WORLD TRADE ORGANIZATION

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EUROPEAN COMMUNITIES – TRADE DESCRIPTION OF SARDINES

Report of the Panel

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I. INTRODUCTION

1.1 In a communication dated 20 March 2001, Peru requested consultations with the European Communities pursuant to Article 4 of the Understanding on Rules and Procedures

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

Chairperson: Ms. Margaret Liang

Members: Ms. Merit Janow

Mr. Mohan Kumar

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

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

II. FACTUAL ASPECTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.9 Article 6 of Codex Stan 94 reads as follows:

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[4] The EC Regulation in its entirety is attached as Annex 1.
[5] Codex Stan 94 is attached in its entirety as Annex 2.
[6] Article 2.1.1 lists the following species:
– *Sardina pilchardus*
– Sardinops melanostictus, S. neopilchardus, S. ocellatus, S. sagax S. caeruleus
– Sardinella

"6. LABELLING

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

6.1 NAME OF THE FOOD

The name of the products shall be:

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

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

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

3.1 Peru makes the following requests:

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

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

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

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

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

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

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

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

4.6 The European Communities contends that the burden of proving that Article 2 of the EC Regulation is not in conformity with paragraphs 4, 2 and 1 of Article 2 of the TBT Agreement and with Article III:4 of GATT 1994 rests entirely with Peru. Accordingly, all the elements of Article 2.4 of the TBT Agreement that must be demonstrated to establish a *prima facie* case are: that a technical regulation has been prepared; that "a relevant intenciplpean Coy with paragraphs 4Tf -0.0746 Tiard"ordisettlement b

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

4.14 In respect of the European Communities' argument that the Regulation at issue is not a technical regulation for preserved *Sardinops sagax* or any other product except preserved

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

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

4.20 The European Communities further argues that it is only possible to use relevant international standards as a basis for the technical regulation when the technical regulation is being drafted or when it is amended. However, this particular question is not before the Panel because the EC Regulation has not been amended. In its view, the question is whether Members are under an obligation after the

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

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

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

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

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

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

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developing international standards within the meaning of the TBT Agreement.[10] Hence, Peru

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.56 With reference to the European Communities' argument that the change in draft was editorial in nature, Peru submits that since the drafters of the final version of Codex Stan 94 described the change from the earlier version as "editorial", rather than substantive, they were obviously of the view in natilw Tj T* -souldy TwrthenslarO5 Twyters' dbmittePeru hangs of the final veuntlbeih textin nously of Tw (chThis

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agreed technical standard would be meaningless if domestic laws and customs could be invoked to

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

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

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

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

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

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

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

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

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

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

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

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

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

sardines" or "Peruvian sardines" is not misled because the consumer is clearly informed that the product is not prepared from sardines caught in F /ropen swaters. I is nhe cse tof a term withou the

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

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

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

E. ARTICLE 2.2 OF THE TBT AGREEMENT

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

(a) Trade-restrictive effects

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) More trade-restrictive than necessary

4.102 **Peru**

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

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

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

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

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

4.113 The European Communities argues that it is only the third criterion of the Appellate Body in *Korea — Various Measures on Beef* (impact of the measure on imports or exports) that is in one sense relevant to the analysis under Article 2.2. In its view, this follows from the very concept of "not more trade restrictive than necessary". However, the Appellate Body uses this criterion for a purpose that it is not relevant under Article 2.2 for the reasons seen above. The European Communities argues that Appelle on im0 -24.75 TD -0.2625 Tc 0 Tw

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

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

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

4.117 According to the European Communities, the non-fulfilment of the objectives in this case would lead to the marketing of lower quality products, the use of disparate and confusing

4.119 In Peru's view, its arguments under Article 2.1 of the TBT Agreement on the less favourable treatment of Peruvian sardines and on the likeness of the species

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

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

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

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

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

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

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

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

marketed contain sardines, whereas the consumers of products made from *Sardina pilchardus* may be given this information. Peru argues that if the *Sardina pilchardus*

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

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

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

H. EUROPEAN COMMUNITIES' ARGUMENT THAT PERU REFORMULATED ITS CLAIMS

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

4.144 The European Communities further contends that Peru's formulation of its request for findings [illegible]

European Communities' obligations under Articles 2.4, 2.2 and 2.1 of the TBT Agreement and

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

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

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

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

5.12 Canada also submits that the European Communities misinterprets the meaning of "in a manner not to mislead the consumer" in paragraph 6.1.1 of Codex Stan 94. Canada argues that, read in context, this phrase refers back to "X sardines" and more specifically, prescribes that the designator "X" must not be presented in a manner that misleads the consumer. Canada contends that the European Communities' argument that consumers would be confused by the use of the word "sardines" along with the appropriate designator is refuted by the research conducted by the Codex Committee in the development of Codex Stan 94. Canada submits that the Codex Committee researched the common names of the species listed in paragraph 2.1.1 of Codex Stan 94 and in examining the results of this research came to a consensus that allowing species other than *Sardina species olSnoto aTa2v () Tj Xe -0.conductoto aTa2v () T Tc 0mits ith th ,rmunitie Tw ("sardalong with the ap*

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

4. Article 2.2 of the TBT Agreement

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

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

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

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

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

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

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

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

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

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

5. Article 2.1 of the TBT Agreement

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

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

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

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

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

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

2. Retroactive application of the TBT Agreement

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

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

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

3. Article 2.4 of the TBT Agreement

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

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

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

5.38 Chile disagrees with the interpretation of the European Communities of Article 2.4 of the TBT Agreement and argues that the reference in Article 2.4 to "as a basis for" affords each Member the possibility of adapting an international standard to its own reality or specific individual circumstances, without altering the objectives of that international standard, unless it (or its components) is an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, and in such case the Member should justify why this is so. The question that arises here is whether Codex Stan 94 is an effective /F1 1sfvh the yr70/pn 94 is i963ment of the l by482 Tc 2.0088 Tw (C

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

3. Article 2.4 of the TBT Agreement

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

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

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

4. Article 2.2 of the TBT Agreement

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

5. Remarks on implementation

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

D. ECUADOR

1. Introduction

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

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

2. Retroactive application of the TBT Agreement

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

3. Article 2.4 of the TBT Agreement

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

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

5.54 Ecuador further argues that Codex Stan 94 is adequate to fulfil the legitimate objectives pursued by the EC Regulation, because it does not mislead the consumers. Ecuador notes that Codex Stan 94 clearly stipulates that sardines of species other than

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3. Article 2.2 of the TBT Agreement

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

5. Article 2.1 of the TBT Agreement

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

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

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

7. Final remarks

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

E. UNITED STATES

1. Introduction

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

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

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

5.68 In the view of the United States, Codex Stan 94 does not anticipate a country choosing between "X Sardines" and the common name of the species. Rather, under the standard, a country permits the named sardine species to be sold as "X Sardines", where "X" is a country, a geographic area, a species, or the common name of the species. The United States argues that under the standard,

2. Remarks on the term "sardines"

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

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

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

3. Article 2.4 of the TBT Agreement

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

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

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[26] See FAO Yearbook of Fishery Statistics, Catches and Landings, Vol. 80, 1995, pp. 308 ff.
[27] See FAO Yearbook of Fishery Statistics, Commodities, Vol. 89, p. 102.
[28]

5.78 Venezuela submits that the Codex Alimentarius is the source of standards, codes of practice and internationally accepted guidelines that have become a global benchmark for food consumers,

5. Remarks on implementation

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

VI. INTERIM REVIEW[30]

6.1 Our interim report was issued to the parties on 28 March 2002, pursuant to Article 15.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). On 5 April 2002, the European Communities requested us to review certain aspects of the interim report. Peru did not have any comments on the interim report. Neither of the parties requested us to hold an interim review meeting. When sending the interim report to the parties, we provided each party an opportunity to transmit in writing its comments on the other party's interim review

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

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

6.6 With regard to paragraph 7.66 of the findings, the European Communities asserted that our reasoning did not accurately reflect the "conditional argument that … there would be less doubts about this [the status of the Codex Alimentarius Commission as an international standardization body] if the European Communities would be allowed to become a member". We note that all member States of the European Communities are parties to the Codex Alimentarius Commission and that the European Communities is an observer at the Commission. We stated in the findings that Annex 1.4 of the TBT Agreement defines an "international body" as a "[b]ody or system whose membership is open to the relevant bodies of at least all Members". According to Rule 1 of the Statutes and Rules of Procedures of the Codex Alimentarius Commission, "[m]embership of the joint FAO/WHO Codex Alimentarius Commission … is open to all Member Nations and Associate Members of the FAOu 2cw (For the aboute "conditional argumenthat this 949tan 94 this [the status of the Codex Alim Comm12.7ission and relevance of a about this [the status of the Codex Alim]Codexif 0 -12.75 TDternat-openal standard within the meaning7of th

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

6.8 The European Communities reminded us of its requests that the Codex Alimentarius Commission be consulted on the meaning of the text of paragraph 6.1.1(ii). We recall the European Communities' statement at the Second Substantive Meeting that "[i]f the Panel should have any doubt that the interpretation of Article 6.1.1(ii) [of] Codex Stan 94 advanced by the European Communities is correct and considers that it will reach the question of the meaning of Article 6.1.1(ii) of Codex Stan 94, the European Communities invites the Panel to ask the Codex Alimentarius to provide its view of the meaning of this text". This request is reflected in paragraph 4.49 of the descriptive part. In accordance with Article 13 of the DSU, it is the right of the panel to seek or refuse to seek information.[32] In this regard, in *EC — Horme3card, inW6nel to ask the Codex* [32] 6 Tf 24.75 0 TD -0.37-0 Tc 0.1875

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

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

6.12 The European Communities objected to the use of dictionaries as proof of consumer expectations and rejected our assertion in paragraph 7.131 that "the European Communities acknowledged that one of the common names for *Sardinops sagax* is 'sardines' or its equivalent thereof in the national language combined with the country or geographical area of origin". Concerning the first comment, we are of the view that the use of the dictionaries referred to by both parties is *an* appropriate means to examine whether the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name that refers to species other than *Sardina pilchardus*, especially in light of the fact that the *Multilingual Illustrated Dictionary of Aquatic Animals and Plants* was published in cooperation with the European Commission and member States of the European Communities for the purposes of, *inter alia*, improving market

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

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

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

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

[37] We noted that *Grand us*

B. MEASURE AT ISSUE[41]

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

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

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

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

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

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

7.7 Article 6 of Codex Stan 94 reads as follows:

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

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

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

[44] Article 2.1.1 lists the following species:

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

6. LABELLING

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

6.1 NAME OF THE FOOD

The name of the products shall be:

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

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

D. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

7.8 Peru makes the following requests:

(a) Peru requests the Panel to find that the measure at issue, the EC Regulation, prohibiting the use of the term "sardines" to be used in combination with the name of

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

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

E. GENERAL INTERPRETATIVE ISSUES

1. Rules of interpretation

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

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

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

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

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

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

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

F. APPLICABILITY OF THE TBT AGREEMENT

1. Consideration of the EC Regulation as a technical regulation

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

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

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

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

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

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

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

> [T]he "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such

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

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

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

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

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

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

7.32 In *EC — Asbestos*, in determining whether French Decree No. 96-1133 concerning asbestos and products containing asbestos constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, the Appellate Body stated that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole" and concluded that the measure at issue had to be examined as an "integrated whole, taking into account, as ap2nldriate, the

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

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

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

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

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

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

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

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

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

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

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

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

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

[57] *The Cassell Thesaurus Dictionary*, (

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

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

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

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

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

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

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

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

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

[65] The Appellate Body stated in paragraph 69:

> "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain "characteristics", or the document may require, negatively, that products *must not possess* certain "characteristics". In both cases, the legal result is the same: the docu

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

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

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

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

1. Burden of proof

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

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

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

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

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

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

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

the complaining party, that bears the burden of establishing a *prima facie* case by demonstrating that a relevant international standard exists and that this standard was not used as a basis for the technical regulation. At this point, should the European Communities make an assertion to rebut Peru's claims, it carries the burden of establishing that assertion. We note that the European Communities asserted that Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation. According to the Appellate Body, "the burden of proof rests upon the party, whether

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

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

7.54 Article 2.4 of the TBT Agreement states:

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

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

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

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

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

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

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

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

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

3. Whether Codex Stan 94 is a relevant international standard

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

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

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

[73] Appellate Body Report, *EC — Hormones*, para. 128. In *Canada a3i75 55s 68.13 9 Tj 0 -10-12 TD Ttio4 inP T*

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

7.63 International standards are standards that are developed by international bodies. Our starting

7.74 Article 2.4 of the TBT Agreement starts with the language "where technical regulations are required". We construe this expression to cover technical regulations that are already in existence as it is entirely possible that a technical regulation that is already in existence can continue to be

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The European Communities' argument that the "predecessor standard" to Codex Stan 94

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.92 Therefore, we reject the European Communities' argument that Codex Stan 94 is not

paragraph 6.1.2

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

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

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

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

> "Sardines X", *"X" désignant un pays, une zone géographique, l'espèce ou le nom*

7.111 In this regard, the European Communities argued that its Regulation uses Codex Stan 94 as a basis and is therefore consistent with Article 2.4 of the TBT Agreement. Specifically, the European Communities argued that Codex Stan 94 provides that the trade description for species other than *Sardina pilchardus* is to be determined by the country in which the product is sold in accordance with its law and custom. Based on this interpretation of Codex Stan 94, the European Communities argued that because the UK and German laws prescribe that the trade description for *Sardinops sagax*

7.116 Concerning the terms "ineffective" and "inappropriate", we note that "ineffective" refers to something which is not "having the function of accomplishing", "having a result", or "brought to bear",[91] whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting".[92] Thus, in the context of Article 2.4, an ineffective means is a means which does not have

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

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

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

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

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

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

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

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

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

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

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

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

[100] With respect to the post-1989 regulations in the United Kingdom and Germany, we fail to see how these documents could be relevant for our assessment, considering the European Communities' confirmation that its Regulation, which predates both documents, "is the law directly applicable" in all European Communities' member States (EC's Response to Panel Question 42(b)). Thus, if European Communities' member States are to comply with the EC Regulation, it would have been surprising to find member State regulations or guidelines post-1989 which extend the right to use the trade description "sardines" also to products made from *Sardinops sagax*, as this would be clearly inconsistent with Article 2 of the EC Regulation. These documents therefore do not demonstrate that consumers in most member States of the European Communities have always, and in some member States have for at least 13 years, associated ions ibope85 -11.25 e85 -

common name "Pacific pilchards" for *Sardinops sagax.* Thus, United Kingdom consumers did not associate *Sardina pilchardus* exclusively with the common name "sardines", and were able to distinguish

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

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

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

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

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

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

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

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

[108] In light of our finding that the consumers in the European Communities do not necessarily associate sardines exclusively with *Sardina pilchardus*, it is worth noting that the regulation governing tuna and bonito

European Communities and its member States cannot use a common name of the species *Sardinops*

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

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

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

I. JUDICIAL ECONOMY

7.147 In this dispute, Peru requested us to first examine the consistency of the EC Regulation with Article 2.4 of the TBT Agreement. Peru requested that we consider the consistency of the EC Regulation with Article 2.2 of the TBT Agreement only if we were to find that the EC Regulation

a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member

IX. ANNEXES

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

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

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

Having regard to the proposal from the Commission,

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

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

Whereas it must be specified in this context, particularly in order to ensure market transparency, that the products concerned must be prepared exclusively with fish,OF 3Tj 7.5 0 TD /F2980 -12 .249 h9Tj 4l4yd tl

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

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

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

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

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

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

– they must be sterilized by appropriate treatment.

Article 3

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

Article 4

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

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

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

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

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

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

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

Article 5

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

1. olive oil;

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

3. tomato sauce;

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

5. marinade, with or without wine;

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

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

Article 6

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

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

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

   – be readily separable from each other,

   – present no significant breaks in the abdominal wall,

   – present no breaks or tears in the flesh,

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

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

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

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

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

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

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

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

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

Article 7

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

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

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

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

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

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

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

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

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

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

Article 8

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

Article 9

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

It shall apply as from 1 January 1990.

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

Done at Luxembourg, 21 June 1989.

For the Council
The President
C. ROMERO HERRERA

B. ANNEX 2: THE CODEX ALIMENTARIUS COMMISSION STANDARD FOR CANNED SARDINES AND SARDINE

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

2.2 PROCESS DEFINITION

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

2.3 PRESENTATION

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

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

(ii)

4. FOOD ADDITIVES

Only the use of the following additives is permitted.

Additive		Maximum Level in the Final Product
Thickening or Gelling Agents		
(for use in packing media only)		
400	Alginic acid	GMP
401	Sodium alginate	
402	Potassium alginate	
404	Calcium alginate	
406	Agar	
407	Carrageenan and its Na, K, and NH_4 salts (including furcelleran)	
407	Processed *Eucheuma* Seaweed (PES)	
410	Carob bean gum	
412	Guar gum	
413	Tragacanth gum	
415	Xanthan gum	
440	Pectins	
466	Sodium carboxymethylcellulose	
Modified Starches		
1401	Acid treated starches (including white and yellow dextrins)	
1402	Alkaline treated starches	
1404	Oxidized starches	
1410	Monostarch phosphate	
1412	Distarch phosphate, esterified	
1414	Acetylated distarch phosphate	
1413	Phosphated distarch phosphate	
1420/1421		

4Carrageenan and -0.17 Tragacanth gum2 Hydr Twpropyl87 Tw sphated distarcylcel3re f BTj 255 164.25 TD -0.3763 T

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

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

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

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

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

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

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

6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged

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

7.2 SENSORIC AND PHYSICAL EXAMINATION

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

7.3 DETERMINATION OF NET WEIGHT

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

(i) Weigh the unopened container.

(ii) Open the container and remove the contents.

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

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

7.4 DETERMINATION OF DRAINED WEIGHT

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

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

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

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

(iv) Weigh the sieve containing the drained fish.

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

7.5 PROCEDURES FOR PACKS IN SAUCES (WASHED DRAINED WEIGHT)

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

(ii) Open and tilt the container and wash the covering sauce and then the full contents

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

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

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

7.6 DETERMINATION OF HISTAMINE

AOAC 977.13 (15th Edition, 1990)

8. DEFINITION OF DEFECTIVES

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

8.1 FOREIGN MATTER

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

8.2 ODOUR/FLAVOUR

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

8.3 TEXTURE

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

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

8.4 DISCOLOURATION

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

8.5 OBJECTIONABLE MATTER

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

9. LOT ACCEPTANCE

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

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

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

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

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