

EUROPEAN COMMUNITIES – TRADE DESCRIPTION OF SARDINES

AB-2002-3

Report of the Appellate Body

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WORLD TRADE ORGANIZATION
APPELLATE BODY

**European Communities – Trade Description
of Sardines**

European Communities, *Appellant*
Peru, *Appellee*

Canada, *Third Participant*
Chile, *Third Participant*
Ecuador, *Third Participant*
United States, *Third Participant*
Venezuela, *Third Participant*

4.

- (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.⁵ (emphasis added)

7. Peru exports preserved products prepared from *Sardinops sagax sagax* ("*Sardinops sagax*"), one of the species of fish covered by Codex Stan 94. This species is found mainly in the Eastern Pacific Ocean, along the coasts of Peru and Chile.⁶

⁵We note, however, that the text of Codex Stan 94, published in the print version of the Codex Alimentarius, presents certain differences in respect to the version used by the Panel and submitted by Peru to the Panel as Exhibit PERU-3. Section 6 published in the print version of the Codex Alimentarius reads as follows:

6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 1-1991) the following *specific* 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*" where "*X*" is the name 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. (emphasis added)

(Codex Alimentarius (Secretariat of the Joint FAO/WHO Food Standards Programme, 2001), Volume 9A, Fish and Fishery Products, pp. 75–81)

⁶Panel Report, para. 2.2.

8. *Sardina pilchardus* and *Sardinops sagax* both belong to the *Clupeidae* family and the *Clupeinae* subfamily. As their scientific name suggests, however, they belong to different genus. *Sardina pilchardus* belongs to the genus *Sardina*, while *Sardinops sagax* belongs to the genus *Sardinops*.⁷ Additional factual aspects of this dispute are set forth in paragraphs 2.1–2.9 of the Panel Report.

9. The Panel in this dispute was established on 24 July 2001. Before the Panel, Peru argued that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement") and Article III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").⁸

10. In the Panel Report circulated to Members of the World Trade Organization (the "WTO") on

29 May 2002, the Panel found that the EC Regulation is inconsistent with Article 2.4 of the TBT Agreement and Article III:4 of the GATT 1994.

13. On 28 June 2002, the European Communities sent letters to the Chairman of the DSB and to the Appellate Body, indicating its intention to withdraw the Notice of Appeal of 25 June 2002, pursuant to Rule 30 of the *Working Procedures*, conditionally on the right to file a new Notice of Appeal. The European Communities filed a new Notice of Appeal on the same day.

14. In a letter dated 1 July 2002, we informed the participants and third parties that neither the European Communities nor the third parties should file written submissions on the issues raised in the Request for a Preliminary Ruling submitted by Peru.

15. Peru submitted a letter, dated 2 July 2002, in which it challenged the right of the European Communities to withdraw conditionally the Notice of Appeal of 25 June 2002, and to file a second Notice of Appeal on 28 June 2002.

16. On 4 July 2002, we informed the participants and third parties that it was our intention to conduct the appellate proceedings in conformity with the Working Schedule drawn up further to the Notice of Appeal of 28 June 2002, without prejudice to the right of the participants and the third participants to present in their submissions arguments relating to the matters raised in Peru's letter dated 2 July 2002.

17. The European Communities filed an appellant's submission on 8 July 2002.¹¹ Peru filed an appellee's submission on 23 July 2002.¹² Ecuador filed a third participant's submission on 22 July 2002.¹³ Canada, Chile, the United States, and Venezuela filed third participant's submissions on 23 July 2002.¹⁴

18. On 23 July 2002, we received a letter from Colombia indicating that, although it would not file a third participant's submission, it had an interest in attending the oral hearing in this appeal. Colombia had participated in the proceedings before the Panel as a third party which had notified its interest to the DSB under Article 10.2 of the DSU. By letter of 7 August 2002, we informed the participants and third participants that we were inclined to allow Colombia to attend the oral hearing as a passive observer, and to notify us if they had any objection. The European Communities had no objection to Colombia attending the oral hearing as a third participant, but did object to Colombia attending as a passive observer. Ecuador had no objection to Colombia attending the hearing, but found there was no legal basis to apply a passive observer status and deny them the right to attend as a

¹¹Pursuant to Rule 21 of the *Working Procedures*.

¹²Pursuant to Rule 22 of the *Working Procedures*.

¹³Pursuant to Rule 24 of the *Working Procedures*.

¹⁴*Ibid.*

24. The European Communities asserts that it is absolutely clear that Peru's rights of defence have

30. According to the European Communities, Article 2.4 applies only to the preparation and adoption of technical regulations, not to their maintenance. The preparation and adoption of the EC Regulation is an act that had "ceased to exist" when the obligation in Article 2.4 became effective. Article 28 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")¹⁶ states that provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which "ceased to exist" before the treaty came into effect.

31. The European Communities objects to the Panel's use of *EC Measures Concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*")¹⁷ to support its finding because the Appellate Body, in that case, based its conclusion on the wording of Articles 2.2, 2.3, 3.3, and 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), all of which include the word "maintain".¹⁸ Article 2.4 of the *TBT Agreement*, however, does not include the word "maintain".

32. The terms "use" and "as a basis for" in Article 2.4 of the *TBT Agreement* and the introductory language "where technical regulations are required" imply, according to the European Communities, that this provision relates to the drawing up, drafting or preparation of technical regulations. This conclusion, furthermore, is supported by the inclusion of the word "imminent" in Article 2.4. The European Communities notes that Article 2.4 does not impose an obligation to use a draft international standard whose completion is not imminent. It argues, therefore, that it could not have been intended that an existing technical regulation would become inconsistent with Article 2.4 once completion of the draft international standard became "imminent", or even once the standard is actually adopted and becomes "existing".

33. The European Communities further alleges that Article 2.5 of the *TBT Agreement* provides contextual support for a conclusion that is the complete opposite of that reached by the Panel. According to the European Communities, Article 2.5 shows that when provisions of the *TBT Agreement* are intended to cover the *application* of technical regulations, they say so explicitly. Similar contextual support is found in Article 12.4, which uses the word "adopt", and in paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards, included as Annex 3 to the *TBT Agreement*, which uses the word "develops". The European Communities also rejects the Panel's conclusion that Article 2.6 of the *TBT Agreement* would be redundant if

¹⁶Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

¹⁷Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.

¹⁸We note that, although the European Communities refers to Article 2.3 of the *SPS Agreement* in its appellant's submission, this provision does not include the word "maintain".

invalid, substantive change (as opposed to an editorial one) was made to the draft standard at Step 8 of the elaboration procedures.

39. The European Communities adds that Codex Stan 94, interpreted consistently with its drafting history, is not a relevant international standard in this case for purposes of Article 2.4 of the *TBT Agreement*, because its scope is different from that of the EC Regulation. It explains that Article 2 of the EC Regulation contains only a naming requirement for preserved sardines. For its part, Codex Stan 94, correctly interpreted, includes as a naming option for preserved "sardine-type"

foreseen in section 6.1.1(i) of Codex Stan 94, the European Communities asserts that the EC Regulation has a substantial relationship with Codex Stan 94. The European Communities concludes by stating that the substantial relationship between the two documents demonstrates that Codex Stan 94 was used "as a basis for" the EC Regulation.

6. The Question of the "Ineffectiveness or Inappropriateness" of Codex Stan 94

44. The European Communities claims that the Panel applied an incorrect burden of proof with respect to the second part of Article 2.4 of the *TBT Agreement* and that it erred in finding that Codex Stan 94 is not an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued".

45. According to the European Communities, there is no general rule-exception relationship between the first and second parts of Article 2.4 and, therefore, there is no shift in the burden of proof from the complainant to the respondent. The European Communities rejects the Panel's claim that only the respondent can spell out the objectives pursued through a regulation, explaining that the objectives are usually described in the measure itself, as the EC Regulation demonstrates. Nor are the Panel's concerns regarding the lack of information on the part of the complainant sufficient, in the European Communities' view, to shift the burden to the respondent. The European Communities explains that, in addition to the obligation on a Member to justify a measure under Article 2.5 of the *TBT Agreement*, the complaining party may also enquire about a measure during consultations. The European Communities asserts, furthermore, that the Panel's finding on the burden of proof is not consistent with how the Appellate Body applied this burden regarding a similar provision of the *SPS Agreement* in the *EC – Hormones* case.

46. The European Communities argues that the Panel arrived at an incorrect finding with respect to the effectiveness or appropriateness of Codex Stan 94, because it misunderstood the objectives of the EC Regulation. In this regard, the European Communities explains that the purpose of the EC Regulation is to lay down marketing standards for preserved *Sardina pilchardus* and that the European Communities does not pursue thereby any objectives in relation to preserved *Sardinops sagax*.

47. The European Communities claims that the Panel erred in basing its conclusion regarding the effectiveness or appropriateness of the EC Regulation on the validity of the factual assumption that consumers in the European Communities have not always associated the term "sardines" exclusively with *Sardina pilchardus*. The European Communities states that even if consumers have different opinions with respect to what is a sardine, there may still be the possibility of confusion and the need for measures to improve market transparency, protect consumers, and maintain product diversity.

48. The European Communities also rejects the Panel's reliance in its reasoning on whether or not "sardines" is a common name for *Sardinops sagax*. According to the European Communities, even if "sardines" were a common name for preserved *Sardinops sagax*, this does not change the need to ensure that this product bears a *unique* name in the European Communities market.

49. The European Communities argues, finally, that the Panel erred in dismissing as irrelevant to the question of consumer expectations the domestic legislation of the member States of the European Communities. In its view, consumer expectations are generally based on some kind of legal protection.

7. The Objectivity of the Assessment of Certain Facts by the Panel

50. The European Communities claims that the Panel did not conduct "an objective assessment of the facts of the case" as required by Article 11 of the DSU, even if

8. The References in the Panel Report to Trade-Restrictiveness

53. The European Communities submits that the Panel erred in qualifying the EC Regulation as trade-restrictive. It rejects the qualification and asserts that the EC Regulation is neither trade-restrictive with respect to preserved *Sardinops sagax*, nor with respect to preserved *Sardina pilchardus*.

54. In addition, the European Communities argues that the issue of trade-restrictiveness is not relevant to the analysis under Article 2.4 of the *TBT Agreement* and that, having exercised judicial economy with respect to Peru's other claims, it was improper for the Panel to have examined this issue.

55. The European Communities states, moreover, that Article 15.2 of the DSU does not permit panels to make additional legal findings at the interim review stage.

9. Completing the Legal Analysis

56. The European Communities asserts that there are insufficient undisputed facts in the Panel record for the Appellate Body to complete the legal analysis in respect of Peru's other claims. It further argues that Articles 2.2 and 2.1 of the *TBT Agreement* involve complex issues of law that, contrary to Peru's contention, are completely different from those related to Article 2.4 of the *TBT Agreement*, and which have not been clarified by the Appellate Body or by dispute settlement panels.

B. *Arguments of Peru – Appellee*

1. Procedural Issues

57. Before addressing the merits of the appeal, Peru challenges the admissibility of what it terms is a second appeal by the European Communities—that is, the proceedings that began with the Notice of Appeal filed by the European Communities on 28 June 2002, after withdrawing the Notice of Appeal it had filed on 25 June 2002.

58. According to Peru, a notice of appeal cannot be withdrawn and resubmitted in revised form without the consent of the appellee. It notes that there is nothing in the *Working Procedures* that establishes the right to commence an appeal twice. Peru asserts that, although Rule 30 of the *Working Procedures* makes clear that an appeal can be withdrawn at any time—which the European Communities did through its communication of 28 June 2002—nothing in that Rule permits the appellant to attach conditions to the withdrawal. Peru submits that if an appellant withdraws its

appeal subject to conditions, the appeal must therefore be deemed withdrawn, irrespective of whether or not the conditions are met.

59. Peru argues that unless the *Working Procedures* are strictly enforced to prevent an appellant

63. Peru argues, moreover, that the circumstances of this case do not allow the Appellate Body to rule that the procedure adopted by the European Communities can be justified under Rule 16(1) of the *Working Procedures*, because that Rule does not justify the creation of procedural rights that the DSU does not accord.

64. Peru requests, therefore, that the Appellate Body reject the European Communities' second appeal.

65. Peru further objects to the acceptance and consideration of the *amicus curiae* briefs submitted in this appeal. It states that, while it welcomes non-Member submissions where they are attached to the submission of a WTO Member engaged in dispute settlement proceedings, the DSU makes clear that only WTO Members can make independent submissions to panels and to the Appellate Body. Peru argues further that the DSU already provides conditions under which WTO Members can participate as third parties in dispute settlement proceedings. According to Peru, accepting *amicus curiae* briefs from WTO Members that did not notify their third party interest to the DSB would be allowing a WTO Member impermissibly to circumvent the DSU.

66. Peru thus requests that the Appellate Body reject the *amicus curiae* briefs submitted in this appeal.

2. The Characterization of the EC Regulation as a "Technical Regulation"

67. Peru submits that, contrary to the European Communities' contention, the EC Regulation is a "technical regulation" that applies to identifiable products and lays down characteristics for products marketed as sardines. Peru explains that Article 2 of the EC Regulation does not apply to *any* product, but to products clearly identified as *products marketed as preserved sardines*. It further claims that these clearly identified products must, according to Article 2 of the EC Regulation, have a number of physical characteristics, including that of having been prepared exclusively from fish of the species *Sardina pilchardus*. Peru asserts, therefore, that the EC Regulation lays down product characteristics for products that are clearly identified.

68. Peru rejects the European Communities' claim that a name applied to a product is not itself a characteristic of that product. According to Peru, Annex 1.1 to the *TBT Agreement* provides that any document that lays down product characteristics with which compliance is mandatory is a "technical regulation", irrespective of the purpose for which the product characteristics are laid down. In Peru's view, a regulation that prescribes the characteristics of products marketed under a particular trade name is, therefore, clearly a document which lays down product characteristics and hence a "technical regulation" as defined in Annex 1.1 to the *TBT Agreement*.

69. According to Peru, the European Communities' argument on this issue is irrelevant to this dispute. It explains that at issue in this dispute is not a "technical regulation" prescribing a particular name for products made from *Sardinops sagax*, but rather that part of the EC Regulation that requires any product marketed as sardines to be made from *Sardina pilchardus*. Peru submits that the European Communities would thus not have to prescribe a specific trade name for products made from *Sardinops sagax* to resolve this dispute.

3. The Temporal Scope of Application of Article 2.4 of the *TBT Agreement*

70. Peru submits that the Panel correctly relied on Appellate Body rulings and on Article 28 of the *Vienna Convention* in concluding that, 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. Peru claims that the EC Regulation is a situation that has not ceased to exist and, therefore, Article 2.4 of the *TBT Agreement* is applicable to the EC Regulation.

71. Peru disagrees with the European Communities' allegation that Article 2.4 of the *TBT Agreement* applies only to the preparation and adoption of technical regulations. According to Peru, this allegation is based on a distinction between the adoption and maintenance of technical regulations that the text of Article 2.4 does not make. Peru asserts that the obligation to use the existing international standard as a basis for technical regulations arises according to the terms of Article 2.4 "where technical regulations are required"—that is, in situations in which the Member considered the adoption of a technical regulation necessary—and not when Members consider they need to introduce technical regulations, as the European Communities alleges. Peru contends, moreover, that the terms "use" and "as a basis for" in Article 2.4 do not imply that the obligation under that provision arises only when a new technical regulation is drawn up, drafted or prepared.

72. Peru submits that the Panel correctly concluded that the references in other Articles of the *TBT Agreement* to the *application* of technical regulations confirm that this Agreement was meant to extend to existing technical regulations.

4. The Characterization of Codex Stan 94 as a "Relevant International Standard"

73. Peru states that the Panel correctly concluded that the *TBT Agreement* covers international standards that are not based on consensus. Peru notes, in this regard, the last two sentences of the Explanatory note to the definition of the term "standard" in Annex

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standardization bodies, but at the same time clarify that consensus-based decision-making was not an
absolute requirement.

74. Peru maintains that, in any event, the Codex Commission observes the principle of consensus
and followed this principle in the adoption of the Codex standard at issue in this dispute.i,dex standard at issue in thi

78. Peru submits that the European Communities does not explain according to what interpretative principle the term "as a basis for" could be given the meaning "having a substantive rational relationship". Peru asserts that the ordinary meaning of this term is not "having a substantive rational relationship" and it cannot be given that meaning in the light of its context and the object and purpose of the *TBT Agreement*.

79. Peru contends, furthermore, that the EC Regulation would not meet the "as a basis" test even if the terms were interpreted according to the definition submitted by the European Communities.

83. Peru states, additionally, that the Panel correctly considered that the second part of Article 2.4 addresses motives and facts that are privy to the Member imposing a technical regulation. Peru argues that to accept the argument of the European Communities would be to require a complaining party to explain that the deviation from an international standard is not necessary to pursue a "legitimate objective", which would mean requiring a complaining party to prove a negative. Moreover, accepting the European Communities' argument would mean, in Peru's view, that the complaining party would have to speculate on the legitimacy of the objectives pursued by the responding party. Peru therefore argues that it is only logical that the responding Member should

technical dictionaries to support its claim that the term "sardines" is a common term for *Sardinops sagax* in the European Communities. The Panel referred to this evidence, as well as other evidence

Appellate Body complete the analysis with respect to Articles 2.2 and 2.1 of the *TBT Agreement* and, in so doing, that it consider the Panel's statements on the trade-restrictiveness of the

103. In referring to the *amicus curiae* briefs received in this appeal, Canada notes that there is a lack of clear agreement among WTO Members as to the role of *amicus curiae* briefs in dispute settlement. It also states that the DSU provides WTO Members with the legal right to make submissions in a dispute, but only if they reserve their third party rights at the outset of the dispute settlement process. Canada finally asserts that, in any event, the *amicus curiae* briefs should be rejected because they are not pertinent or useful.

2. Chile

104. Chile agrees with Peru's claim that the European Communities could not conditionally withdraw its Notice of Appeal of 25 June 2002 and replace it with a new Notice of Appeal.

105. Chile also agrees with the Panel's conclusion that the EC Regulation is a "technical regulation" for purposes of the *TBT Agreement*.

106. Chile states that the Panel was correct in concluding that Article 2.4 of the *TBT Agreement* applies to all technical regulations that existed prior to 1 January 1995. According to Chile, the commitment under the *TBT Agreement* not to restrict trade more than necessary is a permanent and continuous one.

107. Chile rejects the European Communities' contention that Article 2.4 applies only to the preparation and adoption of technical regulations. Chile states that Article 2 of the *TBT Agreement* is entitled "*Preparation, Adoption and Application of Technical Regulations by Central Government Bodies*". Given the title of Article 2, Chile argues that if Article 2.4 were limited to the preparation and adoption of technical regulations, its text would have indicated this explicitly or the provision would have been included in a different article.

108. Chile agrees with the Panel's conclusion that Codex Stan 94 is a "relevant international standard". Chile, nevertheless, disagrees with the Panel's interpretation of the Explanatory note to the definition of "standard" in Annex 1.2 to the *TBT Agreement*. According to Chile, the Explanatory note provides that international standards must be based on consensus, and this was confirmed 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, adopted by the WTO Committee on Technical Barriers to Trade.²² Chile notes, however, that the European Communities has not provided any evidence to demonstrate that Codex Stan 94 was not approved by consensus.

²²G/TBT/9, Committee on Technical Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, 13 November 2000, Annex 4.

109. Chile submits that the Panel was correct in finding that Codex Stan 94 was not used "as a

4. United States

116. According to the United States, the Panel correctly found, as a factual matter, that the EC Regulation lays down product characteristics that must be complied with in order for a product to be labelled and sold as preserved sardines, and that one of those mandatory product characteristics is that the fish must be of the species *Sardina pilchardus*. It further notes that the European Communities has not contested that the EC Regulation is a "technical regulation", but only that it is a "technical regulation" relating to *Sardinops sagax*.

117. The United States submits that, contrary to what the European Communities claims, there is no need to prove that the EC Regulation is an explicit "technical regulation" for *Sardinops sagax*. Although the EC Regulation mentions only *Sardina pilchardus* by name, the United States asserts that this does not mean that the EC Regulation cannot be challenged by another Member, especially when that Member is precluded from labelling its sardine species as "sardines" by that regulation.

118. The United States also rejects the European Communities' attempt to distinguish between labels and names, and states that the Panel correctly noted that both labelling and naming requirements are means of identifying a product.

119. The United States agrees with the Panel's conclusion that Article 2.4 applies to technical regulations that were in effect when the *TBT Agreement* came into force. The United States submits that the Appellate Body's reasoning in *EC – Hormones*²³ regarding the temporal application of the *SPS Agreement* is also relevant for interpreting Article 2.4 of the *TBT Agreement*.

120. The United States further asserts that the European Communities' allegation that Article 2.4 applies only to the drafting, drawing up or preparation of technical regulations is not supported by the text of that provision nor by its context. In this regard, the United States argues that this provision "follows fast" upon Article 2.3 of the 2.4 of the

allegations that the international standard at issue does not mean what it says, or is invalid because of drafting changes made in the course of developing the standard.

122. The United States disagrees, however, with the Panel's conclusion that international standards do not have to be based on consensus. According to the United States, this conclusion is contrary to the Explanatory note to the definition of "standard" in Annex 1.2 to the *TBT Agreement*²⁶

forbids the name "X sardines" for other sardine species, that part of Codex Stan 94 concerning "X sardines" is therefore plainly a relevant part of the standard.

127. The United States claims that the Panel correctly concluded that Codex Stan 94 is not an "ineffective or inappropriate" means for pursuing the European Communities' "legitimate objectives", identified as market transparency, consumer protection, and fair competition, because, *inter alia*, this international standard provides for conveying accurate information to the consumer concerning the content of the product. The United States also agrees with the Panel's finding that Peru met the burden of showing that Codex Stan 94 is not "ineffective or inappropriate".

128. The United States alleges, however, that the Panel erred in stating that Peru was not required to meet this burden—even though it found that Peru had done so. According to the United States, this reasoning is unnecessary to the Panel's finding and legally erroneous. In the United States' view, it is the complaining party, not the responding party, that has the burden of presenting evidence and arguments sufficient to make a *prima facie* demonstration of each claim that the measure is inconsistent with a provision of a covered agreement. This includes the demonstration under Article 2.4 of the *TBT Agreement* that the relevant international standards are not "ineffective or inappropriate". The United States argues, moreover, that this burden does not shift to the responding party because the obligation is characterized as an exception, or because the responding party asserts that the international standard is "ineffective or inappropriate", or because the responding party may have more information at its disposal concerning the "legitimate objectives."

129. The United States, therefore, requests the Appellate Body to modify the portion of the Panel's reasoning dealing with the allocation of the burden of proving that relevant international standards are an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" through the technical regulation.

130. The United States submits that the Appellate Body has the discretion to accept both *amicus curiae* briefs received in this appeal, but that it need not do so because they are not pertinent or useful.

5. Venezuela

131. Venezuela states that the Panel correctly found that the EC Regulation is a "technical regulation". It also agrees with the Panel's finding that Article 2.4 of the *TBT Agreement* applies to measures adopted before 1 January 1995, but which have not ceased to exist. According to

Venezuela, the Panel properly applied the principle set forth in Article 28 of the *Vienna Convention*²⁴, as interpreted by the Appellate Body.

132. Venezuela agrees with the Panel's conclusion that Codex Stan 94 is a "relevant international standard" and contends that the EC Regulation does not take into account the standard established in Codex Stan 94.

133. Venezuela disagrees with the European Communities' assertion that Codex Stan 94, by authorizing use of the term "sardines" for products other than *Sardina pilchardus*, is "ineffective or inappropriate" to fulfil the "legitimate objectives" of consumer protection, market transparency, and fair competition. Venezuela also submits that Peru presented sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

III. Issues D3f19.5,Vene to;ot 5 0 9.75 -1rties through4.25 52 n0.4219 Tc 0 Tw (433.) Tj 18.75 0 TD /F5 11

- (f) whether the Panel erred by finding that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*;
- (g) whether the Panel correctly interpreted and applied the second part of Article 2.4 of the *TBT Agreement*, which allows Members not to use international standards "as a basis for" their technical regulations "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued";
- (h) whether the Panel properly discharged its duty under Article 11 of the *Understanding*
legitim assessor the Panel found it had used in comparing the Settlement of Disputes 5.5 0 a5911.25 /F1 221 0 TD -07113

136. We set out earlier in this Report²⁷ the sequence of events relevant to the filing by the European Communities of a Notice of Appeal on 25 June 2002, the withdrawal of that Notice three days later, and the filing of a replacement Notice of Appeal on 28 June 2002. Before commencing our analysis of the admissibility of the Notice of Appeal of 28 June 2002, we note first that Peru does not request that we rule in this Report on Peru's Request for a Preliminary Ruling, submitted on 27 June 2002, regarding the sufficiency of paragraphs (d), (f), (g), and (h) of the European Communities' Notice of Appeal dated 25 June 2002.²⁸ Peru states in its appellee's submission that "[t]he Division presumably considers the original Notice of Appeal to be withdrawn"²⁹, and Peru does not address further the question of the insufficiency of the original Notice of Appeal. The European Communities submits that "the preliminary objections raised by Peru on the adequacy of the Notice of Appeal filed by the [European Communities] on 25 June 2002 is a matter that is now moot and settled."³⁰ In the light of these submissions, we need not, and, therefore, we do not decide the issues raised in the Request for a Preliminary Ruling filed by Peru regarding the sufficiency of the Notice of Appeal filed on 25 June 2002.

137. We turn to the claim by Peru that the European Communities was not entitled to attach a condition to its withdrawal of the Notice of Appeal filed on 25 June 2002. Rule 30(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*"), which governs the withdrawal of an appeal, provides:

At any time during an appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the DSB.

138. This rule accords to the appellant a broad right to withdraw an appeal at any time. This right appears, on its face, to be unfettered: an appellant is not subject to any deadline by which to withdraw its appeal; an appellant need not provide any reason for the withdrawal; and an appellant need not provide any notice thereof to other participants in an appeal. More significantly for this appeal, there is nothing in the Rule prohibiting the attachment of conditions to a withdrawal. Indeed, in two previous cases, notices of appeal were withdrawn subject to the condition that new notices would be

²⁷*Supra*, paras. 11 *ff.*

²⁸WT/DS231/10, 27 June 2002.

²⁹Peru's appellee's submission, para. 42.

³⁰European Communities' appellant's submission, para. 235.

filed.³¹ Nor is the right to withdraw an appeal expressly subject to the condition that no new notice be filed on the same matter after the withdrawal.

139. However, despite this permissive language, we emphasize that the *Working Procedures* must not be interpreted in a way that could undermine the effectiveness of the dispute settlement system, for they have been drawn up pursuant to the DSU and as a means of ensuring that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute.³² As we have said:

The procedural rules of WTO dispute settlement are designed to

determine whether, in fact, the particular condition in a particular case in any way obstructs the dispute settlement process, or in some way diminishes the rights of the appellee or other participants in the appeal.

142. With this in mind, we examine next whether, by withdrawing the Notice of Appeal of 25 June 2002 subject to the condition of filing a replacement notice of appeal, the European Communities has effectively undermined the "fair, prompt and effective resolution of trade disputes" or has not "engage[d] in [dispute settlement] procedures in good faith in an effort to resolve the dispute."

143. According to the European Communities, it withdrew the Notice of Appeal of 25 June 2002 after receiving Peru's Request for a Preliminary Ruling in order to "enlarge ... the description of the points" in paragraphs (d), (f), (g), and (h) of the original Notice and, thus, "clarify the points that Peru considered were not clear".³⁴ The European Communities maintains that the "replacement"³⁵ Notice contained "no new grounds of appeal, or modified ones."³⁶ Moreover, the European Communities contends that "Peru's rights of defense have not been harmed in any way by the replacement of the original Notice of Appeal with a new one and by the new Working Schedule".³⁷ The European Communities submits that it acted in a timely manner, "within the 60 days provided by the DSU [for adoption of panel reports]" and "well in advance of any substantial exchange between the parties".³⁸

144. In our view, attaching the condition to the withdrawal was not unreasonable under the circumstances. The conditioning by the European Communities of its withdrawal of the Notice of Appeal of 25 June 2002 on the right to file a replacement Notice of Appeal arose as a response to the Request for a Preliminary Ruling filed by Peru. Although Peru contests the European Communities' contention that no prejudice was suffered by Peru—arguing that Peru was "forced to address a completely novel procedural issue and waste time on that issue that [Peru] could have used for better purposes"³⁹—we are not persuaded that the European Communities' response in any way obstructed the process or diminished Peru's rights. Indeed, it may well have had the opposite effect. Although the European Communities states that it thought Peru's Request for a Preliminary Ruling "to be

³⁴European Communities' response to questioning at the oral hearing.

³⁵European Communities' appellant's submission, para. 235.

³⁶European Communities' response to questioning at the oral hearing.

³⁷European Communities' appellant's submission, para. 235.

³⁸European Communities' response to questioning at the oral hearing.

³⁹Peru's response to questioning at the oral hearing.

without merit"⁴⁰, the European Communities sought to remedy the difficulty perceived by Peru, and not to delay the proceedings further by contesting the allegations of insufficiency.

145. Moreover, the European Communities responded in a timely manner, providing the additional information in a replacement Notice of Appeal the day following receipt of Peru's objections to the Notice of Appeal of 25 June 2002, and only three days after filing the original Notice of Appeal. The replacement Notice was provided well before any submissions were filed. Thus, for the reasons explained, we find that the withdrawal of the original Notice on condition of filing a replacement Notice was appropriate and had the effect of conditionally withdrawing the original Notice.

146. In making this finding, we are mindful of Peru's argument that allowing the withdrawal of a notice of appeal subject to a unilaterally declared condition of the right to file a new notice of appeal, and the filing thereafter of a new notice of appeal, creates an "immense potential for abuse and disorder in appellate review proceedings."⁴¹ Peru suggests a number of examples of possible abusive practices that could result—including the delaying of the adoption of a panel report by submitting a new notice of appeal each time a panel report is before the Dispute Settlement Body (the "DSB"), the amending of allegations of error in the light of arguments made by the appellee or of questions posed by the Division at the oral hearing, and the attempt to have a different division selected or a different date chosen for the oral hearing.⁴² We agree with Peru that there may be situations where the withdrawal of an appeal on condition of refileing a new notice, and the filing thereafter of a new notice, could be abusive and disruptive. However, in such cases, we would have the right to reject the condition, and also to reject any filing of a new notice of appeal, on the grounds either that the Member seeking to file such a new notice would not be engaging in dispute settlement proceedings in good faith, or that Rule 30(1) of the *Working Procedures* must not be used to undermine the fair, prompt, and effective resolution of trade disputes. We agree with Peru that the rules must be interpreted so as to "ensure that appellate review proceedings do not become an arena for unfortunate litigation techniques that frustrate the objectives of the DSU, and that developing countries do not have the resources to deal with".⁴³ The case before us, however, presents none of these circumstances.

147. In addition, we believe there are circumstances that, although not constituting "abusive practices", would be in violation of the DSU, and would, thus, compel us to disallow the conditional withdrawal of a notice of appeal as well as the filing of a replacement notice. For example, if the

⁴⁰European Communities' letter to the Appellate Body dated 28 June 2002.

⁴¹Peru's appellee's submission, para. 45.

⁴²*Ibid.*

⁴³*Ibid.*, para. 51.

conditional withdrawal or the filing of a new notice were to take place after the 60-day deadline in Article 16.4 of the DSU for adoption of panel reports, this would effectively circumvent the requirement to file appeals within 60 days of circulation of panel reports. In such circumstances, we would reject the conditional withdrawal and the new notice of appeal.

148. We turn now to Peru's request that we declare the Notice of Appeal of 28 June 2002 inadmissible because neither the DSU nor the *Working Procedures* "accord[s] an appellant the right to appeal the same panel report twice on different grounds."⁴⁴ In our view, this argument by Peru is also misplaced, for we do not consider that the European Communities has in fact appealed "twice". The European Communities maintains that it "never intended to appeal twice", and also that it "considered that [the European Communities] only appealed once".⁴⁵ The European Communities contends as well that the replacement Notice contained "no new grounds of appeal, or modified ones."⁴⁶ Peru, for its part, states that the replacement Notice "reformulated the points to which Peru had objected"⁴⁷ and was based on "different allegations of error"⁴⁸, but Peru does not point to any new or modified grounds of appeal.⁴⁹

149. As we have explained, we are of the view that the conditional withdrawal of the Notice of Appeal of 25 June 2002 was appropriate and effective, and that, therefore, the filing of a replacement Notice on 28 June 2002 did not constitute a second appeal. Moreover, we agree with the European Communities that the replacement Notice of Appeal contains no additional grounds of appeal, and

... give full meaning and effect to the right of appeal and to give a party which regards itself aggrieved by some legal finding or interpretation in a panel report a real and effective opportunity to demonstrate the error in such finding or interpretation.⁵⁰

In that same Report, we added that "an appellee is, of course, always entitled to its full measure of due process."⁵¹ In the circumstances of this case, we believe that Peru has been accorded the full measure of its due process rights, because the withdrawal of the original Notice and the filing of a replacement Notice were carried out in response to objections raised by Peru, the replacement Notice was filed in a timely manner and early in the process, and the replacement Notice contained no new or modified grounds of appeal. Also, Peru has not demonstrated that it suffered prejudice as a result. Moreover, Peru was given an adequate opportunity to address its concerns about the European Communities'

"would be to allow a WTO Member impermissibly to circumvent the DSU", which "establishes the conditions under which WTO Members can participate as third parties in dispute settlement proceedings."⁵³ On this basis, Peru requests us to reject both of these briefs.

155. The European Communities does not address this issue in its written submission. In response to our questioning at the oral hearing, however, the European Communities stated that the *amicus curiae* briefs are pertinent, and that we have the discretion to accept them. Among the third participants, Canada argues that there is a lack of clear agreement among WTO Members as to the role of *amicus curiae* briefs in dispute settlement, and contends that WTO Members have a legal right to participate in dispute settlement proceedings only if they reserve their third party rights at the outset of the dispute settlement process. Moreover, Canada asserts that both *amicus curiae* briefs should be rejected because they are not pertinent or useful. Chile and Ecuador also ask us to reject the *amicus curiae* briefs, alleging that the DSU does not permit participation by *amici*. The United States is of the view that we have the authority to accept both briefs, but believes we should not consider either of them because they are not pertinent or useful.

156. We recall that, in *US – Shrimp*⁵⁴, we admitted three *amicus curiae* briefs that were attached as exhibits to the appellant's submission in that appeal. We concluded that those briefs formed part of the appellant's submission, and observed that it is for a participant in an appeal to determine for itself what to include in its submission.⁵⁵ We followed this approach in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*")⁵⁶, and in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*").⁵⁷ In subsequent cases, *amicus curiae* briefs were submitted by private individuals or organizations separately from participants' submissions. We admitted those briefs as well.⁵⁸

157. We have the authority to accept *amicus curiae* briefs. We enunciated this authority for the first time in our Report in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled*

⁵³Peru's letter dated 26 July 2002.

⁵⁴Appellate Body Report, *supra*, footnote 50.

⁵⁵*Ibid.*, para 91.

⁵⁶Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted 5 April 2001.

⁵⁷Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/AB/RW, adopted 21 November 2001.

⁵⁸Appellate Body Report, *EC – Asbestos*, *supra*, footnote 15, Appellate Body Report, *Thailand – H-Beams*, *supra*, footnote 56, Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601.

Lead and Bismuth Carbon Steel Products Originating in the United Kingdom ("US – Lead and Bismuth II"), where we reasoned:

In considering this matter, we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit[s] acceptance or consideration of such briefs. ... [Article 17.9⁵⁹] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.⁶⁰ (footnote omitted)

158. In that finding, we drew a distinction between, on the one hand, parties and third parties to a dispute, which have a *legal right* to participate in panel and Appellate Body proceedings, and, on the other hand, private individuals and organizations, which are not Members of the WTO, and which, therefore, do not have a *legal right* to participate in dispute settlement proceedings. We said there:

We wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages *participation* in panel or Appellate Body proceedings, as a matter of legal right, *only* by parties and third parties to a dispute. And, under the DSU, *only* Members of the WTO have a legal right to participate as parties or third parties in a particular dispute. ...

Individuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal *duty* to accept and consider *only* submissions from WTO Members which are parties or third parties in a particular dispute.⁶¹ (original emphasis; underlining added; footnotes omitted)

⁵⁹ Article 17.9 of the DSU provides as follows:

Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

⁶⁰ Appellate Body Report, *supra*, footnote 58, para. 39.

⁶¹ *Ibid.*, paras. 40–41.

159. We explained further in that appeal that participation by private individuals and organizations is dependent upon our permitting such participation if we find it useful to do so. We observed that:

... we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision.⁶²

We have followed this same approach in a number of subsequent appeals.⁶³

160. Peru conceded at the oral hearing that its "position is not exactly supported by the case law of the Appellate Body".⁶⁴ On this, Peru is correct. Accordingly, we believe that the objections of Peru with regard to the *amicus curiae* brief submitted by a private individual are unfounded. We find that we have the authority to accept the brief filed by a private individual, and to consider it. We also find that the brief submitted by a private individual does not assist us in this appeal.

161. We turn now to the issue of the *amicus curiae* brief filed by Morocco, which raises a novel issue, as this is the first time that a WTO Member has submitted such a brief in any WTO dispute settlement proceeding. The European Communities is of the view that we should not treat *amicus curiae* briefs submitted by private individuals differently from *amicus curiae* briefs submitted by WTO Members.⁶⁵ Peru objects to our accepting Morocco's brief, arguing that such acceptance would circumvent the rules in the DSU setting out the conditions under which WTO Members can participate as third parties in dispute settlement proceedings.⁶⁶ Peru refers specifically to Articles 10.2 and 17.4 of the DSU, which provide, respectively:

⁶²Appellate Body Report, *US – Lead and Bismuth II*, *supra*, footnote 58, para. 42.

⁶³The issue of unsolicited *amicus curiae* briefs submitted to us by private individuals also arose in *EC – Asbestos*, *supra*, footnote 15; *Thailand – H-Beams*, *supra*, footnote 56; and *US – Shrimp (Article 21.5 – Malaysia)*, *supra*, footnote 57.

⁶⁴Peru's response to questioning at the oral hearing.

⁶⁵European Communities' response to questioning at the oral hearing.

⁶⁶Peru's letter dated 26 July 2002.

Article 10

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164. We have been urged by the parties to this dispute not to treat Members less favourably than non-Members with regard to participation as *amicus curiae*.⁶⁹ We agree. We have not. And we will not. As we have already determined that we have the authority to receive an *amicus curiae* brief from a private individual or an organization, *a fortiori* we are entitled to accept such a brief from a WTO Member, provided there is no prohibition on doing so in the DSU. We find no such prohibition.

165. None of the participants in this appeal has pointed to any provision of the DSU that can be

this allegation, and provides no support for this position. Therefore, this, too, fails to assist us in this appeal. However, some of the legal arguments put forward by Morocco relate to Article 2.1 of the *TBT Agreement* and to the GATT 1994. Therefore, we will consider whether these arguments are of assistance when we consider Article 2.1 and the GATT 1994 later in this Report.

170. In sum, with the exception of the arguments relating to Article 2.1 of the *TBT Agreement* and the GATT 1994, to which we will return later, we find that Morocco's *amicus curiae* brief does not assist us in this appeal.

V. The Characterization of the EC Regulation as a "Technical Regulation"

171. We now turn to whether the Panel erred by finding that the EC Regulation is a "technical regulation" for purposes of Article 2.4 of the *TBT Agreement*. We recall that we have described the measure at issue—the EC Regulation—earlier in this Report.⁷²

172. The Panel found 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.⁷³

173. The European Communities does not contest that the EC Regulation is a "technical regulation" *per se*.⁷⁴ Instead, on appeal, the European Communities reiterates two arguments that the Panel rejected. First, the European Communities argues that the product coverage of the EC Regulation is limited to preserved *Sardina pilchardus*. The European Communities contends that the EC Regulation does not regulate preserved fish made from *Sardinops sagax* or from any other species, and that, accordingly, *Sardinops sagax* is not an *identifiable* product under the EC Regulation.⁷⁵ The European Communities concludes that, in the light of our ruling in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos")⁷⁶ that a "technical regulation" must apply to *identifiable* products, the EC Regulation is not a "technical regulation" for *Sardinops sagax*.⁷⁷

⁷²*Supra*, paras. 2–3.

⁷³

174. Second, the European Communities contends that a "naming" rule is distinct from a labelling requirement. The European Communities argues that, "[t]he requirement to state a certain name on the label ... involves not only a labelling requirement but also a substantive naming rule, which is not subject to the TBT Agreement."⁷⁸ Thus, according to the European Communities, even if it were determined that the EC Regulation relates to *Sardinops sagax*, the "naming" rule set out in Article 2 of the EC Regulation—the provision challenged by Peru—is not a product characteristic.⁷⁹ On this basis, the European Communities argues that Article 2 of the EC Regulation—which the European Communities contends sets out a "naming" rule and not a labelling requirement—does not meet the definition of the term "technical regulation" provided in the *TBT Agreement*.⁸⁰

175. As we explained in *EC – Asbestos*, whether a measure is a "technical regulation" is a threshold issue because the outcome of this issue determines whether the *TBT Agreement* is applicable.⁸¹ If the measure before us is not a "technical regulation", then it does not fall within the scope of the *TBT Agreement*.⁸² The term "technical regulation" is defined in Annex 1.1 to the *TBT Agreement* as follows:

1. *Technical Regulation*

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 symbols, packaging, marking or labelling requirements for application

179. The Panel rejected this argument because, in the Panel's view, it:

... 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.⁸⁷ (footnote omitted)

The Panel then concluded that:

... by requiring the use of only the species *Sardina pilchardus* as preserved sardines, *the EC*

A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, "of the *products to be covered*" by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named, identified or specified* in the regulation. (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the "characteristic" that is the subject of regulation.⁹¹ (original emphasis; footnote omitted)

Thus, a product does not necessarily have to be mentioned *explicitly* in a document for that product to be an *identifiable* product. *Identifiable* does not mean expressly identified.

183. This alone, however, does not dispose of the European Communities' argument, as the European Communities reproaches the Panel for failing to acknowledge that the EC Regulation uses the term "preserved sardines" to mean—exclusively—preserved *Sardina pilchardus*. We observe that the EC Regulation does not expressly identify *Sardinops sagax*. However, this does not necessarily mean that *Sardinops sagax* is not an *identifiable* product. As we stated in *EC – Asbestos*, a product need not be expressly identified in the document for it to be *identifiable*.⁹⁴

184. Even if we were to accept, for the sake of argument, the European Communities' contention that the term "preserved sardines" in the EC Regulation refers exclusively to preserved *Sardina pilchardus*, the EC Regulation would still be applicable to a range of *identifiable* products beyond *Sardina pilchardus*. This is not 657 presented in the index (not 4 amp 7 de 3 on 73 pro lluc (sp 5 a 0 w). 25 7 21 25 10 0

rather, it sets out a "naming" rule. The European Communities argues that, although the definition of "technical regulation" in the *TBT Agreement* "naming" rule. The Regulation is a technical regulation. The European Communities asserts that Article

The heart of the definition of a "technical regulation" is that a "document" must "lay down" – that is, set forth, stipulate or provide – "product *characteristics*". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "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".¹⁰¹ (original emphasis; underlining added)

Accordingly, product characteristics include not only "features and qualities intrinsic to the product", but also those that are related to it, such as "means of identification".

190. We do not find it necessary, in this case, to decide whether the definition of "technical regulation" in the *TBT Agreement* makes a distinction between "naming" and labelling. This question is irrelevant to the issue before us. As we stated earlier, the EC Regulation expressly identifies a product, namely "preserved sardines". Further, Article 2 of the EC Regulation provides that, to be marketed as "preserved sardines", products must be prepared exclusively from fish of the species *Sardina pilchardus*. We are of the view that this requirement—to be prepared exclusively from fish of the species *Sardina pilchardus*—is a product characteristic "intrinsic to" preserved sardines that is laid down by the EC Regulation.¹⁰² Thus, we agree with the Panel's finding in this regard that:

¹⁰¹ Appellate Body Report, *supra*, footnote 15, para. 67.

¹⁰² We observe that Article 2 of the EC Regulation lays down another intrinsic product characteristic in requiring that only products "sterilized by appropriate treatment" may be marketed as 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

192. Before concluding on this second criterion and proceeding to the third criterion in the definition of "technical regulation", we observe that, although the European Communities argued before the Panel that Article 2 of the EC Regulation could not be analyzed in isolation, on appeal, the European Communities asks us to focus our attention exclusively on whether Article 2, taken by itself, lays down product characteristics.¹⁰⁷ As the Panel correctly points out, in *EC – Asbestos*, we stated that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole".¹⁰⁸ With this in mind, we observe that the Panel analyzed other articles of the EC Regulation and found that those, too, lay down product characteristics.¹⁰⁹

193. For all these reasons, we agree with the Panel's conclusion that the EC Regulation lays down product characteristics.

194. The third and final criterion that a document must fulfil to meet the definition of "technical regulation" in the *TBT Agreement* is that compliance must be mandatory. The European Communities does not contest that compliance with the EC Regulation is mandatory.

197. The Panel found that:

...the EC Regulation is a "situation or measure that did not cease to exist" and the TBT January

201. In the European Communities' view, both the text and the context of Article 2.4 make plain that the scope of application of Article 2.4 is limited to the *preparation* and *adoption* of technical regulations, and not to their *maintenance*.¹¹⁸ The European Communities does not contest that the EC Regulation—which is currently in force—is an act that has not "ceased to exist". However, according to the European Communities, the *preparation* and *adoption* of the EC Regulation are both "acts that ceased to exist"—in the sense that they were completed—before the date of the entry into force of the *TBT Agreement*. Therefore, the European Communities contends that, consistent with Article 28 of the *Vienna Convention*¹¹⁹, Article 2.4 of the *TBT Agreement* is not applicable to the EC Regulation.¹²⁰

202. The text of Article 2.4 of the *TBT Agreement* provides as follows:

TECHNICAL REGULATIONS AND STANDARDS

Article 2

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies:

...

2.4 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.

203. According to the European Communities, it is evident from the text of Article 2.4 that the temporal scope of the provision is limited to the two stages of *preparation* and *adoption* of technical regulations, and that the continued existence thereafter of these regulations is not governed by that provision. The European Communities finds support for this contention in what the European Communities sees as the time-limited nature of the terms "where technical regulations are required",

¹¹⁸European Communities' appellant's submission, paras. 66–83.

pointed out, is relevant to the issue before us. In *EC – Hormones*, we addressed the temporal scope of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "SPS Agreement"), and stated:

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*. If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly.¹²⁴ (emphasis added; footnote omitted)

207. Like the sanitary measure in *EC – Hormones*, the EC Regulation is currently in force. The European Communities has conceded that the EC Regulation is an act or fact that has not "ceased to exist".¹²⁵ Accordingly, following our reasoning in *EC – Hormones*, Article 2.4 of the *TBT Agreement* applies to existing measures unless that provision "reveals a contrary intention".¹²⁶ As we have said, we see nothing in Article 2.4 which would suggest that the provision does not apply to existing measures.

208. Furthermore, like Articles 5.1 and 5.5 of the *SPS Agreement*, Article 2.4 is a "central provision" of the *TBT Agreement*, and it cannot just be assumed that such a central provision does not apply to existing measures. Again, following our reasoning in *EC – Hormones*, we must conclude that, if the negotiators had wanted to exempt the very large group of existing technical regulations from the disciplines of a provision as important as Article 2.4 of the *TBT Agreement*, they would have said so explicitly.¹²⁷ No such explicit exemption is found in the terms "where technical regulations are required", "exist", "imminent", "use", or "as a basis for".

¹²⁴Appellate Body Report, *supra*, footnote 17, para. 128.

¹²⁵European Communities' response to questioning at the oral hearing.

¹²⁶Appellate Body Report, *supra*, footnote 17, para. 128.

¹²⁷*Ibid.*

209. The European Communities' argument that our ruling in

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.¹³³ (original emphasis)

The Panel also looked to Article 2.6 of the *TBT Agreement*:

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.¹³⁴ (original emphasis)

212. We agree with the Panel's analysis. Thus, we find no support for the European Communities' claim in the context of Article 2.4 of the *TBT Agreement*. Rather than supporting the European Communities' argument, Articles 2.5 and 2.6 of the *TBT Agreement* provide support for the argument advanced by Peru that Article 2.4 of the *TBT Agreement* regulates measures adopted before the date of the entry into force of the *TBT Agreement*. We note also that there is additional contextual support in the title of Article 2, which reads "Preparation, Adoption and *Application* of Technical Regulations by Central Government Bodies". (emphasis added) This express reference to

¹³³Panel Report, para. 7.75.

¹³⁴*Ibid.*, para. 7.76.

the *application* of technical regulations in the title of Article 2 runs counter to an interpretation of

VII. The Characterization of Codex Stan 94 as a "Relevant International Standard"

217. We proceed to the European Communities' claim that the Panel erred in finding that Codex Stan 94 is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*.

218. The Panel found that "Codex Stan 94 is a relevant international standard".¹³⁵ The European Communities challenges this finding for two reasons. The European Communities asserts, first, that only standards adopted by international bodies by consensus are "relevant international standards" under Article 2.4 of the *TBT Agreement*.¹³⁶ The European Communities argues that the Panel assumed "that Codex Stan 94 ... was adopted by consensus ... without undertaking positive steps to verify the accuracy of the conflicting statements made in this respect by the parties".¹³⁷ Second, the European Communities asserts that, even if Codex Stan 94 were considered an international standard, it is not a "*relevant* international standard" because its product coverage is different from that of the EC Regulation. The European Communities contends that the EC Regulation covers only preserved sardines, while Codex Stan 94 covers that product as well as "sardine-type" products.¹³⁸ We will address each of these arguments in turn.

A. *The European Communities' Argument that Consensus is Required*

219. The European Communities argues that only standards that have been adopted by an

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220. However, in our view, the European Communities' contention is essentially related to whether Codex Stan 94 meets the definition of a "standard" in Annex 1.2 of the *TBT Agreement*. The term "standard", is defined in Annex 1.2 as follows:

2. *Standard*

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.

Explanatory note

The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. *Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.* (emphasis added)

221. The European Communities does not contest that the Codex Commission is an international standardization body, and that it is a "recognized body" for purposes of the definition of a "standard" in Annex 1.2.¹⁴⁰ The issue before us, rather, is one of *approval*. The definition of a "standard" refers to documents *approved* by a recognized body. Whether approval takes place by consensus, or by other methods, is not addressed in the definition, but it is addressed in the last two sentences of the Explanatory note.

¹⁴⁰European Communities' response to questioning at the oral hearing.

222. The Panel interpreted the last two sentences of the Explanatory note as follows:

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.

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 paragraph 2 of Annex 1 of the TBT Agreement which states that the TBT Agreement covers "documents that are not based on consensus".¹⁴¹

We agree with the Panel's interpretation. In our view, the text of the Explanatory note supports the conclusion that consensus is not required for standards adopted by the international standardizing community. The last sentence of the Explanatory note refers to "documents". The term "document" is also used in the singular in the first sentence of the definition of a "standard". We believe that "document(s)" must be interpreted as having the same meaning in both the definition and the Explanatory note. The European Communities agrees.¹⁴² Interpreted in this way, the term "documents" in the last sentence of the Explanatory note must refero5.25h101low0BT

226. Furthermore, we observe that the Panel found that, in any event, the European Communities did *not* prove that Codex Stan 94 was *not* adopted by consensus. Instead, the Panel found that, "[t]he record does not demonstrate that Codex Stan 94 was not adopted by consensus".¹⁴⁵

227. Therefore, we uphold the Panel's conclusion, in paragraph 7.90 of the Panel Report, that the definition of a "standard" in Annex 1.2 to the *TBT Agreement* does not require approval by consensus for standards adopted by a "recognized body" of the international standardization community. We emphasize, however, that this conclusion is relevant only for purposes of the *TBT Agreement*. It is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the *TBT Agreement* does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe an international standardization body should not require consensus for the adoption of its standards. That is not for us to decide.

B. *The European Communities' Argument on the Product Coverage of Codex Stan 94*

228. We turn now to examine the European Communities' argument that Codex Stan 94 is not a "*relevant* international standard" because its product coverage is different from that of the EC Regulation.

229. In analyzing the merits of this argument, the Panel first noted that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent".¹⁴⁶ The Panel reasoned that, to be a "relevant international standard", Codex Stan 94 would have to bear upon, relate to, or be pertinent to the EC Regulation.¹⁴⁷ The Panel then conducted the following analysis:

¹⁴⁵Panel Report, footnote 86 to para. 7.90. The report of the meeting of the Codex Commission where Codex Stan 94 was adopted, which Peru submitted to the Panel, makes no mention of votes being cast before its approval. (Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission (ALINORM 78/41), submitted as Exhibit Peru-14 by Peru to the Panel) We note that, at the oral hearing, the European Communities and Peru agreed that the Panel's conclusion that the record does not demonstrate that Codex Stan 94 was not adopted by consensus is a factual finding, which is beyond the purview of appellate review.

¹⁴⁶Panel Report, para. 7.68, quoting *Webster's New World Dictionary* (William Collins & World Publishing Co., Inc. 1976), p. 1199.

¹⁴⁷*Ibid.*

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. *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.¹⁴⁸ (emphasis added; footnote omitted)

230. We do not disagree with the Panel's interpretation of the ordinary meaning of the term "relevant". Nor does the European Communities.¹⁴⁹ Instead, the European Communities argues that, although the EC Regulation deals *only* with preserved sardines—understood to mean exclusively preserved *Sardina pilchardus*—Codex Stan 94 *also covers* other preserved fish that are "sardine-type".¹⁵⁰

231. We are not persuaded by this argument. First, even if we accepted that the EC Regulation relates only to preserved *Sardina pilchardus*, which we do not, the fact remains that section 6.1.1(i) of Codex Stan 94 also relates to preserved *Sardina pilchardus*. Therefore, Codex Stan 94 can be said to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved *Sardina pilchardus*.

232. Second, we have already concluded that, although the EC Regulation expressly mentions only *Sardina pilchardus*, it has legal consequences for other fish species that could be sold as preserved sardines, including preserved *Sardinops sagax*.¹⁵¹ Codex Stan 94 covers 20 fish species in addition to *Sardina pilchardus*.¹⁵² These other species also are legally affected by the exclusion in the EC Regulation. Therefore, we conclude that Codex Stan 94 bears upon, relates to, or is pertinent to the EC Regulation.

¹⁴⁸Panel Report, para. 7.69.

¹⁴⁹European Communities' response to questioning at the oral hearing.

¹⁵⁰*Ibid.*

¹⁵¹See *supra*, paras. 184–185.

¹⁵²The fish species covered by Codex Stan 94 are listed in section 2.1.1 thereto. (*Supra*, footnote 4) See also, *supra*, para. 5.

233. For all these reasons, we uphold the Panel's finding, in paragraph 7.70 of the Panel Report, that Codex Stan 94 is a "relevant international standard" for purposes of Article 2.4 of the *TBT Agreement*.

VIII. Whether Codex Stan 94 Was Used "As a Basis For" the EC Regulation

234. We turn now to whether Codex Stan 94 has been used "as a basis for" the EC Regulation. It will be recalled that Article 2.4 of the *TBT Agreement* requires Members to use relevant international standards "as a basis for" their technical regulations under certain circumstances. The Panel found that "the relevant international standard, i.e., Codex Stan 94, was not used as a basis for the

pilchardus. Further, Peru argued that prohibiting the marketing in the European Communities of *Sardinops sagax* imported from Peru as, for example, "Peruvian sardines" would run counter to the first of the four options in section 6.1.1(ii).

238.

the use of the term 'sardines' with a qualification"¹⁵⁹, with the fact that, under the EC Regulation, "species such as *Sardinops sagax* cannot be called 'sardines' even when ... combined with the name of a country, of a name

In *EC – Hormones*, we stated that "based on" does not mean the same thing as "conform to".¹⁶⁴ In that appeal, we articulated the ordinary meaning of the term "based on", as used in Article 3.1 of the *SPS Agreement* in the following terms:

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.¹⁵⁰

¹⁵⁰ L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 187.¹⁸⁵

The Panel here referred to this conclusion in its analysis of Article 2.4 of the *TBT Agreement*. In our view, the Panel did so correctly, because our approach in *EC – Hormones* is also relevant for the interpretation of Article 2.4 of the *TBT Agreement*.¹⁶⁶

243. In addition, as we stated earlier, the Panel here used the following definition to establish the ordinary meaning of the term "basis":

The word "basis" means "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".⁹⁰

⁹⁰ [*Webster's New World Dictionary*, (William Collins & World Publishing Co., Inc., 1976)], p. 117.¹⁶⁷

Informed by our ruling in *EC – Hormones*, and relying on this meaning of the term "basis", the Panel concluded that an international standard is used "as a basis for" a technical regulation when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation.¹⁶⁸

244. We agree with the Panel's approach. In relying on the ordinary meaning of the term "basis", the Panel rightly followed an approach similar to ours in determining the ordinary meaning of "based on" in *EC – Hormones*.¹⁶⁹ In addition to the definition of "basis" in *Webster's New World Dictionary* that was used by the Panel, we note, as well, the similar definitions for "basis" that are set

¹⁶⁴ Appellate Body Report, *supra*, footnote 17, para. 166.

¹⁶⁵ *Ibid.*, para. 163 and footnote 150 thereto.

¹⁶⁶ Panel Report, para. 7.110.

¹⁶⁷ *Ibid.* and footnote 90 thereto.

¹⁶⁸ *Ibid.*, para. 7.110.

¹⁶⁹ In the present case, we do not consider it necessary to decide whether the term "as a basis", in the context of Article 2.4 of the *TBT Agreement*, has the same meaning as the term "based on", in the context of Article 3.1 of the *SPS Agreement*.

out in the *The New Shorter Oxford English Dictionary*, and also provide guidance as to the ordinary meaning of the term:

3 [t]he main constituent. ... **5** [a] thing on which anything is constructed and by which its constitution or operation is determined; a determining principle; a set of underlying or agreed principles.¹⁷⁰

245. From these various definitions, we would highlight the similar terms "principal constituent", "fundamental principle", "main constituent", and "determining principle"—all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is "the basis for" the other.

246. The European Communities, however, seems to suggest the need for something different. The European Communities maintains that a "rational relationship" between an international standard and a technical regulation is sufficient to conclude that the former is used "as a basis for" the latter.¹⁷¹ According to the European Communities, an examination based on the criterion of the existence of a "rational relationship" focuses on "the qualitative aspect of the substantive relationship that should exist between the relevant international standard and the technical regulation".¹⁷² In response to questioning at the oral hearing, the European Communities added that a "rational relationship" exists when the technical regulation is informed in its overall scope by the international standard.

247. Yet, we see nothing in the text of Article 2.4 to support the European Communities' view, nor has the European Communities pointed to any such support. Moreover, the European Communities does not offer any arguments relating to the context or the object and purpose of that provision that would support its argument that the existence of a "rational relationship" is the appropriate criterion for determining whether something has been used "as a basis for" something else.

248. We see no need here to define in general the nature of the relationship that must exist for an international standard to serve "as a basis for" a technical regulation. Here we need only examine this measure to determine if it fulfils this obligation. In our view, it can certainly be said—at a

249. Thus, we need only determine here whether there is a *contradiction* between Codex

been challenged by Peru in this dispute. There is simply no purpose served in examining other provisions of the EC Regulation that are irrelevant to this dispute.¹⁷³

253. As we have said, the European Communities contends that Codex Stan 94 was used "as a basis for" the EC Regulation "because it used as a basis paragraph 6.1.1(i) of the Codex standard"¹⁷⁴, which stipulates that only *Sardina pilchardus* may have the name "sardines", and that our examination as to whether Codex Stan 94 has been used "as a basis for" the EC Regulation must be limited to section 6.1.1(i).¹⁷⁵ This contention stems from the European Communities' proposition that the scope of the EC Regulation and that of Codex Stan 94 are different: the European Communities considers that the EC Regulation lays down prescriptions and technical requirements for *Sardina pilchardus* only, whereas Codex Stan 94 has a broader scope, as it also addresses other species, namely "sardine-type" products. In the view of the European Communities, section 6.1.1(ii) is not a "relevant part" of Codex Stan 94 for our determination of whether that standard has been used "as a basis for" the EC Regulation, because section 6.1.1(ii) concerns species other than *Sardina pilchardus*, a subject-matter the EC Regulation does not address.

254. We are not persuaded by this line of reasoning. Article 2 of the EC Regulation governs the use of the term "sardines" for the identification and marketing of preserved fish products. Section 6.1.1(ii) of Codex Stan 94 also relates to this same subject. Therefore, section 6.1.1(ii) is a "relevant part" of Codex Stan 94 for the purpose of determining whether Codex Stan 94 was used "as a basis for" the EC Regulation. As we stated earlier, the analysis must address *all* of the parts of Codex Stan 94 that relate to the use of the term "sardines" for the identification and the marketing of preserved fish products, and not only to selected parts. Moreover, the European Communities' argument that the EC Regulation does not relate to species other than *Sardina pilchardus* is simply untenable. It is tantamount to saying that a regulation stipulating 16 years as the age at which one may obtain a term "T 0" is untenable. ads other than

255. In the light of all this, we ask now whether there is a *contradiction* between the EC Regulation and Codex Stan 94 in the use of the term "sardines" for the identification and marketing of preserved fish products.

256. We accept the European Communities' contention that the EC Regulation contains the prescription set out in section 6.1.1(i) of Codex Stan 94. However, as we have just explained, the analysis must go beyond section 6.1.1(i); it must extend also to sections 6.1.1(ii) and 2.1.1 of Codex Stan 94. And, a comparison between, on the one hand, sections 6.1.1(ii) and 2.1.1 of Codex Stan 94 and, on the other hand, Article 2 of the EC Regulation, leads to the inevitable conclusion that a contradiction exists between these provisions.

257. The effect of Article 2 of the EC Regulation is to prohibit preserved fish products prepared from the 20 species of fish other than *Sardina pilchardus* to which Codex Stan

... 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.¹⁷⁶ (footnote omitted)

261. Regarding the substance of the phrase "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued", the Panel began by examining the meaning of the terms "ineffective" and "inappropriate". The Panel said:

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.

⁹¹ The *effectiveness* of a measure is determined by its ability to achieve the objective of the measure. See, for example, *US - Shrimp*, WT/DS28/AB/R, para. 119, and *US - Tuna*, WT/DS28/AB/R, para. 119.

263. The Panel took note of the three "objectives" of the EC Regulation identified by the European Communities, namely market transparency, consumer protection, and fair competition.¹⁸⁰ The Panel also noted Peru's acknowledgement that those "objectives" are "legitimate", and the Panel saw "no reason to disagree with the parties' assessment in this respect."¹⁸¹ During questioning at the oral hearing, Peru confirmed that it does see these three objectives pursued by the European Communities as "legitimate" within the meaning of Article 2.4.

264. The Panel then examined whether Codex Stan 94 is "ineffective" or "inappropriate" for the

265. Although the Panel had assigned the burden of proof under Article 2.4 to the European Communities—so that it was for the European Communities to prove that Codex Stan 94 was "ineffective or inappropriate" to meet the European Communities' "legitimate objectives"—the Panel stated that Peru had, in any event, adduced sufficient evidence and legal arguments to allow the Panel to reach the conclusion that the standard was not "ineffective or inappropriate".¹⁸⁶

266. The European Communities appeals the Panel's assignment of the burden of proof under Article 2.4 of the *TBT Agreement*. The European Communities disputes the Panel's conclusion that the burden rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" of the EC Regulation. The European Communities maintains that the burden of proof rests rather with Peru, as Peru is the party claiming that the measure at issue is inconsistent with WTO obligations.

267. The European Communities also appeals the finding of the Panel that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. In particular, the European Communities argues that the Panel erred in founding its analysis on the factual premise that consumers in the European Communities associate "sardines" exclusively with *Sardina pilchardus*.¹⁸⁷ Furthermore, the European Communities contends that the Panel erred in concluding that the term "sardines", either by itself or when combined with the name of a country or geographic area, is a common name for *Sardinops sagax* in the European Communities. The European Communities also objects to the decision by the Panel to take this conclusion into account in its assessment of whether consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*.

268. In considering these claims of the European Communities, we will address, first, the question of the burden of proof, and, next, the substantive content of the second part of Article 2.4 of the *TBT Agreement*.

A. *The Burden of Proof*

269. Before the Panel, the European Communities asserted that Codex Stan 94 is "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. The Panel was of the view that the European Communities was thus asserting the affirmative of a particular claim or defence, and, therefore, that the burden of proof rests with the European Communities to demonstrate that

¹⁸⁶Panel Report, para. 7.138.

¹⁸⁷European Communities' appellant's submission, paras. 176–179.

claim.¹⁸⁸ The Panel justified its position as follows: first, it reasoned that the complainant is not in a position to "spell out" the "legitimate objectives" pursued by a Member through a technical regulation; and, second, it reasoned "that the assessment of whether a relevant international standard is 'inappropriate' ... may extend to considerations which are proper to the Member adopting or applying a technical regulation."¹⁸⁹

270. We recall that, in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, we said the following about the burden of proof:

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

In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.¹⁹⁰ (footnote omitted)

271. In *EC – Hormones*, we stated that characterizing a treaty provision as an "exception" does not, by itself, place the burden of proof on the respondent Member.¹⁹¹ That case concerned, among

3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement. (footnote omitted)

272. In *EC – Hormones*, the panel assigned the burden of showing that the measure there was justified under Article 3.3 to the respondent, reasoning that Article 3.3 provides an exception to the general obligation contained in Article 3.1. The panel there was of the view that it was the *defending* party that was asserting the *affirmative* of that particular defence. We reversed the panel's finding.¹⁹² In particular, we stated:

The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an "exception". In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "SPS-erower" interpretation of that provision than0.1527 TcTWitself jgs5rovisi or

both Articles 3.1 and 3.3.¹⁹⁶ We reached this conclusion as a consequence of our finding there that "Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement".¹⁹⁷ Similarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. Accordingly, as with Articles 3.1 and 3.3 of the *SPS Agreement*, there is no "general rule-exception" relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru—as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities—to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used "as a basis for" the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

276. The *TBT Agreement* acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objectives. That said, part of the reason why the Panel concluded that the burden of proof under Article 2.4 is on the respondent is because, in the Panel's view, the complainant cannot "spell out" the "legitimate objectives" of the technical regulation. In addition, the Panel reasoned that the assessment of the appropriateness of a relevant international standard involves considerations which are properly the province of the Member adopting or applying a technical regulation.¹⁹⁸

277. In our opinion, these two concerns are not justified. The *TBT Agreement* affords a complainant adequate opportunities to obtain information about the objectives of technical regulations or the specific considerations that may be relevant to the assessment of their appropriateness. A complainant may obtain relevant information about a technical regulation from a respondent under Article 2.5 of the *TBT Agreement*, which establishes a *compulsory* mechanism requiring the supplying of information by the regulating Member. This Article provides in relevant part:¹⁹⁹

A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4.

278. Peru expresses doubts about the usefulness and efficacy of this obligation in the

B. *Whether Codex Stan 94 is an Effective and Appropriate Means to Fulfil the "Legitimate Objectives" Pursued by the European Communities Through the EC Regulation*

284. We recall that the second part of Article 2.4 of the *TBT Agreement* reads as follows:82

of some such objectives can be.²⁰⁸ Two implications flow from the Panel's interpretation. First, the term "legitimate objectives" in Article 2.4, as the Panel concluded, must cover the objectives explicitly mentioned in Article 2.2, namely: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment." Second, given the use of the term "*inter alia*" in Article 2.2, the objectives covered by the term "legitimate objectives" in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2. Furthermore, we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure.²⁰⁹

2. The Application of the Second Part of Article 2.4

287. With respect to the application of the second part of Article 2.4, we begin by recalling that Peru has the burden of establishing that Codex Stan 94 is an effective *and* appropriate means for the fulfilment of the "legitimate objectives" pursued by the European Communities through the EC Regulation. Those "legitimate objectives" are market transparency, consumer protection, and fair competition. To satisfy this burden of proof, Peru must, at least, have established a *prima facie* case of this claim. If Peru has succeeded in doing so, then a presumption will have been raised which the European Communities must have rebutted in order to succeed in its defence. If Peru has established a *prima facie* case, and if the European Communities has failed to rebut Peru's case effectively, then Peru will have discharged its burden of proof under Article 2.4. In such an event, Codex Stan 94 must, consistent with the European Communities' obligation under the *TBT Agreement*, be used "as a basis for" any European Communities regulation on the marketing of preserved sardines, because Codex Stan 94 will have been shown to be both effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities. Further, in such an event, as we have already determined that Codex Stan 94 was not used "as a basis for" the EC Regulation, we would then have to find as a consequence that the European Communities has acted inconsistently with Article 2.4 of the *TBT Agreement*.

288. This being so, our task is to assess whether Peru discharged its burden of showing that Codex Stan 94 is appropriate and effective to fulfil these same three "legitimate objectives". In the light of our reasoning thus far, Codex Stan 94 would be *effective* if it had the capacity to accomplish all three of these objectives, and it would be *appropriate* if it were suitable for the fulfilment of all three of these objectives.

²⁰⁸Panel Report, para. 7.118.

²⁰⁹*Ibid.*, para. 7.122.

289. We share the Panel's view that the terms "ineffective" and "inappropriate" have different meanings, and that it is conceptually possible that a measure could be effective but inappropriate, or

294. All four points were raised by the European Communities in the interim review and addressed by the Panel at that stage of the Panel proceedings. On the use of the dictionary definitions of the term "sardines", the Panel stated:

[W]e 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 and Canada as well as the *Grand Dictionnaire Encyclopédique Larousse* and *Diccionario de la lengua espanola* referred to by the 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*.²²⁰ (original emphasis; footnotes omitted)

295. On the letter from the United Kingdom Consumers' Association, the Panel replied:

We are ... 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.

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. 267.²²¹

²²⁰ Panel Report, para. 6.12.

²²¹ *Ibid.*, para. 6.15 and footnote 40 thereto.

298. Finally, the Panel commented on its decision not to seek information from the Codex Commission:

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* —

facts²²⁵; they enjoy "a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence."²²⁶ We have also said that we will not "interfere lightly" with the Panel's appreciation of the evidence: we will not intervene solely because we might have reached a different factual finding from the one the panel reached; we will intervene only if we are "satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence".²²⁷

300.

... 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.²³⁰

In the light of the comments made by the Panel at the interim review stage, we have no reason to believe, nor has the European Communities been able to persuade us, that the Panel did not examine and consider all the evidence properly put before it, or that the Panel did not evaluate the relevance and probative value of each piece of evidence. In particular, the Panel manifestly did not ignore the evidence in the form of tins, supermarket receipts, and labels relating to various preserved fish submitted by the European Communities, for it addressed that evidence specifically in paragraph 6.18 of the Panel Report. In addition, the Panel specifically stated that its factual finding 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*"²³¹ was the result of an "overall weighing and balancing process"²³² bearing upon a plurality of pieces of evidence. On the other points raised by the European Communities, we reiterate: the Panel enjoyed a margin of discretion, as the trier of facts, to assess the value of each piece of evidence and the weight to be ascribed to them. In our view, the Panel did not exceed the bounds of this discretion by giving some weight to dictionary definitions, and to an extract of a letter from a United Kingdom Consumers' Association.²³³

301. We also reject the European Communities' contention relating to the letters it submitted at the interim review stage. The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during

²³⁰Appellate Body Report, *supra*, footnote 203, para. 137.

²³¹Panel Report, para. 7.137.

²³²*Ibid.*, para. 6.15.

²³³The extract of the letter from a United Kingdom Consumers' Association cited in the Panel Report is the following:

[A] wide array of sardines were made available to European consumers for many decades prior to the imposition of this restrictive Regulation.

(*Ibid.*, para. 7.132, referring to Exhibit Peru-16, submitted by Peru to the Panel, p. 8)

that stage of the proceedings, to submit comments on the draft report issued by the panel²³⁴, and to make requests "for the panel to review precise aspects of the interim report".²³⁵ At that time, the panel process is all but completed; it is only—in the words of Article 15—"precise aspects" of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence. Therefore, we are of the view that the Panel acted properly in refusing to take into account the new evidence during the interim review, and did not thereby act inconsistently with Article 11 of the DSU.

302. We also reject the European Communities' claim regarding the fourth instance of supposed impropriety, which relates to the decision of the Panel not to seek information from the Codex Commission. Article 13.2 of the DSU provides that "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter." This provision is clearly phrased in a manner that attributes discretion to panels, and we have interpreted it in this vein. Our statements in *EC – Hormones, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items ("Argentina – Textiles and Apparel")*²³⁶, and *US – Shrimp*, all support the conclusion that, under Article 13.2 of the DSU, panels enjoy discretion as to *whether or not* to seek information from external sources.²³⁷ In this case, the Panel evidently concluded that it did not need to request information from the Codex Commission, and conducted itself accordingly.

²³⁴Article 15.1 of the DSU provides:

Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

²³⁵Article 15.2 of the DSU provides:

Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, *a party may submit a written request for the panel to review precise aspects of the interim report* prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any

We believe that, in doing so, the Panel acted within the limits of Article 13.2 of the DSU. A contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the due exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU.

303. In the light of this, we reject the claim of the European Communities that the Panel did not conduct "an objective assessment of the facts of the case", as required by Article 11 of the DSU.

XI. The References in the Panel Report to Trade-Restrictiveness

304. We now turn to the issue whether the Panel made a determination that the EC Regulation is trade-restrictive, and, if so, whether the Panel erred in making such a determination, as contended by the European Communities.

305. The Panel stated:

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.* 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*.²³⁸ (emphasis added)

²³⁸Panel Report, para. 7.127.

At the interim review in the Panel proceedings, the European Communities asked the Panel to delete the term "trade-restrictive" in the sixth line of paragraph 7.127 of the Panel Report.²³⁹

306. The Panel dismissed this request in the following terms:

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

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

EC Regulation is trade-restrictive is not relevant for the purposes of making a finding under Article 2.4. The Panel exercised judicial economy with respect to other claims where the trade-restrictive character of the EC Regulation might have been relevant.²⁴² As a consequence, the Panel should have refrained from making the statements quoted from paragraph 6.11 and footnote 35 of the Panel Report.²⁴³

311. The question whether the EC Regulation is trade-restrictive in nature could have been relevant to a legal analysis under Article 2.2 of the *TBT Agreement*. For this reason, the Panel's statements in paragraph 6.11 and in footnote 35 of the Panel Report on the trade-restrictive character of the EC Regulation, *to the extent that they could relate to the legal analysis under Article 2.2 of the TBT Agreement*, constitute legal interpretations within the meaning of Article 17.6 of the DSU. Because the Panel had determined *not* to make legal findings under Article 2.2, we declare the two statements in paragraph 6.11 and in footnote 35 of the Panel Report on the trade-restrictive character of the EC Regulation moot and without legal effect.

XII. Completing the Legal Analysis

312. Peru submits that, if we conclude that the EC Regulation is consistent with Article 2.4, it would be appropriate for us to complete the Panel's analysis and resolve the dispute by making findings on those provisions of Article 2 of the *TBT Agreement* on which the Panel did not make any

²⁴²The claims where such a finding would have been relevant related to Article 2.2 of the *TBT Agreement*.

²⁴³This approach is along the lines of that which we followed in *United States – Import Measures on Certain Products from the European Communities*:

Having found that the 3 March Measure is the measure at issue in this dispute, and that the 19 April action is outside its terms of reference, the Panel should have limited its reasoning to issues that were relevant and pertinent to the 3 March Measure. By making statements on an issue that is only relevant to the 19 April action, the Panel failed to follow the logic of, and thus acted inconsistently with, its own finding on the measure at issue in this dispute. The Panel, therefore, erroneously made statements that relate to a measure which it had *itself* previously determined to be outside its terms of reference.

For these reasons, we conclude that the Panel erred by making the statements in paragraphs 6.121 to 6.126 of the Panel Report on the mandate of arbitrators appointed under Article 22.6 of the DSU. Therefore, these statements by the Panel have no legal effect. (original emphasis; underlining added)

(Appellate Body Report, WT/DS165/AB/R, adopted 10 January 2001, paras. 89–90)

In that case, the irrelevance of the statements of the panel resulted from the limits of the terms of reference, rather than from judicial economy. Nevertheless, our views to the effect that a panel should limit its reasoning to relevant and pertinent issues, and that irrelevant statements may have no legal effect, are also pertinent to the case before us.

findings, namely Articles 2.2 and 2.1 of the *TBT Agreement*.²⁴⁴ Although Peru made a claim before the Panel under Article III:4 of the GATT 1994, Peru does not ask us to complete the analysis by addressing that provision. The European Communities objects to the completion of the analysis, expressing the view that there are not sufficient undisputed facts in the record to do so.²⁴⁵

313. Because we have found that the EC Regulation is *not* consistent with Article 2.4 of the *TBT Agreement*, the conditions to Peru's request have not been met, and, therefore, we do not think it is necessary for us to make a finding under Articles 2.2 and 2.1 of the *TBT Agreement* in order to resolve this dispute. Equally, we do not think it is necessary to make a finding under Article III:4 of the GATT 1994 in order to resolve this dispute. Therefore, we decline to make findings on Articles 2.2 and 2.1 of the *TBT Agreement*, or on Article III:4 of the GATT 1994.

314. We indicated earlier in this Report that we would return to the question whether Morocco's *amicus curiae* brief assists us in this appeal when considering the issue of completing the legal analysis under Article 2.1 of the *TBT Agreement* and the GATT 1994.²⁴⁶ In the light of our decision not to complete the analysis by making findings on these provisions, we find that the legal arguments submitted by Morocco in its *amicus curiae* brief on Article 2.1 of the *TBT Agreement* and on the GATT 1994 do not assist us in this appeal.

XIII. Findings and Conclusions

315. For the reasons set out in this Report, the Appellate Body:

- (a) finds that the condition attached to the withdrawal of the Notice of Appeal of 25 June 2002 is permissible, and that the appeal of the European Communities, commenced by the Notice of Appeal of 28 June 2002, is admissible;
- (b) finds that the *amicus curiae* briefs submitted in this appeal are admissible but their contents do not assist us in deciding this appeal;
- (c) upholds the Panel's finding, in paragraph 7.35 of the Panel Report, that the EC Regulation is a "technical regulation" under the *TBT Agreement*;

²⁴⁴Peru's appellee's submission, para. 181.

²⁴⁵European Communities' response to questioning at the oral hearing.

²⁴⁶*Supra*, paras. 169–170.

(d)

