

**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 Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and Article 14 of the Agreement on Technical Barriers to Trade (the "TBT Agreement"), with respect to Council Regulation (EEC) No. 2136/89 (the "EC Regulation" or "Regulation") laying down common marketing standards for preserved sardines.<sup>1</sup>

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

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

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

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

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

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

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

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<sup>1</sup> WT/DS231/1; G/L/449; G/TBT/D/22, 23 April 2001.

<sup>2</sup> WT/DS231/6, 8 June 2001.

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

Chairperson: Ms. Margaret Liang

Members: Ms. Merit Janow

Mr. Mohan Kumar

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

1.9 The Panel submitted its interim report to the parties on 28 March 2002. On 3 May 2002, the parties requested the Panel to suspend its proceedings in accordance with Article 12.12 of the DSU until 21 May 2002 so as to enable the parties to find a mutually satisfactory solution to the dispute. The Panel agreed to this request.<sup>3</sup> 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	Clupeioidi	Clupeioidi
Family	Clupeidae	Clupeidae
Subfamily	Clupeinae	Clupeinae
Genus	<i>Sardina</i>	<i>Sardinops</i>
Species	<i>Sardina pilchardus Walbaum</i>	<i>Sardinops sagax sagax</i>

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.

<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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*.<sup>6</sup>

2.9 Article 6 of Codex Stan 94 reads as follows:

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<sup>4</sup> The EC Regulation in its entirety is attached as Annex 1.

<sup>5</sup> Codex Stan 94 is attached in its entirety as Annex 2.

<sup>6</sup> Article 2.1.1 lists the following species:

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

"6. LABELLING

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

6.1 NAME OF THE FOOD

The name of the products shall be:

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

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

**III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES**

3.1 Peru makes the following requests:

- (a) Peru requests the Panel to find that the measure at issue, the EC Regulation, prohibiting the use of the term "sardines" combined with the name of the country of origin ("Peruvian Sardines"); the geographical area in which the species is found ("Pacific Sardines"); the species ("Sardines — *Sardinops sagax*"); or the common name of the species *Sardinops sagax* customarily used in the language of the member State of the European Communities in which the product is sold ("Peruvian Sardines" in English or "Südamerikanische Sardinen" in German), is inconsistent with Article 2.4 of the TBT Agreement because the European Communities did not use the naming standard set out in paragraph 6.1.1(ii) of Codex Stan 94 as a basis for its Regulation even though that standard would be an effective and appropriate means to fulfil the legitimate objectives pursued by the Regulation.
- (b) If the Panel were to find that the EC Regulation is consistent with Article 2.4 of the TBT Agreement, Peru requests the Panel to find that the EC Regulation is inconsistent with Article 2.2 of the TBT Agreement because it is more trade-restrictive than necessary to fulfil the legitimate objective of market transparency that the European Communities claims to pursue.
- (c) If the Panel were to find that the EC Regulation is consistent with Articles 2.2 and 2.4 of the TBT Agreement, Peru requests the Panel to find that the measure is inconsistent with Article 2.1 of the TBT Agreement because it is a technical regulation that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.
- (d) If the Panel were to find that the measure at issue is consistent with the TBT Agreement, Peru requests the Panel to find that it is inconsistent with Article III:4 of the GATT 1994 because it is a requirement affecting the offering for sale of imported sardines that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.

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

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

**[Parties' and Third Parties' Arguments in Sections IV and V and Annexes deleted from this version]**

## VI. INTERIM REVIEW<sup>30</sup>

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

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

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

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

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

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

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

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

6.7 The European Communities commented on paragraphs 7.93 to 7.96 where it felt that its position on the understanding of the text of paragraph 6.1.1(ii) of Codex Stan 94 had not been adequately reflected. The European Communities requested us to justify why the European Communities' arguments about the editorial change were not persuasive. The European Communities also asserted that there were differences between the three linguistic versions of Codex Stan 94. Contrary to the European Communities' assertion, we dealt with the European Communities' arguments set out in paragraphs 4.34 and 4.48 and actually explained why we were not persuaded that the negotiating history supported the European Communities' interpretation that Codex Stan 94 allows Members to choose between "X sardines" on the one hand and the common name of the species in accordance with the law and custom of the country in which the product is sold on the other hand. Our reasoning on this issue was in threefold. First, the text of Codex Stan 94 is clear on its face that it provides Members with four alternatives. Second, the deletion of the third alternative and the adoption of the current text indicate that the latter reflects the true intentions of the drafters. Third, that the change is referred to as "editorial" in the minutes of the meeting suggests that both the earlier version and the final text expressed the same view but the final text did so more succinctly. Moreover, we considered that Codex standards are adopted in a procedurally correct manner and were not persuaded that Codex Stan 94 was not adopted in a procedurally correct manner. Concerning the European Communities' argument in respect of the three different linguistic versions, we stated, in paragraphs 7.108 and 7.109 of the findings, that there was no difference between the French and the English text, and that the Spanish version confirmed the view that the name of the species or common name must be added to the word "sardines" and not replace the word "sardines".

Therefore, we reject the arguments made by the European Communities with respect to these paragraphs.

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

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

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

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

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

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

'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*.<sup>35</sup>

6.12 The European Communities objected to the use of dictionaries as proof of consumer expectations and rejected our assertion in paragraph 7.131 that "the European Communities acknowledged that one of the common names for *Sardinops sagax* is 'sardines' or its equivalent thereof in the national language combined with the country or geographical area of origin". Concerning the first comment, we are of the view that the use of the dictionaries referred to by both parties is an appropriate means to examine whether the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name that refers to species other than *Sardina pilchardus*, especially in light of the fact that the *Multilingual Illustrated Dictionary of Aquatic Animals and Plants* was published in cooperation with the European Commission and member States of the European Communities for the purposes of, *inter alia*, improving market transparency. We note that the electronic publication, *Fish Base*, was also produced with the support of the European Commission. In making our finding, not only did we consider carefully dictionaries referred to by both parties but also considered other evidence such as the regulations of several member States of the European Communities, statements made by the Consumers' Association and the trade description used by Canadian exporters of *Clupea harengus harengus* to the Netherlands and the United Kingdom. In our weighing and balancing of the totality of evidence before us, including the examination of the *Oxford Dictionary* referred to by Peru<sup>36</sup> and Canada as well as the *Grand Dictionnaire Encyclopédique Larousse* and *Diccionario de la lengua española* referred to by the European Communities, we were persuaded, on balance, that the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name in the European Communities and that the consumers in the European Communities do not associate the term "sardines" exclusively with *Sardina pilchardus*.<sup>37</sup> For the sake of clarity, we inserted a sentence

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

<sup>36</sup> Peru's First Oral Statement, para. 4.

<sup>37</sup> We noted that *Grand Dictionnaire Encyclopédique Larousse* refers the term "sardine" to *Sardina pilchardus*. We also took note of the fact that the same dictionary states "[o]n trouve des espèces voisines dans

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,<sup>38</sup> 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.<sup>39</sup>

6.15 We are also mindful that we are not "required to accord to factual evidence of the parties the same meaning and weight as do the parties".<sup>40</sup> We did consider the Consumers' Association letter in determining whether the European consumers associate the term "sardines" exclusively with *Sardina pilchardus* but, as stated above, this was not the sole basis on which we made the determination as

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le Pacifique (*Sardinops caerulea*), ainsi que sur les côtes du sud de l'Afrique (*S. sagax*) et d'Australie (*S. neopilchardus*). *Diccionario de la lengua española* defines the term "sardina" as "pez teleosteo marino fisóstomoto, de 12 a 15 centímetros de largo, parecido al arenque, pero de carne más delicada, cabeza relativamente menor, la aleta dorsal muy delantera y el cupero más delicada y el cuerpo más fusiforme y de color negro ayulado por encima, dorado en la cabeza y peteado en los costados y vientre." (emphasis added) These two dictionaries referred to by the European Communities support the view that the term "sardines" is not limited to just *Sardina pilchardus* but includes other species, including *Sardinops sagax*.

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

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

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

other evidence was considered in the overall weighing and balancing process. We therefore do not agree with the European Communities' argument that our approach was partial.

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

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

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

6.19 In light of the above, we reject the European Communities' argument that our assessment was not objective and decline to change our views set out in paragraph 7.132. We have, however, for the sake of clarity, revised the last sentence to state that the term "sardines", either by itself or combined with the name of a country or geographic area is a common name for *Sardinops sagax* in the European Communities. We are obliged to point out, in response to the European Communities' comment that "[t]he assessment of the facts developed by the Panel ... to establish that sardines is a generic term in the territory of the European Communities is not objective", that we stated in Footnote 107 of the findings: "With respect to parties' argument about whether the term 'sardines' is generic, we do not consider it necessary to make a determination on this particular issue".

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

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

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

## VII. FINDINGS

### A. PRODUCTS AT ISSUE

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

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

### B. MEASURE AT ISSUE<sup>41</sup>

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

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<sup>41</sup> 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.

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.<sup>43</sup> 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*.<sup>44</sup>

7.7 Article 6 of Codex Stan 94 reads as follows:

## 6. LABELLING

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

### 6.1 NAME OF THE FOOD

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<sup>42</sup> The EC Regulation in its entirety is attached as Annex 1.

<sup>43</sup> Codex Stan 94 was amended in 1979 and 1989 by adding more species and revised in 1995. Codex Stan 94 is attached in its entirety as Annex 2.

<sup>44</sup> 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*

The name of the products shall be:

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

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

D. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

7.8 Peru makes the following requests:

- (a) Peru requests the Panel to find that the measure at issue, the EC Regulation, prohibiting the use of the term "sardines" to be used in combination with the name of the country of origin ("Peruvian Sardines"); the geographical area in which the species is found ("Pacific Sardines"); the species ("Sardines — *Sardinops sagax*"); or the common name of the species *Sardinops sagax* customarily used in the language of the member State of the European Communities in which the product is sold ("Peruvian Sardines" in English or "Südamerikanische Sardinen" in German) is inconsistent with Article 2.4 of the TBT Agreement because the European Communities did not use the naming standard set out in paragraph 6.1.1(ii) of Codex Stan 94 as a basis for its Regulation even though that standard would be an effective and appropriate means to fulfil the legitimate objectives pursued by the Regulation.
- (b) If the Panel were to find that the EC Regulation is consistent with Article 2.4 of the TBT Agreement, Peru requests the Panel to find that the EC Regulation is inconsistent with Article 2.2 of the TBT Agreement because it is more trade-restrictive than necessary to fulfil the legitimate objective of market transparency that the European Communities claims to pursue.
- (c) If the Panel were to find that the EC Regulation is consistent with Articles 2.2 and 2.4 of the TBT Agreement, Peru requests the Panel to find that the measure is inconsistent with Article 2.1 of the TBT Agreement because it is a technical regulation that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.
- (d) If the Panel were to find that the measure at issue is consistent with the TBT Agreement, Peru requests the Panel to find that it is inconsistent with Article III:4 of the GATT 1994 because it is a requirement affecting the offering for sale of imported sardines that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.

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

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

E. GENERAL INTERPRETATIVE ISSUES

**1. Rules of interpretation**

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

7.12 In *US — Gasoline*, the Appellate Body stated that the fundamental rule of treaty interpretation as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention")<sup>45</sup> 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'".<sup>46</sup> Pursuant to Article 31(1) of the Vienna Convention, the duty of a treaty interpreter is to determine the meaning of a term in accordance with the ordinary meaning to be given to the term in its context and in light of the object and purpose of the treaty.

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

**2. Order of analysis of the claims**

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

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

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

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

<sup>47</sup> Appellate Body Report, *EC — Computer Equipment*, para. 86.

GATT 1994.<sup>48</sup> 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 claim 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.<sup>49</sup> 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.<sup>50</sup>

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

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.

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

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

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

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<sup>51</sup> 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.

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

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

compliance is mandatory. We note that the key part of the definition is that the document has to lay down "product characteristics". In this regard, the Appellate Body in *EC — Asbestos* stated:

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

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

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

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

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<sup>52</sup> Appellate Body Report, *EC — Asbestos*, para. 67.

<sup>53</sup> *Ibid.*, para. 70.

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".<sup>54</sup>

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

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

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

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<sup>54</sup> Appellate Body Report, *EC — Asbestos*, para. 68.

<sup>55</sup> *Ibid.*, para. 64.

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

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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<sup>56</sup> 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.<sup>57</sup> 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"<sup>58</sup> and the term "marking" in turn is defined as "write a word or symbol on (an object), typically for *identification*".<sup>59</sup> The ordinary meaning of the term "naming" is "*identify by name*".<sup>60</sup> 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".<sup>61</sup> In light of the ordinary meaning of the term "label" and based on the European Communities' response, Article 2 of the EC Regulation, in conjunction with Articles 4, 5 and 7, also constitutes a related product characteristic in the form of a

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<sup>57</sup> *The Cassell Thesaurus Dictionary*, (Mackays of Chatham PLC, 1998), pp. 387 and 453.

<sup>58</sup> *Black's Law Dictionary*, (West Publishing Company, 1979, fifth edition), p. 786.

<sup>59</sup> *The New Oxford Dictionary of English*, (Clarendon Press, Oxford, 1998), p. 1132.

<sup>60</sup> *Ibid.*, p. 1229.

<sup>61</sup> EC's Response to Panel Question 7. We note that the label on a sample of sardines submitted as evidence by the European Communities states "Sardines MAROCAINES SANS PEAU & SANS ARÊTES — À L'HUILE D'OLIVE".

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

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*.<sup>63</sup>

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.<sup>64</sup> 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.<sup>65</sup> 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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<sup>62</sup> 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".

<sup>63</sup> EC's Rebuttal Submission, para. 12.

<sup>64</sup> 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.

<sup>65</sup> The Appellate Body stated in paragraph 69:

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

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

7.46 If only characteristics set out in a positive form of an identifiable product can be taken into account in determining whether it constitutes a technical regulation without considering the negative implications stemming therefrom, it would be possible to circumvent the obligations contained in the TBT Agreement. It would be possible to argue that a measure is not the relevant technical regulation on the basis that it does not positively set out product characteristics of the identifiable product although such product would be affected by the negative implications of the technical regulation. Yet, the European Communities makes this argument when it claims that because the EC Regulation lays down product characteristic of preserved *Sardina pilchardus*, it is not a labelling requirement for preserved *Sardinops sagax* and that "the fact that the name 'sardines' cannot be used for products other than preserved *Sardina pilchardus* is in fact simply the logical consequence of the fact that this name is reserved for ... products produced exclusively from preserved *Sardina pilchardus*".<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup> Applying this principle in the context of Article 2.4 of the TBT Agreement, it is Peru, as

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<sup>66</sup> EC's Rebuttal Submission, para. 12.

<sup>67</sup> 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.

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

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

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

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

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<sup>69</sup> Appellate Body Report, *US — Wool Shirts and Blouses*, p. 335.

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

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

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

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

7.54 Article 2.4 of the TBT Agreement states:

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

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

7.56 The general principle of international law embodied in Article 28 of the Vienna Convention is that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." In *Brazil — Desiccated Coconut*, the Appellate Body stated that, in reference to Article 28 of the Vienna Convention, "[a]bsent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force".<sup>72</sup> 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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<sup>72</sup> 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.<sup>73</sup>

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

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

### **3. Whether Codex Stan 94 is a relevant international standard**

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

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

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

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

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

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

7.64 The term "standard" is defined as:

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

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

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

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

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

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<sup>74</sup> We note that the Codex Alimentarius Commission is explicitly referred to in Article 3.4 of the SPS Agreement.

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

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

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

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

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

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

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

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

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

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<sup>75</sup> *Webster's New World Dictionary*, (William Collins & World Publishing Co., Inc., 1976), p. 1199.

<sup>76</sup> EC's Response to Panel Question 6.

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

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

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

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

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<sup>77</sup> *Webster's New World Dictionary, supra*, p. 702.

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

7.78 In our view, Article 2.4 of the TBT Agreement imposes an ongoing obligation on Members to reassess their existing technical regulations in light of the adoption of new international standards or the revision of existing international standards. We do not, however, share the concern expressed by the European Communities that the obligation to amend a technical regulation when a new international standard is adopted would turn standardization bodies into "world legislators" because the nature of the obligation agreed to by Members is circumscribed by four elements. First, the obligation applies only "where technical regulations are required". If a Member does not enact a technical regulation or determines that the technical regulation is no longer required, it need not consider the international standard. Second, the obligation exists only to the extent that the international standard is relevant for the existing technical regulation. Third, if it is determined that a technical regulation is required and the international standard is relevant, Members are to use that international standard "as a basis", which means that Members are to use a relevant international standard as "the principal constituent ... or fundamental principle"<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup> 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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<sup>78</sup> *Webster's New World Dictionary*, *supra*, p. 117.

<sup>79</sup> 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".

<sup>80</sup> A detailed discussion on the meaning of ineffective and inappropriate is set out in paragraph 7.116.

<sup>81</sup> 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",<sup>82</sup> of products can change and technical regulations governing these products are to reflect these changes. The above interpretation is also consistent with the object and purpose of not creating unnecessary obstacles to international trade and one way to achieve that objective is to discontinue technical regulations that no longer serve their purpose or find a less trade-restrictive manner in which the objective can be fulfilled.

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

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

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

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

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<sup>82</sup> *Webster's New World Dictionary, supra*, p. 1056.

the requirements of the Tokyo Round Standards Code when it adopted the Regulation and notified it to the GATT".<sup>83</sup>

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.<sup>84</sup>

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.<sup>85</sup>

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.<sup>86</sup> This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard.

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<sup>83</sup> EC's First Submission, para. 115.

<sup>84</sup> 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.

<sup>85</sup> 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.

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

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

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

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

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

6.1.1 The name of the product shall be:

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

The final version of the text reads:

The name of the product shall be:

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>87</sup> Our examination of paragraph 6.1.1 of Codex Stan 94 is set out in paragraphs 7.103 to 7.109.

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

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

7.102 Paragraph 6.1.1 of Codex Stan 94 reads:

The name of the product shall be:

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>89</sup> *Webster's New World Dictionary, supra*, p. 1564.

<sup>90</sup> *Ibid.*, p. 117.

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

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

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

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

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

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

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

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

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

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

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

and recognized that:

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

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

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<sup>91</sup> *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), p. 786.

<sup>92</sup> *Ibid.*, p. 103.

<sup>93</sup> In this case, we observe that the European Communities has used the terms "ineffective" and "inappropriate" interchangeably throughout its oral and written statements.

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

7.121 Article 2.4 refers to "the legitimate objective pursued". The ordinary meaning of "to pursue" is "to try to obtain or accomplish" and "to aim at".<sup>94</sup> 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".<sup>95</sup>

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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<sup>94</sup> *The New Shorter Oxford English Dictionary*, *supra*, p. 2422.

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

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

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

In most parts of the European Communities, especially in the production countries, the term "sardine" has historically made reference only to the *Sardina pilchardus*.<sup>96</sup> 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<sup>97</sup>) 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.*<sup>98</sup>

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

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

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<sup>96</sup> (footnote original) See Spanish legislation (Exhibit EC-21) and French legislation (Exhibit EC-22).

<sup>97</sup> (footnote original) See Exhibit EC-23.

<sup>98</sup> EC's First Submission, paras. 64-65. Emphasis added.

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

7.128 As indicated above, the European Communities asserted that in most member States the consumer expectations allegedly underlying the EC Regulation existed before the EC Regulation introduced an EC-wide regime. To that effect, the European Communities submitted copies of pre-1989 Spanish and French regulations prescribing the common name "sardines" for products made from *Sardina pilchardus*. The European Communities also submitted copies of the 1981 and 1996 United Kingdom Food Labelling Regulations and a copy of the 2000 German *Lebensmittelbuch*, which the European Communities has described as constituting "only a guideline". These documents prescribe the common name "sardines" for *Sardina pilchardus*, and "Pacific pilchard" or "pilchard" for *Sardinops sagax*. Thus, the European Communities argued that for those four European Communities' member States, domestic regulations reserving the common name "sardines" for *Sardina pilchardus* is to be considered probative of consumer perceptions at that time and thereafter. In other words, governments in those countries would have "codified" consumer expectations in their domestic regulations. Although it may be debatable as to whether this will always be so,<sup>99</sup> we will proceed on the assumption that domestic legislation pre-dating<sup>100</sup> 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.<sup>101</sup> 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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<sup>99</sup> 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".

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

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

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

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

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

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

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

<sup>103</sup> Exhibit Peru-16, p. 8.

<sup>104</sup> EC's First Submission, paras. 63, 140 and 141.

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

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

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

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

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

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

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

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

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

7.137 In light of our considerations above and based on our review of the available evidence and legal arguments, we find that it has not been established that consumers in most member States of the European Communities have always associated the common name "sardines" exclusively with *Sardina pilchardus* and that the use of "X sardines" would therefore not enable the European consumer to distinguish preserved *Sardina pilchardus* from preserved *Sardinops sagax*.<sup>108, 109</sup> 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### I. JUDICIAL ECONOMY

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

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

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

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

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

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

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

<sup>113</sup> Appellate Body Report, *EC — Bananas III*, para. 141.

<sup>114</sup> Appellate Body Report, *US — Wool Shirts and Blouses*, p. 339. Emphasis original.

<sup>115</sup> Appellate Body Report, *US — Wool Shirts and Blouses*, p. 340.

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

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

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

## VIII. CONCLUSIONS AND RECOMMENDATIONS

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

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

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

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<sup>116</sup> Appellate Body Report, *Australia — Salmon*, para. 223.