis that Peru's interpretation would mean that the Codex Stan 94 is invalid because there was no referral to the Committee even though there was a substantive change

7.93 The European Communities argues that the negotiating history of paragraph 6.1.1 of Codex Stan 94 indicates that the provision provides an option between "X sardines" on the one hand and the common name of the species on the other. The European Communities' claim is based on the fact that the change is described as "editorial" in the minutes of the meeting. The European Communities points out that the text of paragraph 6.1.1 was prepared and discussed in steps 1 to 7 and the text reads:

> 6.1.1 The name of the product shall be:
> (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or
> (ii) "X sardines", where "X" is the name of a country, a geographic area, or the species; or
> (iii) the common name of the species;
> in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

The final version of the text reads:

> The name of the product shall be:
> 6.1.1 (i) "Sardines" to be reserved exclusively for *Sardina pilchardus* (Walbaum); or
> (ii) "X Sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

7.94 The European Communities' argument is that these changes are "editorial" as indicated in the minutes of the meeting and points out that substantive changes cannot be made at step 8 of the adoption process because an amendment at the stage requires the text to be referred back to the relevant committee for comments before its final adoption. Therefore, according to the European Communities, the reformulation of the text at step 8 cannot have produced any substantive change and its interpretation that a Member can choose between "X sardines" and common names is correct and that any change to this interpretation would render Codex Stan 94 invalid and therefore cannot be deemed relevant.

7.95 While the European Communities' explanation on the negotiating history and the process involving the adoption of an international standard is much appreciated, we are not persuaded that the negotiating history supports the European Communities' interpretation that Codex Stan 94 allows Members to choose between "X sardines" on the one hand and the common name of the species in accordance with the law and custom of the country in which the product is sold on the other hand.

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paragraph 2 of Annex 1 of the TBT Agreement which states that the TBT Agreement covers "documents that are not based on consensus".

The text of Codex Stan 94 is clear on its face that it provides Members with four alternatives using the term "sardines" combined with the name of a country, the name of a geographic area, the name of species or the common name.[87] Moreover, the deletion of the third alternative and the adoption of the current text indicate that the latter reflects the true intentions of the drafters. That the change is referred to as "editorial" in the minutes of the meeting suggests that both the earlier version and the final text expressed the same view but the final text did so more succinctly. Thus, paragraph 6.1.1 of Codex Stan 94 provides four alternatives and the use of the common name is not, as argued by the European Communities, "a self standing option independent from the formula 'X sardine'".

7.96 For these reasons, we reject the European Communities' argument that Codex Stan 94 is not a relevant international standard.

(v) The European Communities' argument that Codex Stan 94 is not a relevant international standard because the EC Regulation does not regulate products other than preserved Sardina pilchardus

7.97 The European Communities argues that paragraph 6.1.1(ii) of Codex Stan 94, on which Peru relies to argue that the EC Regulation is inconsistent with Article 2.4, is not the relevant provision because the EC Regulation does not apply to products other than preserved *Sardina pilchardus*. The European Communities argues that the relevant part of the international standard is paragraph 6.1.1(i) of Codex Stan 94 which deals with *Sardina pilchardus*.

7.98 We referred to the Appellate Body finding in *EC — Asbestos* that a document may prescribe a product characteristic in either a positive or a negative form. We determined that Article 2 of the EC Regulation requires positively that only products using *Sardina pilchardus* can be "marketed as preserved sardines and under the trade description referred to in Article 7" and that the negative implication flowing therefrom is that those products using species other than *Sardina pilchardus* cannot be "marketed as preserved sardines and under the trade description referred to in Article 7". We considered that by laying down a product characteristic that only *Sardina pilchardus* can constitute preserved sardines, the EC Regulation regulates species other than *Sardina pilchardus* by laying down product characteristics in a negative form.

7.99 As a standard that lays down product characteristics for *Sardinops sagax* and other species except *Sardina pilchardus*, we consider that paragraph 6.1.1(ii) of Codex Stan 94 is the relevant provision of the international standard in respect of species other than *Sardina pilchardus* and therefore reject the European Communities' argument that paragraph 6.1.1(ii) of Codex Stan 94 is not the relevant provision. Therefore, we confirm our finding in paragraph 7.70 that Codex Stan 94 is a relevant international standard.

4. Whether Codex Stan 94 was used as a basis for the technical regulation

7.100 Peru acknowledges that a measure would be consistent with paragraph 6.1.1(i) if it requires the term "sardines", when used without any qualification, be reserved for *Sardina pilchardus*. However, Peru contends that all other species referred to in Codex Stan 94 may be marketed, pursuant to sub-paragraph (ii), as "X sardines" where "X" is either a country, a geographic area, the species or the common name of the species. Peru argues that *Sardinops sagax* exported by Peru to the European Communities shall be marketed as "Peruvian sardines", "Pacific sardines", just "sardines" combined with the name of the species or the common name in the European Communities' member State in which the sardines are sold, such as "Südamerikanische Sardinen" in Germany. Peru contends that in each of the four alternatives set out in this labelling standard, the term "sardines" is part of the trade description and a total prohibition on the use of the term "sardines" in the labelling of canned sardines is not foreseen. Peru argues that it is therefore inconsistent with sub-paragraph (ii) of

[87] Our examination of paragraph 6.1.1 of Codex Stan 94 is set out in paragraphs 7.103 to 7.109.

paragraph 6.1.1 of Codex Stan 94 if sardines of the species *Sardinops sagax* may not be marketed under the name "sardines" qualified by the name of a country, name of a geographic area of origin, name of the species or the common name.

7.101 The European Communities argues that, under paragraph 6.1.1(ii) of Codex Stan 94, each country has the option of choosing between "X sardines" and the common name of the species. The European Communities argues that "the common name of the species in accordance with the law and customs of the country in which the product is sold" is intended to be a self-standing option independent of the formula "X sardines". The European Communities argues that the fact that the name for products other than *Sardina pilchardus* could not be harmonized and had to defer to each country is reflected in the language "in accordance with the law and custom of the country in which the product is sold". The European Communities argues that the use of the word "sardines" for products other than preserved *Sardina pilchardus* would not be in accordance with the law and custom of the European Communities' member States and would mislead the consumers in the European Communities. The European Communities notes that there is an additional element contained in Codex Stan 94 that is not applicable to *Sardina pilchardus* but applicable to other species, namely that the trade description of the latter group of species must not mislead the consumer in the country in which the product is sold.

7.102 Paragraph 6.1.1 of Codex Stan 94 reads:

> The name of the product shall be:
>
> 6.1.1 (i) "Sardines" to be reserved exclusively for *Sardina pilchardus* (Walbaum); or
>
> (ii) "X Sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

7.103 Textual reading of paragraph 6.1.1(ii) suggests that for species other than *Sardina pilchardus*, the label would read "X Sardines" with the "X" denoting a country, a geographic area, the species or the common name of the species in accordance with the law and custom of the country where the product is sold. We consider that paragraph 6.1.1(ii) of Codex Stan 94 contains four alternatives and each alternative envisages the use of the term "sardines" combined with the name of a country, name of a geographic area, name of the species or the common name of the species in accordance with the law and custom of the country in which the product is sold.

7.104 The European Communities construes paragraph 6.1.1(ii) of Codex Stan 94 as providing a choice between "X sardines" with the "X" representing a country, geographical area or the species on the one hand and the common name of species in accordance with the law and custom of the country in which the product is sold on the other hand. The European Communities' interpretation is based on the fact that the phrase "the common name of the species in accordance with the law and custom of the country in which the product is sold" is situated between commas; there is no comma between "species" and "in accordance with"; and there is a comma before "and in a manner not to mislead the consumer".

7.105 We are not persuaded that the European Communities' reasons support its interpretation. As a matter of English grammar, it is not uncommon to insert a comma before the words "or" when listing more than two items. That is, the expression "A, B, C, or D" means one of the four items. It does not mean that A, B or C constitute one option while D is another option. For the European Communities' interpretation to be persuasive, Codex Stan 94 would at least have to contain an additional "or" so as to read:

> "X Sardines" of a country, a geographical area ***or*** the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

7.106 With respect to the European Communities' second argument that there is no comma between "species" and "in accordance with", the comma is missing because the words "in accordance with the law and custom of the country in which the product is sold" refer to the "common name of the species" and not to the name of a country, a geographical area or the species which need not be subject to the law and custom of the country.[88]

7.107 With respect to the European Communities' third argument, the existence of a comma before "and in a manner not to mislead the consumer" indicates that the requirement of not misleading the consumer attaches to all four alternatives.

7.108 The interpretation that paragraph 6.1.1(ii) of Codex Stan 94 contains four alternatives which provide for the use of the term "sardines" in each alternative is confirmed by the French text of Codex Stan 94. We note that the official languages of the Codex Alimentarius Commission are English, French and Spanish which means that all three versions are authentic. The French version reads:

> "Sardines X", *"X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce en conformité des lois et usages du pays où le produit est vendu*, de manière à ne pas induire le consommateur en erreur. (emphasis added)

7.109 The French version confirms the interpretation that a Member is to choose among the four available alternatives and that it does not offer the option of choosing between "X Sardines" of a country, a geographical area or the species on the one hand and the common name in accordance with the law and custom of the country on the other hand. The Spanish version also confirms the view that the name of the species or common name must be added to the word "sardines" and not replace the word "sardines".

7.110 We note the European Communities' argument that even if Peru's interpretation were valid in that the term "sardines" must be used with a qualification for species other than *Sardina pilchardus*, Article 2.4 of the TBT Agreement would still not require that such name be used because use as a basis does not mean conform to. We are cognizant of the Appellate Body's finding in *EC — Hormones* that the term "based on" does not mean "conform to". Yet, this observation does not resolve the issue at hand. Article 2.4 states that Members "*shall* use" international standards "as a basis" for their technical regulation. The use of the word "shall" denotes a requirement that is obligatory in nature and that goes beyond mere encouragement. The ordinary meaning of the word "use" is "to employ for or apply to a given purpose".[89] The word "basis" means "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".[90] Thus, if the European Communities "used" the existing relevant international standard, that is, if it employed or applied Codex Stan 94 as the principal constituent or fundamental principle for the purpose of enacting its technical regulation governing preserved sardines, the EC Regulation would not be inconsistent with Article 2.4 of the TBT Agreement.

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[88] We note that the Report of the Tenth Session of the Codex Committee on Fish and Fishery Products states: "The attention of the Committee was drawn to the clause that the name of the food should be 'in accordance with the law and custom of the country in which the product is sold'. One delegation held the view that such a requirement was not conducive to harmonization of food legislation. Other delegations stated that for sardines and sardine type products this provision was indispensable. It was agreed to request governments to supply information on the *names commonly used* in labelling of these types of products in their countries". (emphasis added)

[89] *Webster's New World Dictionary*, *supra*, p. 1564.

[90] *Ibid*., p. 117.

7.111 In this regard, the European Communities argued that its Regulation uses Codex Stan 94 as a basis and is therefore consistent with Article 2.4 of the TBT Agreement. Specifically, the European Communities argued that Codex Stan 94 provides that the trade description for species other than *Sardina pilchardus* is to be determined by the country in which the product is sold in accordance with its law and custom. Based on this interpretation of Codex Stan 94, the European Communities argued that because the UK and German laws prescribe that the trade description for *Sardinops sagax* is to be Pacific pilchard and Sardinops or pilchard, respectively, there is no need to allow *Sardinops sagax* to be labelled as sardines on the basis that the use of the term "sardines" would not be in accordance with the law and custom of European Communities' member States. As we have found above, paragraph 6.1.1(ii) of Codex Stan 94 contains four alternatives for labelling species other than *Sardina pilchardus* and all four alternatives require the use of the term "sardines" with a qualification. The European Communities' interpretation that Members need not use the term "sardines" if their laws provide otherwise would render international standards meaningless because Members would be able to justify their non-use of the relevant international standard on the basis that their domestic technical regulations are contrary to the international standard.

7.112 We recall our finding that the EC Regulation constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement as it lays down product characteristics of preserved sardines. We also found that the EC Regulation contains a labelling requirement that permits only products prepared from *Sardina pilchardus* to be labelled as "sardines" and that species such as *Sardinops sagax* cannot be called "sardines" even when it is combined with the name of a country, name of a geographic area, name of the species or the common name in accordance with the law and custom of the country in which the product is sold. The European Communities confirmed that species other than *Sardina pilchardus* cannot use the word "sardines" and that preserved *Sardinops sagax* is referred to as pilchards in the European Communities. In light of our findings above, we find that the relevant international standard, i.e., Codex Stan 94, was not used as a basis for the EC Regulation.

5. Whether Codex Stan 94 would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued

7.113 The European Communities contends that Codex Stan 94, by allowing for the use of the word "sardines" for products other than *Sardina pilchardus*, is ineffective or inappropriate to fulfil the objectives of consumer protection, market transparency and fair competition. The European Communities argues that its consumers expect that products of the same nature and characteristics will always have the same trade description, and that consumers in most member States of the European Communities have always, and in some member States have for at least 13 years, associated "sardines" exclusively with *Sardina pilchardus*. With respect to the objective of promoting fair competition, the European Communities argues that Peru should not be able to take advantage of the reputation associated with the term "sardines", but that Peru should "develop its own reputation with its own name and persuade the consumer to appreciate its product with its own characteristics".

7.114 In paragraph 7.50, we determined that the European Communities, as the party asserting that Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the Regulation, has the burden of proving this assertion. Although the burden of proof rests with the European Communities to prove that Codex Stan 94 is an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, we note that Peru has provided sufficient evidence and legal arguments, as set out below, to demonstrate that Codex Stan 94 is not an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the EC Regulation.

7.115 In assessing the arguments presented by the European Communities, we must first determine what should be understood by the term "ineffective or inappropriate" and what the "legitimate objectives" referred to by this provision are.

7.116 Concerning the terms "ineffective" and "inappropriate", we note that "ineffective" refers to something which is not "having the function of accomplishing", "having a result", or "brought to bear",[91] whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting".[92] Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. An inappropriate means will not necessarily be an ineffective means and vice versa. That is, whereas it may not be *specially suitable* for the fulfilment of the legitimate objective, an inappropriate means may nevertheless be *effective* in fulfilling that objective, despite its "unsuitability". Conversely, when a relevant international standard is found to be an effective means, it does not automatically follow that it is also an appropriate means. The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.

7.117 We note that the terms "ineffective" and "inappropriate" are separated in the text by the disjunctive "or". Thus, it is clear that the party invoking the affirmative defence under Article 2.4 need not establish that a relevant international standard is both ineffective and inappropriate. If it is established by a party that the relevant international standard is either an ineffective or inappropriate means for the fulfilment of the legitimate objective pursued, that party would not have to use the international standard as a basis for its technical regulation.[93]

7.118 The next question we address concerns the phrase "legitimate objectives pursued". We first consider that the "legitimate objectives" referred to in Article 2.4 must be interpreted in the context of Article 2.2, which lists examples of objectives which are considered legitimate under the TBT Agreement. As indicated by the phrase "*inter alia*", this list is illustrative and allows for the possibility that other objectives, which are not explicitly mentioned, may very well be legitimate under the TBT Agreement.

7.119 We also note in this respect that the WTO Members expressed in the preamble to the TBT Agreement their desire that:

> […] technical regulations and standards […] do not create *unnecessary obstacles* to trade […]; (emphasis added)

and recognized that:

> no country should be prevented from taking measures to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, *at the levels it considers appropriate*, subject to the requirement that they are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail or a *disguised restriction on international trade* […]. (emphasis added)

7.120 Article 2.2 and this preambular text affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them. At the same time, these provisions impose some limits on the regulatory autonomy of Members that decide to adopt technical regulations: Members cannot create obstacles to trade which are unnecessary or which, in their application, amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Thus, the TBT Agreement, like the GATT 1994, whose objective it is to further,

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[91] *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), p. 786.
[92] *Ibid*., p. 103.
[93] In this case, we observe that the European Communities has used the terms "ineffective" and "inappropriate" interchangeably throughout its oral and written statements.

accords a degree of deference with respect to the domestic policy objectives which Members wish to pursue. At the same time, however, the TBT Agreement, like the GATT 1994, shows less deference to the means which Members choose to employ to achieve their domestic policy goals. We consider that it is incumbent upon the respondent to advance the objectives of its technical regulation which it considers legitimate.

7.121 Article 2.4 refers to "the legitimate objective pursued". The ordinary meaning of "to pursue" is "to try to obtain or accomplish" and "to aim at".[94] Thus, a "legitimate objective pursued" is a legitimate objective which a Member aims at or tries to accomplish. Only the Member pursuing the legitimate objective is in a position to elaborate the objective it is trying to accomplish. Panels are, however, required to determine the legitimacy of those objectives. We note in this regard that the panel in *Canada — Pharmaceuticals Patents*, in defining the term "legitimate interests", stated that it must be defined "as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms".[95]

7.122 Thus, we are obliged to examine whether the objectives outlined by the European Communities are legitimate in the context of Article 2.4 of the TBT Agreement. We note, however, that in this case Peru acknowledged that the objectives identified by the European Communities are legitimate and we see no reason to disagree with the parties' assessment in this respect. Accordingly, we will proceed with our examination based on the premise that the objectives identified by the European Communities are legitimate.

7.123 We now turn to the arguments presented by the European Communities in support of its position that Codex Stan 94 is ineffective or inappropriate for the fulfilment of the three legitimate objectives pursued by its Regulation. We recall that the three legitimate objectives pursued by the EC Regulation are market transparency, consumer protection and fair competition and these objectives, as argued by the European Communities, are interdependent and interact with each other. In this regard, we are mindful of the European Communities' argument that providing accurate and precise names allows products to be compared with their true equivalents rather than with substitutes and imitations whereas inaccurate and imprecise names reduce transparency, cause confusion, mislead the consumer, i.e., make consumers believe that they are buying something they are not, allow products to benefit from the reputation of other different products, give rise to unfair competition and reduce the quality and variety of products available in trade and ultimately for the consumer. In light of the fact that the three objectives are closely interrelated, if we were to find that Codex Stan 94 allows for precise labelling of products so as to improve market transparency, such finding would have a bearing upon whether Codex Stan 94 is effective or appropriate in protecting consumers and promoting fair competition, that is, not misleading consumers and confusing them into believing that they are buying something that they are not. We also note that the European Communities' stated objectives are based on the factual premise that the consumers in the European Communities associate "sardines" exclusively with *Sardina pilchardus*. Thus, the persuasiveness of European Communities' argument will be affected by the extent to which this factual premise is supported by the evidence and established to be valid.

7.124 Under Codex Stan 94, if a hermetically sealed container contains fish of species *Sardina pilchardus*, the product would be labelled "sardines" without any qualification. A product containing preserved *Sardinops sagax*, however, would be labelled "X sardines" with the "X"

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[94] *The New Shorter Oxford English Dictionary, supra*, p. 2422.

[95] Panel Report, *Canada — Patent Protection of Pharmaceutical* Products ("*Canada — Pharmaceuticals*"), WT/DS114/R, adopted 7 April 2000, para. 7.69. Similarly, the panel in *US — Section 110(5) Copyright Act* stated that the term has to be considered from a "normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights". Panel Report, *United States — Section 110(5) of the US Copyright Act* ("*US — Section 110(5) Copyright Act*"), WT/DS160/R, adopted 27 July 2000, para. 6.224.

representing the name of a country, the name of a geographic area, the name of the species or the common name in accordance with the law and custom of the country in which the product is sold. If a hermetically sealed container is labelled simply as "sardines" without any qualification, the European consumer would know that it contains European sardines. However, if the product is labelled, for example, "Pacific sardines", the European consumer would be informed that the product does not contain sardines originating from Europe. We note that preserved sardines from Morocco, which contains *Sardina pilchardus*, sold in the European Communities is labelled "Sardines Marocaines". Although the product could simply be called "sardines" because it contains *Sardina pilchardus*, the label containing the name of a country provides a precise trade description by informing the European consumers of the provenance of the preserved *Sardina pilchardus*.

7.125 The European Communities, however, argued that "X sardines" is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation because European consumers associate the term "sardines" exclusively with *Sardina pilchardus* and even if "sardines" is combined with a qualification, it would suggest to European consumers that the products are the same but come from different countries or geographic areas. As noted above, the argument advanced by the European Communities in support of its claim that Codex Stan 94 is ineffective or inappropriate is based on the underlying factual assumption that consumers in most member States of the European Communities have always associated the common name "sardines" exclusively with *Sardina pilchardus* and that the use of "sardines" in conjunction with "Pacific", "Peruvian" or "*Sardinops sagax*" would therefore not enable the European consumer to distinguish products made from *Sardinops sagax* as opposed to *Sardina pilchardus.* The European Communities summarizes its argument as follows:

> In most parts of the European Communities, especially in the production countries, the term "sardine" has historically made reference only to the *Sardina pilchardus*.[96] However, other species like sprats (*Sprattus sprattus*) were sold in tiny quantities on the European Communities market with the denomination "brisling sardines". In view of the confusion that this created in the market place, the European Communities has constantly tried to clarify the situation, both externally (note of 16/04/73 to Norway[97]) and internally (Regulation 2136/89).
>
> *This situation has now created uniform consumer expectations throughout the European Communities*, the term "sardine" referring only to a preserve made from *Sardina pilchardus*.[98]

7.126 Thus, the European Communities asserted, on the one hand, that in most member States the term "sardines" has historically responded to the particular consumer expectations which in its view underlie its Regulation, and acknowledged, on the other hand, that in some member States, it is the Regulation which "created" those "uniform" consumer expectations. The European Communities therefore made a factual distinction between two situations, and we will address these two situations separately.

7.127 The European Communities acknowledged that it is the Regulation which in certain member States "created" the consumer expectations which it now considers require the maintenance of that same Regulation. Thus, through regulatory intervention, the European Communities consciously would have "created" consumer expectations which now are claimed to affect the competitive conditions of imports. If we were to accept that a WTO Member can "create" consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations, we would be endorsing the permissibility of "self-justifying" regulatory trade barriers.

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[96] (footnote original) See Spanish legislation (Exhibit EC-21) and French legislation (Exhibit EC-22).
[97] (footnote original) See Exhibit EC-23.
[98] EC's First Submission, paras. 64-65. Emphasis added.

Indeed, the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of the governmentally created consumer expectations. Mindful of this concern, we will proceed to examine whether the evidence and legal arguments before us demonstrate that consumers in most member States of the European Communities have always associated the common name "sardines" exclusively with *Sardina pilchardus* and that the use of "sardines" in conjunction with "Pacific", "Peruvian" or "*Sardinops sagax*" would therefore not enable European consumers to distinguish between products made from *Sardinops sagax* and *Sardina pilchardus*.

7.128 As indicated above, the European Communities asserted that in most member States the consumer expectations allegedly underlying the EC Regulation existed before the EC Regulation introduced an EC-wide regime. To that effect, the European Communities submitted copies of pre-1989 Spanish and French regulations prescribing the common name "sardines" for products made from *Sardina pilchardus*. The European Communities also submitted copies of the 1981 and 1996 United Kingdom Food Labelling Regulations and a copy of the 2000 German *Lebensmittelbuch*, which the European Communities has described as constituting "only a guideline". These documents prescribe the common name "sardines" for *Sardina pilchardus*, and "Pacific pilchard" or "pilchard" for *Sardinops sagax*. Thus, the European Communities argued that for those four European Communities' member States, domestic regulations reserving the common name "sardines" for *Sardina pilchardus* is to be considered probative of consumer perceptions at that time and thereafter. In other words, governments in those countries would have "codified" consumer expectations in their domestic regulations. Although it may be debatable as to whether this will always be so,[99] we will proceed on the assumption that domestic legislation pre-dating[100] the EC Regulation may indeed have such probative value regarding consumer expectations.

7.129 Concerning the pre-1989 versions of Spanish, French and United Kingdom regulations, we consider that these do indeed demonstrate that the legislative or regulatory authorities in those countries considered that the common name "sardines" without any qualification was to be reserved for products made from *Sardina pilchardus*, even before the EC Regulation entered into force.[101] We note, however, that these documents, which concern three European Communities' member States, are not probative of the assertion that the use of a qualifying term, such as "Pacific", "Peruvian" or "*Sardinops sagax*", in combination with "sardines" would not enable European consumers to distinguish products made from *Sardinops sagax* as opposed to *Sardina pilchardus*.

7.130 We also note that in the United Kingdom, which imports 97% of all Peruvian exports of preserved *Sardinops sagax* to the European Communities, the 1981 Food Labelling Regulations also allowed for the use of the common name "pilchards" for *Sardina pilchardus* and prescribed the

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[99] See paragraph 7.127 wherein we express our concern that "Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory invention on the basis of the governmentally created consumer expectation".

[100] With respect to the post-1989 regulations in the United Kingdom and Germany, we fail to see how these documents could be relevant for our assessment, considering the European Communities' confirmation that its Regulation, which predates both documents, "is the law directly applicable" in all European Communities' member States (EC's Response to Panel Question 42(b)). Thus, if European Communities' member States are to comply with the EC Regulation, it would have been surprising to find member State regulations or guidelines post-1989 which extend the right to use the trade description "sardines" also to products made from *Sardinops sagax*, as this would be clearly inconsistent with Article 2 of the EC Regulation. These documents therefore do not demonstrate that consumers in most member States of the European Communities have always, and in some member States have for at least 13 years, associated the trade description "sardines" exclusively with *Sardina pilchardus*. They are simply consistent with the EC Regulation, as they can expected to be.

[101] We note, however, that the European Communities have not provided any evidence regarding this assertion for the twelve other European Communities' member States.

common name "Pacific pilchards" for *Sardinops sagax.* Thus, United Kingdom consumers did not associate *Sardina pilchardus* exclusively with the common name "sardines", and were able to distinguish *Sardinops sagax* from *Sardina pilchardus* by the simple indication of a geographical region (i.e., "Pacific"). If the insertion of the geographic area "Pacific" with the word "pilchard" was used in the United Kingdom to distinguish between *Sardina pilchardus* and *Sardinops sagax*, we fail to see why the inclusion of the name of a country, name of a geographic area, name of the species or the common name with the term "sardines" to refer to *Sardina sagax* would be ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation.

7.131 Contrary to the European Communities' assertion, Peru submitted evidence to demonstrate that European consumers do not associate "sardines" exclusively with *Sardina pilchardus*. It did so by demonstrating that the term "sardines" either by itself or combined with the name of a country or the geographic area, is a common name for *Sardinops sagax* in the European Communities. In support of its assertion that "sardines" by itself or combined with the name of a country or geographic region is a common name for *Sardinops sagax* in the European Communities, Peru referred to the *Multilingual Illustrated Dictionary of Aquatic Animals and Plants*, published in close cooperation with the European Commission and the member States of the European Communities for the purpose of, *inter alia*, *improving market transparency*, which lists the common name of *Sardinops sagax* in nine European languages as "sardines" or the equivalent thereof in the national language combined with the country or geographic area of origin. Similarly, Peru submitted copies of the electronic publication, *Fish Base*, produced with the support of the European Commission, which indicates that a common name for *Sardinops sagax* in Italy, the Netherlands, Germany, France, Sweden and Spain is "sardines" or its equivalent in the national language combined with the country or geographical area of origin. In addition, Peru relied on the *Multilingual Dictionary of Fish and Fish Products* prepared by the Organisation for Economic Cooperation and Development ("OECD") which indicates that a common name of *Sardinops sagax* is "sardines", either by itself or combined with the name of a country or geographic area. According to this *Multilingual Dictionary of Fish and Fish Products*, one of the common names in English is "Pacific Sardine", or "Sardine du Pacifique" in French. Even the European Communities acknowledged that one of the common names for *Sardinops sagax* is "sardines" or its equivalent thereof in the national language combined with the country or geographical area of origin.[102]

7.132 According to the Consumers' Association, "a wide array of sardines were made available to European consumers for many decades prior to the imposition of this restrictive Regulation".[103] Canada submitted evidence showing that a Canadian company exported *Clupea harengus harengus* under the trade description "Canadian sardines" to the Netherlands for thirty years, until 1989. Canada also submitted evidence showing that there have been exports of *Clupea harengus harengus* under the trade description "[company name] sardines in hot tabasco" to the United Kingdom for forty years, until 1989. We note in this regard that with respect to the objective of promoting fair competition, the aim of which is to prevent producers of one product from benefitting from the reputation associated with another product,[104] the underlying premise is that the term "sardines" is associated only with *Sardina pilchardus*. However, as species other than *Sardina pilchardus* also contributed to the reputation of the term "sardines" and in light of the fact that "sardines", either by itself or combined with the name of a country or a geographic area, is a common name for *Sardinops sagax* in the European Communities, we do not consider that only *Sardina pilchardus* developed the reputation associated with the term "sardines".

7.133 Even if we were to assume that the consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*, the concern expressed by the

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[102] EC's First Submission, paras. 25 and 27-28. The European Communities lists one of the common names for *Sardinops sagax* as "sardina" in Spain and "Pacific sardine" in the United Kingdom.

[103] Exhibit Peru-16, p. 8.

[104] EC's First Submission, paras. 63, 140 and 141.

European Communities, in our view, was taken into account when Codex Stan 94 was adopted. By establishing a precise labelling requirement "in a manner not to mislead the consumer", the Codex Alimentarius Commission considered the issue of consumer protection in countries producing preserved sardines from *Sardina pilchardus* and those producing preserved sardines from species other than *Sardina pilchardus* by reserving the term "sardines" without any qualification for *Sardina pilchardus* only. The other species enumerated in Codex Stan 94 are to be labelled as "X sardines" with the "X" denoting the name of a country, name of a geographic area, name of the species or the common name in accordance with the law and custom of the country in which the product is sold. Thus, Codex Stan 94 allows Members to provide precise trade description of preserved sardines which promotes market transparency so as to protect consumers and promote fair competition.[105]

7.134 Negotiating history confirms that Codex Stan 94 takes into account the European Communities' concern that consumers might be misled if a distinction were not made between *Sardina pilchardus* and other species. The Report of Codex Committee on Fish and Fishery Products on the Seventh Session states:

> The traditional canners of this fish [*Sardina pilchardus*] were adamant that no other species should be allowed to use "sardines" without some form of qualification. Nor were they disposed to agree to qualifications which in their view could lead to confusion as to the species … For [countries producing fish of other species] any distinction was discriminatory and would result in their consumers being misled …. *The Committee agreed upon the need to protect the consumer*.[106] (emphasis added)

7.135 At the Twelfth Session of the Codex Alimentarius Commission where the Commission adopted the draft standard for canned sardines and sardine-type products, a proposal was made to include *Engraulis mordax* and *Sardinella longiceps.* In response to this proposal, it is recorded that:

> France stated that, in its opinion, the list of species (2.1.2) covered too broad range of fish which could place the consumer at a disadvantage with regard to making a sound choice between different products. It was pointed out that the present standard was a group standard and that the labelling section contained adequate provisions to safeguard the consumer.[107]

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[105] We note that Article 7(c) of the EC Regulation permits, "by way of derogation from Article 2, second indent", a can of sardines to be labelled as "sardine mousse", "sardine paste" or "sardine pâté", even if the can is comprised of only 25% *Sardina pilchardus* and 75% other fish, including those of *Sardinops sagax*. In its response to the Panel's question on the matter, the European Communities confirmed that a can containing at least 25% of homogenised *Sardina pilchardus* flesh and the remainder containing "the flesh of other fish which have undergone the same treatment" can be marketed as "sardine mousse", "sardine paste", or "sardine pâté" if the content of the flesh of any other fish is less than 25%. Thus, as long as the 25% of *Sardina pilchardus* is the predominant weight, the product can be marketed as "sardine mousse", "sardine paste", or "sardine pâté". For example, if a mousse is made of 60% fish and 40 % other ingredients, the fish component could, according to Article 7, be comprised of 25% *Sardina pilchardus* and 15% each of five different fish and it would still be a "sardine mousse". On the other hand, a mousse of which the fish component represents 49.9% *Sardina pilchardus* and 50.1% *Sardinops sagax*, however, would not. The European Communities argues that consumers will nevertheless be protected by the indication of the ingredients on the can. However, if the indication of ingredients on the can is sufficient to inform consumers that their "sardine" product in reality contains 25% *Sardina pilchardus* and 75% other fish, we fail to see why Codex Stan 94 which informs consumers that no *Sardina pilchardus* is contained by labelling the product "X sardines" is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation.

[106] Exhibit Canada-3, Report of the Codex Committee on Fish and Fishery Products, Seventh Session, 2-7 October 1972, ALINORM 74/18, paras. 57 and 59.

[107] Exhibit Canada-3, Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission, p. 52.

7.136 Moreover, a 1969 Synopsis of Governments Replies on the Questionnaire on "Canned Sardines", prepared by the Codex Committee on Fish and Fishery Products, demonstrates that the governments of several current European Communities' member States, such as Denmark, Sweden and the United Kingdom, responded affirmatively to the question "[i]s it accepted that existing practices whereby sardine-type products are often labelled as sardines but with an appropriate qualifying phrase should be fully taken into account and provided for so long as the consumer is not deceived?". These governments considered "that this way of designating the sardine-type products as sardines has been in use for about one century in many countries". France was recorded as stating that "only the species recognized as sufficiently near to *Sardina pilchardus* might be designated as 'sardine' followed or preceded by a qualifying term", adding that "a geographic qualifying term could be acceptable on the condition that the consumer is not deceived (i.e., Atlantic sardine can mean either *Sardina pilchardus*, or another species caught in the Atlantic Ocean)". Of all current European Communities' members States, only the Federal Republic of Germany, Portugal and Spain stated that their domestic legislation did "not accept any designation of 'sardines' even with a qualifying term for species other than *Sardina pilchardus* (Walbaum)".

7.137 In light of our considerations above and based on our review of the available evidence and legal arguments, we find that it has not been established that consumers in most member States of the European Communities have always associated the common name "sardines" exclusively with *Sardina pilchardus* and that the use of "X sardines" would therefore not enable the European consumer to distinguish preserved *Sardina pilchardus* from preserved *Sardinops sagax*.[108, 109] We also find that Codex Stan 94 allows Members to provide precise trade description for preserved sardines and thereby promote market transparency so as to protect consumers and promote fair competition.

7.138 We therefore conclude that it has not been demonstrated that Codex Stan 94 would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued by the EC Regulation, i.e., consumer protection, market transparency and fair competition. We conclude that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation.

6. Overall conclusion with respect to Article 2.4 of the TBT Agreement

7.139 In light of our findings that Codex Stan 94 is a relevant international standard, that it was not used as a basis for the EC Regulation and that it is not ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation, we find that the EC Regulation is inconsistent with Article 2.4 of the TBT Agreement.

H. CONSIDERATION OF THE EUROPEAN COMMUNITIES' ARGUMENT THAT PERU BROADENED ITS CLAIMS

7.140 The European Communities argues that Peru's reformulated request for findings broadens the claims made by Peru in its first written submission and is therefore inadmissible. The European Communities argues that Peru is claiming in its second written submission that the

[108] In light of our finding that the consumers in the European Communities do not necessarily associate sardines exclusively with *Sardina pilchardus*, it is worth noting that the regulation governing tuna and bonito indicates that Atlantic and Pacific bonito, Atlantic little tuna, Eastern little tuna, black skipjack and other species of the genus *Euthynnuis* can be labelled "bonito" without any qualification. If a requirement that is less precise, especially in respect of the geographic origin, than that set out in Codex Stan 94 can "ensure market transparency" and "ensure clarity in the trade description of the products concerned", Codex Stan 94 that allows a more precise trade description to be used is arguably effective and appropriate to fulfil the objective of promoting market transparency, protecting consumers and promoting fair competition.

[109] With respect to parties' argument about whether the term "sardines" is generic, we do not consider it necessary to make a determination on this particular issue.

European Communities and its member States cannot use a common name of the species *Sardinops sagax* according to the relevant law and custom to designate the preserved product unless it is accompanied by the word "sardines".

7.141 The European Communities argues that Peru's formulation of its request for findings seeks to obtain a declaratory judgment that would require the European Communities to take certain specific action rather than simply remove any inconsistency and, in the European Communities' view, this request goes beyond the panel's mandate and is inadmissible. The European Communities argues that Peru's reformulation of its claim is a consequence of the fact that Peru failed to properly research the common names of *Sardinops sagax* in the European Communities prior to commencing this dispute.

7.142 Concerning the European Communities' argument that Peru broadened its claim, it is necessary to examine the terms of reference which are set out in document WT/DS231/16:

> To examine, in the light of the relevant provisions of the covered agreements cited by Peru in document WT/DS231/6, the matter referred to the DSB by Peru in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

7.143 Regarding the term "matter", the Appellate Body in *Guatemala — Cement I* stated that the matter consists of the specific measure and the claims relating to it, both of which must be identified in the request for the establishment of a panel.[110] In its Request for the Establishment of a Panel, Peru invoked the EC Regulation as the specific measure at issue and claimed that the EC Regulation is inconsistent with Articles 2 and 12 of the TBT Agreement and Articles I, III and XI:1 of the GATT 1994. In the so-called reformulated request for findings, Peru asked the Panel to find that the EC Regulation prohibiting the use of the term "sardines" combined with the name of a country of origin, name of a geographic area, name of the species or the common name of *Sardinops sagax* used in the language of the member State of the European Communities in which the product is sold is inconsistent with Article 2.4 of the TBT Agreement. Peru specifically referred to the EC Regulation and Article 2.4 of the TBT Agreement, both of which are set out in Peru's Request for the Establishment of a Panel. Therefore, we do not consider that Peru, even if it broadened the scope of its request beyond what it originally requested in its first written submission, made any claims that exceeded the terms of reference.[111]

7.144 We are well aware that panels can consider only those *claims* that it has the authority to consider under the terms of reference which sets out our mandate. In this regard, a distinction must be made between claims and arguments.[112] We note that the Appellate Body stated:

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[110] Appellate Body Report, *Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico ('Guatemala — Cement I')*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, para. 72.

[111] In any event, we note that the findings requested by Peru as set out in the first and second written submissions are not substantively different. Peru's second written submission refers to the prohibition to market the products prepared from *Sardinops sagax* under the name "sardines" combined with an indication of the name of the country of origin, the geographic area, the species and the common name whereas the first written submission, while similar in all respect, refers to "the prohibition … to market the products … under the common name of the species *Sardinops sagax* customarily used in the language of the member State of the European Communities in which the product is sold (such as 'Peruvian sardine' in English, or 'Südamerikanische Sardine' in German)". Although the latter does not contain the explicit reference to the term "sardines" combined with the common name, we note that examples cited by Peru uses the term "sardines" with the putative common name. Moreover, Peru argued throughout the proceedings that the term "sardines" has to be used in combination with the four alternatives set out in Codex Stan 94.

[112] The Appellate Body in *Korea — Dairy*, para. 139, stated that "[b]y 'claim' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a

> there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and *progressively* clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[113] (emphasis added)

7.145 The request for findings submitted by Peru in its first and second written submissions, in our view, is a summation of its arguments and do not constitute claims. And, as arguments, we are not bound by them.

7.146 For the reasons set out above, we reject the European Communities' argument that Peru's reformulated request broadens the claim and that Peru's request goes beyond the Panel's mandate.

I. JUDICIAL ECONOMY

7.147 In this dispute, Peru requested us to first examine the consistency of the EC Regulation with Article 2.4 of the TBT Agreement. Peru requested that we consider the consistency of the EC Regulation with Article 2.2 of the TBT Agreement only if we were to find that the EC Regulation is consistent with Article 2.4 of the TBT Agreement and then examine its claim under Article 2.1 of the TBT Agreement only if we were to find the EC Regulation is consistent with Article 2.2 of the TBT Agreement. In the event that we were to find the EC Regulation consistent with the TBT Agreement, Peru requested that we examine whether the EC Regulation is consistent with Article III:4 of the GATT 1994. The European Communities did not contest Peru's requests.

7.148 We note that our obligation as a panel is set out in Article 11 of the DSU which provides:

> a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and the make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

7.149 We are mindful that "[n]othing in [Article 11 of the DSU] or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party"[114] but note that the principle of judicial economy has to be applied bearing in mind the aim of the dispute settlement mechanism which is to "secure a positive solution to a dispute".

7.150 Panels in a number of disputes have applied the principle of judicial economy. We are mindful that in some instances, the Appellate Body found that principle was applied incorrectly; in others, the Appellate Body affirmed the panel's decision. As initially developed in *US — Wool Shirts and Blouses*, the Appellate Body stated that "a panel need only address those claims which must be addressed in order to resolve the matter at issue".[115] This was further qualified in *Australia — Salmon* where the Appellate Body stated that:

> the principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. The aim is to resolve the matter at issue and to secure a positive solution to the dispute. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which

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particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision" (emphasis original).

[113] Appellate Body Report, *EC — Bananas III*, para. 141.

[114] Appellate Body Report, *US — Wool Shirts and Blouses*, p. 339. Emphasis original.

[115] Appellate Body Report, *US — Wool Shirts and Blouses*, p. 340.

> a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members". [116]

7.151 Therefore, in keeping with the principle of judicial economy, we conclude that it is not necessary for us to consider other claims and arguments raised by the parties in this dispute. We made an objective assessment of whether the EC Regulation is consistent with Article 2.4 of the TBT Agreement and found that the EC Regulation is not consistent with Article 2.4 of the TBT Agreement. This finding, in our view, produces a positive solution to the current dispute and also enables the DSB to make sufficiently precise recommendations and rulings without any further findings under Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994. Although panels are not bound by the complaining party's request which is not contested by the responding party, we are aided in our view by the complaining party's specific request that we examine the consistency of the EC Regulation with other legal provisions invoked by Peru only if we were to find the EC Regulation is consistent with Article 2.4 of the TBT Agreement.

7.152 Accordingly, we exercise judicial economy with respect to Peru's claim under Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the findings above, we conclude that the EC Regulation is inconsistent with Article 2.4 of the TBT Agreement.

8.2 Pursuant to Article 3.8 of the DSU which provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification and impairment", we conclude that the EC Regulation nullified and impaired the benefits of Peru under the WTO Agreement, in particular under the TBT Agreement.

8.3 Peru requested that we suggest in accordance with Article 19.1 of the DSU that "the European Communities permit Peru without any further delay to market its sardines in accordance with a naming standard consistent with the TBT Agreement." We note that Article 19.1 states that the panel may suggest a way to implement the recommendations of the panel and that the panel is not required to make such suggestion. As the authority under Article 19.1 is one of discretion, we decline to make a suggestion. We recommend that the DSB request the European Communities to bring its measure into conformity with its obligations under the TBT Agreement.

[116] Appellate Body Report, *Australia — Salmon*, para. 223.

IX. ANNEXES

A. ANNEX 1: COUNCIL REGULATION (EEC) 2136/89 OF 21 JUNE 1989 LAYING DOWN COMMON MARKETING STANDARDS FOR PRESERVED SARDINES

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3796/81 of 29 December 1981 on the common organization of the market in fishery products[117], as last amended by Regulation (EEC) No 1495/89[118], and in particular Article 2(3) thereof,

Having regard to the proposal from the Commission,

Whereas Regulation (EEC) No 3796/81 provides for the possibility of adopting common marketing standards for fishery products in the Community, particularly in order to keep products of unsatisfactory quality off the market and to facilitate trade relations based on fair competition;

Whereas the adoption of such standards for preserved sardines is likely to improve the profitability of sardine production in the Community, and the market outlets therefor, and to facilitate disposal of the products;

Whereas it must be specified in this context, particularly in order to ensure market transparency, that the products concerned must be prepared exclusively with fish of the species '*Sardina pilchardus* Walbaum" and must contain a minimum quantity of fish;

Whereas, in order to ensure good market presentation, the criteria for the preparation of the fish prior to packaging, the presentations in which it may be marketed and the covering media and additional ingredients which may be used should be laid down; whereas these criteria must not, however, be such as to preclude the introduction of new products on to the market;

Whereas, to prevent the marketing of unsatisfactory products, certain criteria which preserved sardines must satisfy in order to be marketed in the Community for human consumption should be defined;

Whereas Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States related to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer[119] as last amended by Directive 86/197/EEC[120] and Council Directive 76/211/EEC of 20 January 1976 on the approximation of the laws of the Member States relating to making-up by weight or by volume of certain pre-packaged products[121] as last amended by Directive 78/891/EEC[122], specify the particulars required for correct information and protection of the consumer as regards the contents of packages; whereas, for preserved sardines, the trade description should be determined according to the culinary preparation proposed, having particular regard to the ratio between the various ingredients in the finished product; whereas, where the covering medium is oil, the way in which the oil must be described should be specified;

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[117] OJ No L 379, 31.12.1981, p. 1.
[118] OJ No L 148, 1.6.1989, p. 1.
[119] OJ No L 33, 8.2.1979, p. 1.
[120] OJ No L 144, 29.5.1986, p. 38.
[121] OJ No. L 46, 21.2.1976, p. 1.
[122] OJ No L 311, 4.11.1978, p. 21.

Whereas the Commission should have responsibility for the adoption of any technical implementing measures,

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation defines the standards governing the marketing of preserved sardines in the Community.

Article 2

Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:

– they must be covered by CN codes 1604 13 10 and ex 1604 20 50;

– they must be prepared exclusively from fish of the species "*Sardina pilchardus* Walbaum";

– they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;

– they must be sterilized by appropriate treatment.

Article 3

The sardines must, to the extent required for good market presentation, be appropriately trimmed of the head, gills, caudal fin and internal organs other than the ova, milt and kidneys, and, according to the market presentation concerned, backbone and skin.

Article 4

Preserved sardines may be marketed in any of the following presentations:

1. sardines: the basic product, fish from which the head, gills, internal organs and caudal fin have been appropriately removed. The head must be removed by making a cut perpendicular to the backbone, close to the gills;

2. sardines without bones: as the basic product referred to in point 1, but with the additional removal of backbone;

3. sardines without skin or bones: as the basic product referred to in point 1, but with the additional removal of the backbone and skin;

4. sardine fillets: portions of flesh obtained by cuts parallel to the backbone, along the entire length of the fish, or a part thereof, after removal of the backbone, fins and edge of the stomach lining. Fillets may be presented with or without skin;

5. sardine trunks: sardine portions adjacent to the head, measuring at least 3 cm in length, obtained from the basic product referred to in point 1 by making transverse cuts across the backbone;

6. any other form of presentation, on condition that it is clearly distinguished from the presentations defined in points 1 to 5.

Article 5

For the purposes of the trade description laid down in Article 7, a distinction shall be drawn between the following covering media, with or without the addition of other ingredients:

1. olive oil;

2. other refined vegetable oils, including olive-residue oil used singly or in mixtures;

3. tomato sauce;

4. natural juice (liquid exuding from the fish during cooking), saline solution or water;

5. marinade, with or without wine;

6. any other covering medium, on condition that it is clearly distinguished from the other covering media defined in points 1 to 5.

These covering media may be mixed, but olive oil may not be mixed with other oils.

Article 6

1. After sterilization, the products in the container must satisfy the following minimum criteria:

   (a) for the presentations defined in points 1 to 5 of Article 4, the sardines or parts of sardine must:

   – be reasonably uniform in size and arranged in an orderly manner in the container,

   – be readily separable from each other,

   – present no significant breaks in the abdominal wall,

   – present no breaks or tears in the flesh,

   – present no yellowing of tissues, with the exception of slight traces,

   – comprise flesh of normal consistency. The flesh must not be excessively fibrous, soft or spongy,

   – comprise flesh of a light or pinkish colour, with no reddening round the backbone, with the exception of slight traces;

   (b) the covering medium must have the colour and consistency characteristic of its description and the ingredients used. In the case of an oil medium, the oil may not contain aqueous exudate in excess of 8 % of net weight;

   (c) the product must retain the odour and flavour characteristics of the species "*Sardina pilchardus* Walbaum" and the type of covering medium, and must be free of any disagreeable odour or taste, in particular bitterness, or taste of oxidation or rancidity;

(d) the product must be free of any foreign bodies;

(e) in the case of products with bones, the backbone must be readily separable from the flesh and friable;

(f) products without skin and without bones must present no significant residues thereof.

2. The container may not present external oxidation or deformation affecting good commercial presentation.

Article 7

Without prejudice to Directives 79/112/EEC and 76/211/EEC, the trade description on the pre-packaging of preserved sardines must correspond to the ratio between the weight of sardines in the container after sterilization and the net weight, both expressed in grams.

(a) For the presentations defined in points 1 to 5 of Article 4, the ratio shall be not less than the following values:

– 70 % for the covering media listed in points 1, 2, 4 and 5 of Article 5,
– 65 % for the covering medium described in point 3 of Article 5;
– 50 % for the covering media referred to in point 6 of Article 5.

Where these values are complied with, the trade description must correspond to the presentation of the sardine on the basis of the corresponding designation referred to in Article 4. The designation of the covering medium must form an integral part of the trade description.

In the case of products in oil, the covering medium must be designated by one of the following expressions:

– "in olive oil", where that oil is used,
or
– "in vegetable oil", where other refined vegetable oils, including olive-residue oil, or mixtures thereof are used,
or
– "in . . . oil", indicating the specific nature of the oil.

(b) For the presentations referred to in point 6 of Article 4, the ratio referred to in the first subparagraph must be at least 35 %.

(c) In the case of culinary preparations other than those defined in (a), the trade description must indicate the specific nature of the culinary preparation.

By way of derogation from Article 2, second indent at point (b) of this Article, preparations using homogenized sardine flesh, involving the disappearance of its muscular structure, may contain the flesh of other fish which have undergone the same treatment provided that the proportion of sardines is at least 25 %.

(d) The trade description, as defined in this Article, shall be reserved for the products referred to in Article 2.

Article 8

Where necessary, the Commission shall adopt, in accordance with the procedure laid down in Article 33 of Regulation (EEC) No 3796/81, the measures necessary to apply this Regulation, in particular the sampling plan for assessing conformity of manufacturing batches with the requirements of this Regulation.

Article 9

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

It shall apply as from 1 January 1990.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 21 June 1989.

For the Council
The President
C. ROMERO HERRERA

B. ANNEX 2: THE CODEX ALIMENTARIUS COMMISSION STANDARD FOR CANNED SARDINES AND SARDINE-TYPE PRODUCTS (CODEX STAN 94 –1981 REV.1 – 1995)

1. SCOPE

This standard applies to canned sardines and sardine-type products packed in water or oil or other suitable packing medium. It does not apply to speciality products where fish content constitute less than 50% m/m of the net contents of the can.

2. DESCRIPTION

2.1 PRODUCT DEFINITION

2.1.1 Canned sardines or sardine-type products are prepared from fresh or frozen fish of the following species:

– *Sardina pilchardus*
– *Sardinops melanostictus, S. neopilchardus, S. ocellatus, S. sagax S. caeruleus*
– *Sardinella aurita, S. brasiliensis, S. maderensis, S. longiceps, S. gibbosa*
– *Clupea harengus*
– *Sprattus sprattus*
– *Hyperlophus vittatus*
– *Nematalosa vlaminghi*
– *Etrumeus teres*
– *Ethmidium maculatum*
– *Engraulis anchoita, E. mordax, E. ringens*
– *Opisthonema oglinum*

2.1.2 Head and gills shall be completely removed; scales and/or tail may be removed. The fish may be eviscerated. If eviscerated, it shall be practically free from visceral parts other than roe, milt or kidney. If ungutted, it shall be practically free from undigested feed or used feed.

2.2 PROCESS DEFINITION

The products are packed in hermetically sealed containers and shall have received a processing treatment sufficient to ensure commercial sterility.

2.3 PRESENTATION

Any presentation of the product shall be permitted provided that it:

(i) contains at least two fish in each can; and

(ii) meets all requirements of this standard; and

(iii) is adequately described on the label to avoid confusing or misleading the consumer;

(iv) contain only one fish species.

3. ESSENTIAL COMPOSITION AND QUALITY FACTORS

3.1 RAW MATERIAL

The products shall be prepared from sound fish of the species listed under sub-section 2.1 which are of a quality fit to be sold fresh for human consumption.

3.2 OTHER INGREDIENTS

The packing medium and all other ingredients used shall be of food grade quality and conform to all applicable Codex standards.

3.3 DECOMPOSITION

The products shall not contain more than 10 mg/100g of histamine based on the average of the sample unit tested.

3.4 FINAL PRODUCT

Products shall meet the requirements of this Standard when lots examined in accordance with Section 9 comply with provisions set out in Section 8. Product shall be examined by the methods given in Section 7.

4. FOOD ADDITIVES

Only the use of the following additives is permitted.

Additive		Maximum Level in the Final Product
Thickening or Gelling Agents (for use in packing media only)		
400	Alginic acid	GMP
401	Sodium alginate	
402	Potassium alginate	
404	Calcium alginate	
406	Agar	
407	Carrageenan and its Na, K, and NH_4 salts (including furcelleran)	
407	Processed *Eucheuma* Seaweed (PES)	
410	Carob bean gum	
412	Guar gum	
413	Tragacanth gum	
415	Xanthan gum	
440	Pectins	
466	Sodium carboxymethylcellulose	
Modified Starches		
1401	Acid treated starches (including white and yellow dextrins)	GMP
1402	Alkaline treated starches	
1404	Oxidized starches	
1410	Monostarch phosphate	
1412	Distarch phosphate, esterified	
1414	Acetylated distarch phosphate	
1413	Phosphated distarch phosphate	
1420/1421	Starch acetate	
1422	Acetylated distarch adipate	
1440	Hydroxypropyl starch	
1442	Hydroxypropyl starch phosphate	
Acidity Regulators		
260	Acetic acid	GMP
270	Lactic acid (L-, D-. and DL-)	
330	Citric acid	
Natural Flavours		
Spice oils		GMP
Spice extracts		
Smoke flavours (natural smoke solutions and extracts)		

5. HYGIENE AND HANDLING

5.1 The final product shall be free from any foreign material that poses a threat to human health.

5.2 When tested by appropriate methods of sampling and examination as prescribed by the Codex Alimentarius Commission, the product:

(i) shall be free from micro-organisms capable of development under normal conditions of storage;

(ii) no sample unit shall contain histamine that exceeds 20 mg per 100 g;

(iii) shall not contain any other substance including substances derived from microorganisms in amounts which may represent a hazard to health in accordance with standards established by the Codex Alimentarius Commission;

(iv) shall be free from container integrity defects which may compromise the hermetic seal.

5.3 It is recommended that the product covered by the provisions of this standard be prepared and handled in accordance with the appropriate sections of the Recommended International Code of Practice – General Principles of Food Hygiene (CAC/RCP 1-1969, Rev. 3-1997) and the following relevant Codes:

(i) the Recommended International Code of Practice for Canned Fish (CAC/RCP 10-1976);

(ii) the Recommended International Code of Hygienic Practice for Low-Acid and Acidified Low-Acid Canned Foods (CAC/RCP 23-1979);

6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following special provisions apply:

6.1 NAME OF THE FOOD

The name of the product shall be:

6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or

(ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

6.1.2 The name of the packing medium shall form part of the name of the food.

6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.

6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer.

7. SAMPLING, EXAMINATION AND ANALYSES

7.1 SAMPLING

(i) Sampling of lots for examination of the final product as prescribed in Section 3.3 shall be in accordance with the FAO/WHO Codex Alimentarius Sampling Plans for Prepackaged Foods (AQL-6.5) (Ref. CAC/RM 42-1977);

(ii) Sampling of lots for examination of net weight and drained weight where appropriate shall be carried out in accordance with an appropriate sampling plan meeting the criteria established by the CAC.

7.2 SENSORIC AND PHYSICAL EXAMINATION

Samples taken for sensoric and physical examination shall be assessed by persons trained in such examination and in accordance with Annex A and the *Guidelines for the Sensory Evaluation of Fish and Shellfish in Laboratories* (CAC/GL 31-1999).

7.3 DETERMINATION OF NET WEIGHT

Net contents of all sample units shall be determined by the following procedure:

(i) Weigh the unopened container.

(ii) Open the container and remove the contents.

(iii) Weigh the empty container, (including the end) after removing excess liquid and adhering meat.

(iv) Subtract the weight of the empty container from the weight of the unopened container. The resultant figure will be the net content.

7.4 DETERMINATION OF DRAINED WEIGHT

The drained weight of all sample units shall be determined by the following procedure:

(i) Maintain the container at a temperature between 20°C and 30°C for a minimum of 12 hours prior to examination.

(ii) Open and tilt the container to distribute the contents on a pre-weighed circular sieve which consists of wire mesh with square openings of 2.8 mm x 2.8 mm.

(iii) Incline the sieve at an angle of approximately 17-20° and allow the fish to drain for two minutes, measured from the time the product is poured into the sieve.

(iv) Weigh the sieve containing the drained fish.

(v) The weight of drained fish is obtained by subtracting the weight of the sieve from the weight of the sieve and drained product.

7.5 PROCEDURES FOR PACKS IN SAUCES (WASHED DRAINED WEIGHT)

(i) Maintain the container at a temperature between 20°C and 30°C for a minimum of 12 hours prior to examination.

(ii) Open and tilt the container and wash the covering sauce and then the full contents with hot tap water (approx. 40°C), using a wash bottle (e.g., plastic) on the tared circular sieve.

(iii) Wash the contents of the sieve with hot water until free of adhering sauce; where necessary separate optional ingredients (spices, vegetables, fruits) with pincers.

Incline the sieve at an angle of approximately 17-20° and allow the fish to drain two minutes, measured from the time the washing procedure has finished.

(iv) Remove adhering water from the bottom of the sieve by use of paper towel. Weigh the sieve containing the washed drained fish.

(v) The washed drained weight is obtained by subtracting the weight of the sieve from the weight of the sieve and drained product.

7.6 DETERMINATION OF HISTAMINE

AOAC 977.13 (15th Edition, 1990)

8. DEFINITION OF DEFECTIVES

A sample unit will be considered defective when it exhibits any of the properties defined below.

8.1 FOREIGN MATTER

The presence in the sample unit of any matter, which has not been derived from the fish or the packing media, does not pose a threat to human health, and is readily recognized without magnification or is present at a level determined by any method including magnification that indicates non-compliance with good manufacturing and sanitation practices.

8.2 ODOUR/FLAVOUR

A sample unit affected by persistent and distinct objectionable odours or flavours indicative of decomposition or rancidity.

8.3 TEXTURE

(i) Excessively mushy flesh uncharacteristic of the species in the presentation.

(ii) Excessively tough or fibrous flesh uncharacteristic of the species in the presentation.

8.4 DISCOLOURATION

A sample unit affected by distinct discolouration indicative of decomposition or rancidity or by sulphide staining of more than 5% of the fish by weight in the sample unit.

8.5 OBJECTIONABLE MATTER

A sample unit affected by Struvite crystals – any struvite crystal greater than 5 mm in length.

9. LOT ACCEPTANCE

A lot will be considered as meeting the requirements of this standard when:

(i) the total number of defectives as classified according to Section 8 does not exceed the acceptance number (c) of the appropriate sampling plan in the Sampling Plans for Prepackaged Foods (AQL-6.5) (CAC/RM 42-1977);

(ii) the total number of sample units not meeting the presentation defined in 2.3 does not exceed the acceptance number (c) of the appropriate sampling plan in the Sampling Plans for Prepackaged Foods (AQL-6.5) (CAC/RM 42-1977);

(iii) the average net weight or the average drained weight where appropriate of all sample units examined is not less than the declared weight, and provided there is no unreasonable shortage in any individual container;

(iv) the Food Additives, Hygiene and Labelling requirements of Sections 3.3, 4.5.1, 5.2 and 6 are met.