

**BEFORE THE APPELLATE BODY
OF THE
WORLD TRADE ORGANIZATION**

***EUROPEAN COMMUNITIES – TRADE DESCRIPTION OF SARDINES
(WT/DS231/R – AB-2002-3)***

**APPELLEE SUBMISSION
OF PERU**

Prepared with the Cooperation of the Advisory Centre on WTO Law

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I. INTRODUCTION

A. THE EUROPEAN COMMUNITIES ERRONEOUSLY CLAIMS THAT THE PANEL'S RULINGS CURTAIL THE RIGHT OF MEMBERS TO PURSUE LEGITIMATE REGULATORY OBJECTIVES.

1. On 25 June 2002, the European Communities filed a Notice of Appeal¹ in respect of the Report of the Panel in *European Communities – Trade Description of Sardines* (the “Panel Report”)² On 28 June 2002, the European Communities withdrew this Notice of Appeal³ and filed another Notice of Appeal in revised form.⁴ This is the first time that a WTO Member has taken the unprecedented step of filing different Notices of Appeal in respect of the same dispute. In this submission, Peru intends to show that the European Communities second appeal is not only inadmissible, but is also unfounded.

2. Before the Panel, the European Communities (“EC”) warned of the serious implications that the acceptance of Peru’s arguments would have. The European Communities stated that “[i]f Peru's claims were to be considered founded, . . . [p]eacocks could be sold under the name ‘quails’, and apples under the name ‘peaches’.”⁵ The European Communities asked the Panel to reject Peru’s claims because “... it cannot be an obstacle to trade to require a product to be called by its name. International trade requires products to have names. Perhaps exporters of margarine could sell more of it if they could call it butter. Is this the kind of trade that the WTO is intended to promote?”⁶ The European Communities even went so far as to claim that Peru’s arguments implied that all directly competitive products had to bear the same trade name and that, “[i]f this was the case, apples and oranges, or chicken and turkeys, because in a competitive relationship, should be called in the same way.”⁷

¹WT/DS231/10, 27 June 2002.

²WT/DS231/R, circulated 29 May 2002.

³WT/DS231/11, 4 July 2002.

⁴WT/DS231/12, 4 July 2002.

⁵EC’s first submission to the Panel, para. 4.

⁶EC’s first submission to the Panel, para. 140.

⁷EC’s first submission to the Panel, para. 161.

3. The Panel scrupulously examined all of the arguments of the European Communities and rejected them. On appeal, the European Communities now claims that “[t]he Panel report is legally untenable . . . and, if allowed to stand, will have serious consequences for all Members in relation to the future creation and application of international standards.”⁸ The European Communities asserts that “... the *Sardines* Panel report essentially considers that the rules of the TBT Agreement must be interpreted as having definitively limited State regulatory action when international standards exist”.⁹ This prompts the European Communities to ask: “Is it possible to imagine that WTO Members abandoned so easily their sovereign right to pursue legitimate objectives at the level of protection they consider appropriate without the necessary safeguards that are normally found in the legal system of a state or a customs union?”¹⁰ The European Communities warns the Appellate Body “...not to confine WTO Members within the rigid formula proposed by the Panel in this case because it is unlikely to work in practice. It risks to discourage the very good work done in many international standard setting bodies, such as the Codex Alimentarius Commission, if their voluntary ‘recommendations’ are to be elevated suddenly to the status of hard law ...”¹¹

4. The interpretations that the Panel adopted have none of these implications. The Panel’s interpretations do not assume that WTO Members abandoned their “sovereign right to pursue legitimate objectives at the level of protection they consider appropriate”. The plain fact is that the Panel found the trade description requirement in Council Regulation No. 2136/89 (the “EC Regulation”) to be inconsistent with Article 2.4 because the European Communities does not pursue a legitimate objective with it. The Panel’s interpretations also do not elevate non-binding standards “to the status of hard law”. The Panel’s rulings leave no doubt that WTO Members remain free to deviate from any international standard that is incompatible with legitimate objectives.

5. Given the alarmist tone of the European Communities’ appellant’s submission, Peru would like to recall briefly what is really at stake in this dispute before giving a detailed response to the specific claims of legal error made by the European Communities.

⁸EC’s appellant’s submission, para. 4.

⁹EC’s appellant’s submission, para. 104.

¹⁰EC’s appellant’s submission, para. 108.

¹¹EC’s appellant’s submission, para. 109.

6.

B. THE PANEL’S RULINGS DO NOT CURTAIL THE RIGHT OF MEMBERS TO PURSUE LEGITIMATE REGULATORY OBJECTIVES.

1. THE CODEX STANDARD AT ISSUE

7. At issue in this dispute is the international standard for sardines adopted in 1978 by the Codex Alimentarius Commission of the Food and Agriculture Organisation of the United Nations (“FAO”) (the “Codex Alimentarius Commission”) and the World Health Organisation (“WHO”) as CODEX STAN-94 (the “Codex standard”). The Codex Commission is an internationally recognised authority, open to all Members of the WTO, that develops standards serving as a reference point for consumers, food producers and processors, national food control agencies and the international food trade.¹² The European Communities recognised that the Codex Commission observes “... the same principles of membership and due process that form the basis for WTO membership ...” and that it could therefore “... be considered as developing international standards” within the meaning of the Agreement on Technical Barriers to Trade (the “TBT Agreement”).¹³

8. The naming standard for sardines was developed consistently with the principles of transparency, openness, and consensus. The Codex Alimentarius Commission adopted the naming standard for sardines at its 12th session in 1978 without any opposition from any of the countries present.¹⁴ The countries present included Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Spain, Sweden and the United Kingdom.¹⁵ Thus, all of the present Member States of the European Communities with the exception of Luxembourg actively participated in the decision to adopt this naming standard and none objected to it.

¹²*Understanding the Codex Alimentarius*, at <http://www.fao.org/docrep/w9114e/w9114e00.htm>

¹³Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 21 July 2000, G/TBT/M/20, para. 90.

¹⁴Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission – Rome, 17-28 April 1978, p. 52, para. 369. (Exhibit PERU-14). For further details, see the entries next to 1978 and 1994 in Exhibit PERU-12.

¹⁵Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission – Rome, 17-28 April 1978 pp. 72 – 84 and Appendix I. (Exhibit PERU-14).

9. Paragraph 1 of the Codex standard clarifies that “[t]his standard applies to canned sardines and sardine-type products packed in water or oil or other suitable packing medium”. Paragraph 2 of the Codex standard defines the products covered by that standard and includes the species *Sardina pilchardus* (Walbaum) (“*Sardina pilchardus*”) and *Sardinops sagax*.
10. The labelling of canned sardines is regulated in paragraph 6 of the Codex standard, according to which 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.
11. According to sub-paragraph (i) of paragraph 6.1.1 of the Codex standard, the European Communities may reserve the name “sardines” to products made from the species *Sardina pilchardus*, which is the species of sardines that populates mainly European waters. This provision thus accords the European Communities the privilege of being able to reserve the unqualified use of the term “sardines” to the particular species of sardines primarily found off the European coasts. There is no equivalent provision in the Codex standard that gives other WTO Members the right to reserve the unqualified use of the term “sardines” to the species of sardines found primarily off their own coasts. The standard was therefore obviously drafted to take into account that European consumers associate the name “sardines” with sardines of the species *Sardina Pilchardus*.
12. According to sub-paragraph (ii) of the Codex standard, products made from certain other species of sardines,¹⁶ including the species *Sardinops sagax* found off the coast of Peru, shall be named “sardines” qualified by “X”, where “X” may be the name of a country, a geographic area, the species or the common name of the species. This paragraph was obviously drafted on the basis that European consumers will not be misled if the name of the product indicated that it was made from sardines of non-European origin or of a species other than *Sardina Pilchardus*.

¹⁶These other species are listed in paragraph 2 of the Codex standard.

13. It is clear that, according sub-paragraph (ii) of paragraph 6.1.1 of the naming standard, Peru should be permitted to market products prepared from fish of the species *Sardinops sagax* under the name “sardines” combined with either:
- 14. - the country of origin (“Peruvian Sardines”); or
 - 15. - the geographic area in which the species is found (“Pacific Sardines”); or
 - 16. - the species (“Sardines - *Sardinops sagax*”); or
 - 17. - 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 sardines” in English, or “Südamerikanische Sardinen” in German).

2. THE TECHNICAL REGULATION AT ISSUE

18. In the mid-1990s, the Peruvian companies Austral and Hayduk invested in new production lines in the expectation that they would sell US\$16 million worth of canned sardines to Germany. This investment created 1, 150 jobs. In July 1999, a German company that marketed Peruvian sardines under the label “Pazifische Sardinen” (Pacific sardines), was advised by the competent German authorities that it had to cease marketing the Peruvian sardines under the name “sardines” because according to EC law, only sardines of the species *Sardina pilchardus* could be marketed as “sardines” even if this name was used in combination with an indication of the non-European origin of the product. As a result, the German company cancelled all contracts with the Peruvian exporter.¹⁷ Peru exports its sardines to over 40 different markets. Nowhere except in the European Communities has Peru been prevented from using the term “sardines” in the labelling of its products.¹⁸

19. At the root of the German importer’s problems was Council Regulation No. 2136/89 (the “EC Regulation”), which the European Communities adopted on 21 June 1989 to lay down common marketing standards for preserved sardines. The EC Regulation establishes quality and other requirements that “products . . . marketed as

¹⁷See letter from German importer cancelling contract because of the EC Regulation, (Exhibit PERU-13).

¹⁸See the collection of packages used by Peruvian exporters of sardines, (Exhibit PERU-4).

preserved sardines” must meet. According to Article 2 of that Regulation, one of the characteristics that such products must have is the following:

... they must be prepared exclusively from fish of the species ‘*Sardina pilchardus* Walbaum’ . . .

20. According to the preamble to the EC Regulation, “the adoption of such standards for preserved sardines is likely to improve the profitability of sardine production in the Community”.¹⁹ When the Commission proposed the Regulation to the Council, it was therefore able to report that “all national associations of producers that have been contacted during the preparation of this draft have given a positive opinion of the introduction of such standards”.²⁰

21. It is easy to understand how the EC Regulation increases the profitability of sardine production in the European Communities and why it was favoured by the national associations of producers of products made from *Sardina pilchardus*. In nine European languages the word sardine is commonly used as a generic term covering a range of species of sardines, including *Sardinops sagax*. The common names for *Sardinops sagax* in all European languages consist of the word sardine combined with a geographical indication, such as “Pacific Sardines”. The effect of monopolising the name “sardines” for products made from fish of the species *Sardina pilchardus* is therefore that European consumers of Peruvian preserved sardines cannot be informed in commonly understood terms that the hermetically sealed containers in which these products are offered contain sardines. However, the consumers of products made from *Sardina pilchardus* may be given this information. The monopolisation of the term “sardines” for products prepared from *Sardina pilchardus* consequently accords competitive conditions to those products that are more favourable than those accorded to products prepared from *Sardinops sagax*.

3. THE MAIN PROVISION OF THE TBT AGREEMENT AT ISSUE

22. The part of Article 2.4 of the TBT Agreement that is relevant in this appeal reads as follows:

¹⁹Fifth introductory clause of the EC Regulation.

²⁰Commission of the European Communities COM (89) 211 final Brussels, 27 April 1989, Proposal for a Council Regulation (EEC) laying down marketing standards for preserved sardines (presented by the Commission).

Where technical regulations are required and relevant international standards exist ..., 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. ...

23. It is clear from this provision that international standards are not binding on WTO Members. The requirements set out in Article 2.4 apply only “where technical regulations are required”, in other words, only when a Member decides to adopt a technical regulation. Article 2.4 of the TBT Agreement therefore leaves it to each WTO Member’s discretion whether or not to adopt a technical regulation on the matters covered by international standards. Furthermore, Article 2.4 does not require that the regulations which a Member decides to adopt be brought “into conformity” with the international standards; it is sufficient that a Member uses the relevant standard “as a basis” for its regulation. It is also not necessary to use the whole of the relevant standard as a basis for the regulation; it is sufficient to use the parts relevant to the technical regulation that the Member has decided to adopt.

24. The most important qualification of the obligation set out in Article 2.4 of the TBT Agreement is that Members need not base their regulations on international standards if these are not an appropriate and effective means to fulfil their legitimate objectives. The main purpose of the TBT Agreement is to prevent unnecessary obstacles to international trade and to further the objectives of the General Agreement on Tariffs and Trade 1994 (the “GATT 1994”). Creating obstacles to trade and affording protection to domestic producers are not “legitimate” objectives within the meaning of Article 2.4. Beyond this, the TBT Agreement imposes no constraints on the range of policy objectives that WTO Members may pursue with their technical regulations.

25. It follows from the above that WTO Members are to base their technical regulations on international standards only to the extent that these standards can be reconciled with their freely-determined regulatory objectives. In short, Article 2.4 leaves it to each government to determine its regulatory objectives; it merely imposes constraints as to the instruments used for the realisation of those objectives. The main function of Article 2.4 is to ensure that deviations from international standards are not used to create unnecessary obstacles to trade. Its essential role in the domestic decision-making process leading to the adoption of technical regulations is to help governments prevent protectionist forces from seizing the regulatory process.

4. THE CODEX STANDARD DOES NOT INTERFERE WITH THE LEGITIMATE OBJECTIVES THAT THE EUROPEAN COMMUNITIES CLAIMS TO PURSUE.

(a) Preserving specific and precise trade descriptions for food

26. The European Communities argues that its monopolisation of the term “sardines” for a species of sardines populating European waters implements its legitimate policy of ensuring “precision in the names of foodstuffs”, a policy different from that of other WTO Members which allow a multiplicity of names.²¹ A system whereby a producer can choose its own trade description would undermine this policy. The European Communities submits that the use of the trade descriptions foreseen in the Codex standard in the European Communities would be inappropriate because it would prevent the implementation of this policy.

27. The Codex standard does not interfere with the attainment of this legitimate objective.

28. The Codex standard does not prevent the European Communities from requiring that each product made from sardines bear a precise trade description on which the consumer can rely as a guarantee. The Codex standard specifically permits countries to adopt for each species of sardines a different trade description. If, for instance, canned fish of the species *Sardina pilchardus* are labelled “sardines” and canned fish of the *Sardinops sagax* are marketed as “Pacific sardines”, each of the two products has a precise trade description, consumer expectations are protected, and the Codex standard is met.

29. The European Communities’ approach to the naming of sardines is not only unique to the European Communities but also, within the European Community, unique to this species of fish. The regulation adopted by the European Communities for common marketing standards for tuna and bonito for instance permits Atlantic or Pacific bonito, Atlantic little tuna, Eastern little tuna, black skipjack “and other species of the genus *Euthynnus*” to be called tuna.²² If a wide range of tuna or bonito species can be marketed in the Community under a common standards regime, the objective of which is according to the preamble to this Regulation to protect “consumers as regards the contents of packages” of tuna, it is difficult to understand why sardines should be

²¹EC’s appellant’s submission, para. 9.

²²See Exhibit PERU-15.

subjected to a more restrictive regulatory regime to achieve the objective of precise trade descriptions.

(b) *Consumer protection*

30. The European Communities argues further that prohibiting the use of the term “sardines” for products made from species of sardines other than *Sardina Pilchardus* is necessary because European consumers associate the word sardines with fish of the species *Sardina pilchardus*.

31. The Codex standard does not interfere with the attainment of this legitimate objective.

32. The European consumers, when offered a can labelled “sardines” without any qualification, possibly expect to buy a product made from sardines of the species that populates European waters. This is taken into account in paragraph 6.1.1(i) of the Codex standard according to which the term “sardines” without any qualification may be reserved for that species. However, the European consumers offered a can labelled “Pacific sardines” or “Peruvian sardines” are not misled because they are clearly informed that the product is not prepared from sardines caught in European waters. Article 6.1.1(ii) of the Codex standard reflects this fact by prescribing that products prepared from fish of the species not found in Europe are to be labelled as “sardines” from a country or geographic area or of a species or the common name of the species. Thus, even assuming that the European consumers indeed associate the word ‘sardines’ exclusively with *Sardina pilchardus*, they would not be misled if sardines of the species *Sardinops sagax* are marketed as “Pacific sardines” or “Peruvian sardines”.

33. The European Commission has prepared a “Multilingual Illustrated Dictionary of Aquatic Animals and Plants”.²³ This Dictionary was produced in close co-operation between the Commission, the Member States and national fishery institutes, *inter alia*, for the purpose of enhancing market transparency.²⁴ The Dictionary lists the scientific name of various species of sardines together with the common name of these species in the nine European languages. The common name listed for fish of the species *Sardinops sagax* in all these nine languages consists of the word “sardine” or its equivalent in the national language combined with the name of a country or geographical area. The

²³See Exhibit PERU-5.

²⁴See the foreword by Yannis Paleokrassas, member of the European Commission.

European Communities now claims that the naming of a product in accordance with linguistic conventions that the EC authorities themselves found to exist in Europe could mislead the European consumer. It is noteworthy that the “Consumers’ Association” based in the United Kingdom, the largest of its kind in Europe, concluded that the “[*The EC Regulation*] does nothing to promote the interests of European consumers.”²⁵

34. Neither before the Panel nor in its appellant’s submission does the European Communities provide *any* plausible explanation why it reached a conclusion on this issue different from that reached by:

35. - the experts advising the Codex Alimentarius Commission;

36. - the fourteen EC Member States that participated in the work of the Commission (all except Luxemburg);

37. - the experts of the European Commission that prepared the “Multilingual Illustrated Dictionary of Aquatic Animals and Plants”; and

38. - the Consumers’ Association.

5. THE PANEL CORRECTLY REJECTED THE EUROPEAN COMMUNITIES’ JUSTIFICATIONS.

39. The Panel considered that the monopolisation of the term “sardines” for fish of a species populating mainly European waters is inconsistent with Article 2.4 of the TBT Agreement because the evidence before it demonstrated that this trade description requirement was not adopted to achieve the legitimate objective of consumer protection. The evidence submitted by Peru demonstrated that the monopolisation of the term “sardines” for fish of a species populating mainly European waters served to afford protection to EC producers of sardines at the expense of EC consumers. Article 2.4 imposes essentially only one limitation on the right of Members to adopt technical regulations: the right must not be exercised for protectionist purposes. The Panel found that the European Communities exceeded that limit by adopting a Regulation that, according to its own terms, is designed “to improve the profitability of sardine production in the Community”.

²⁵Open letter of the Consumers’ Association, para. 35. (Exhibit PERU-16).

40. In its 82-page appellant's submission, the European Communities declares virtually every single finding of the Panel to be an error of law. According to the European Communities:

- Article 2.4 of the TBT Agreement should be interpreted to “grandfather” all technical regulations that existed on 1 January 1995 and to require that technical regulations merely have “a substantive **rational relationship**” with international standards rather than being based on them;
- the words “shall use as a basis” must be interpreted to mean “should use as a basis”;
- a WTO Member asserting its rights under Article 2.4 has to demonstrate not only that an international standard exists but also that that standard was adopted in accordance with the rules of procedure of the standardisation body;
- panels, rather than the standardisation bodies themselves, should interpret these rules of procedure;
- panels could not determine the meaning of a standard without seeking an opinion of the body that adopted it, so that the meaning of a standard should be determined by a panel on the basis of an opinion by a body of which the respondent may be a member; and
- the complaining party in a dispute involving Article 2.4 has to prove that the deviation from an international standard is *not* necessary to pursue a legitimate objective, meaning that a complaining party is required to prove a negative and effectively make the enforcement of the rights under that Article impossible.

41. Peru considers that the interpretations of Article 2.4 proposed by the European Communities amount to an amendment of the terms of Article 2.4 of the TBT Agreement that would make ineffective the policies and interests embodied in that provision. The terms of Article 2.4 of the TBT Agreement reflect a carefully negotiated compromise that takes into account both the inherent right of Members to determine their regulatory objectives and the need to ensure that this right is not abused for the purpose of creating

unnecessary obstacles to international trade. The European Communities is inviting the Appellate Body to reassess the wisdom of this compromise on the basis of the views and facts presented by the European Commission and Peru in a dispute on the trade description of one fish. However, such a reassessment can appropriately be done only by the WTO membership as a whole in a decision-making framework in which the values and interests of all Members and the facts available to all of them can be taken into account. The Appellate Body has confirmed on numerous occasions that the balance of rights and obligations reflected in treaty language must be respected. The process of interpretation must therefore be based on the terms actually used in the treaty, not on alleged policy concerns that find no expression in the treaty text. The Panel carefully followed the treaty language of the TBT Agreement. The European Communities is inviting the Appellate Body to depart from it. This is the basic reason why the European Communities' appeal is unfounded.

II. LEGAL ARGUMENTS.

A. THE APPEAL IS INADMISSABLE.

1. THE EUROPEAN COMMUNITIES WITHDREW ITS APPEAL AND RESUBMITTED A NEW NOTICE OF APPEAL.

42. Before addressing the merits of the appeal, Peru challenges the admissibility of the European Communities' second appeal in this dispute.

43. On 25 June 2002, the European Communities filed a Notice of Appeal concerning the Panel Report in *European Communities – Trade Description of Sardines*, complaint by Peru, WT/DS231/R (“the Panel Report”). On 26 June 2002, Peru requested the Appellate Body to make a preliminary ruling pursuant to Rule 16.1 of the Working Procedures for Appellate Review (the “Working Procedures”), and find that four of the nine points raised in this Notice of Appeal do not identify the findings and interpretations alleged by the European Communities to be in error and consequently do not meet the requirements set out in Rule 20(2)(d) of the Working Procedures. Peru pointed out that in the appeal in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body ruled that:

... the “nature of the appeal”, including the “allegations of errors” are sufficiently set out where the notice of appeal *adequately identifies the*

*findings or legal interpretations of the Panel which are being appealed as erroneous.*²⁶ (emphasis added)

44. Peru pointed out that:

In paragraphs (d) and (f), the European Communities alleges that the Panel erred in interpreting Article 2.4 of the *TBT Agreement* and the Codex standard. Since the Panel report deals almost exclusively with the interpretation and application of Article 2.4 of the *TBT Agreement* and the Codex standard, this allegation fails to inform the reader which finding or interpretation of the Panel the European Communities considers to be erroneous. In paragraph (g), the European Communities claims that the Panel committed *several* legal errors but fails to inform the reader what these legal errors are. Paragraphs (d), (f) and (g) therefore do not adequately identify the findings or legal interpretations of the Panel that the European Communities is appealing as erroneous.²⁷

In paragraph (h) the European Communities makes the claim that the Panel failed to make an objective assessment of the matter before it in accordance with Article 11 of [the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”)]. This provision imposes on panels the general obligation to make “an objective assessment of the fact of the case and the applicability of and conformity with the relevant covered agreements”. Every aspect of the Panel’s findings and interpretations is therefore potentially covered by the European Communities’ sweeping allegation of error in paragraph (h). The claim that the Panel failed in its obligations under Article 11 consequently leaves it unclear which findings or legal interpretations of the Panel the European Communities is asking the Appellate Body to review.²⁸

45. In its request, Peru noted that the Appellate Body has recognised that the right to appeal is an important procedural right under the DSU.²⁹ However, the Appellate Body

²⁶WT/DS58/AB/R, adopted 6 November 1998, paras.95-97.

²⁷Request by Peru for a Preliminary Ruling pursuant to Rule 16.1 of the Working Procedures for Appellate Review, 26 June 2002, para. 5.

²⁸Request by Peru for a Preliminary Ruling pursuant to Rule 16 of the Working Procedures for Appellate Review, 26 June 2002, para. 6.

²⁹Appellate Body Report, *United States – Shrimp*, WT/DS58/AB/R, adopted 6 November 2002, para. 97.

has also frequently noted that Article 3.10 of the DSU commits the Members of the WTO to engage in the dispute settlement procedures "in good faith in an effort to resolve the dispute" and that the WTO dispute settlement system can function only if each WTO Member exercises its rights under the DSU in a manner that does not prevent other Members from exercising their rights under the DSU.³⁰ Peru stated that the sufficiency of a Notice of Appeal must therefore be determined in the light of the basic principle of good faith governing the WTO dispute settlement procedures. Accordingly, Peru requested the Appellate Body to exclude these four points from the scope of the appeal.

46. On 27 June 2002, in response to Peru's request, the Appellate Body invited the European Communities and the third parties to submit their comments on the issues raised by Peru by noon on 2 July 2002.

47. On 28 June 2002, the European Communities withdrew its Notice of Appeal "conditional on its right to submit a new Notice of Appeal". On the same day, the European Communities filed a new Notice of Appeal in which it reformulated the points to which Peru had objected in its request for a preliminary ruling. In a letter dated 28 June 2002 addressed to the Presiding Member of the Division hearing this appeal, the European Communities explained it was entitled to withdraw its Notice of Appeal and that it "would then be entitled" to submit a revised Notice of Appeal within the 60-day period for the adoption of a panel report foreseen in Article 16.4 of the DSU.

48. On 1 July 2002, the Appellate Body Division selected to hear and decide the new appeal, which was also the division selected to hear the withdrawn appeal, drew up a Working Schedule for this appeal and communicated it to the participants and third participants. At the same time, the Division communicated to the European Communities and to the third parties a letter in which it decided that "in the light of these developments, neither the European Communities nor the third parties should file written submissions on the issues raised by Peru in its Request for a Preliminary Ruling regarding the Notice of Appeal that has been withdrawn."

49. On 2 July 2002, Peru sent a letter to the Division in which it welcomed the recognition by the European Communities that the errors of law in points (d), (f), (g) and (h) of its original Notice of Appeal were not adequately identified, but objected to the position put forward by the European Communities that the appellant can validly attach

³⁰Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporation"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

conditions to the withdrawal of the appeal and commence a new appellate proceeding on different grounds without the consent of the appellee. Peru stated that there was nothing in the Working Procedures that establishes the right to commence an appeal twice, and that nothing in Rule 30 of the Working Procedures permits the appellant to attach conditions to the withdrawal of an appeal. If an appellant withdraws its appeal subject to conditions, the appeal must therefore be deemed withdrawn irrespective of whether or not the conditions are met. Peru therefore requested the Appellate Body to consider the appeal to be withdrawn and to reject the European Communities' request for a new appellate review proceeding.

50. In response to the above requests, the Appellate Body Division informed the participants and the third parties in a letter dated 2 July 2002, that it intended to conduct the appellate proceedings in conformity with the Working Schedule it had established in response to the European Communities' second Notice of Appeal "without prejudice to the right of the participants and the third participants to present in their submissions arguments relating to the matters raised in your letter dated 2 July 2002".

51. The Division presumably considers the original Notice of Appeal to be withdrawn. If this were not the case, it would not have advised the European Communities and the third participants that comments on Peru's objections to that Notice were no longer required. However, if the original Notice of Appeal is no longer relevant to this appeal, it is not clear to Peru why the European Communities devotes a Section in its appellant submission to justifying the sufficiency of its original Notice of Appeal.³¹ Considering that the European Communities is so convinced that its original Notice of Appeal was sufficient, it is strange that the European Communities saw it fit to withdraw its original appeal, and file a new, expanded Notice of Appeal.

52. Peru also notes that the Division has stated that arguments on this matter can still be presented in the written submissions in this appeal. Peru concludes from this that the Appellate Body Division has not yet decided whether the European Communities was entitled to request a new appellate proceeding. For these reasons, Peru proceeds on the assumption that the European Communities' first appeal is withdrawn and that, notwithstanding the Division's decision to draw up a Working Schedule in response to the European Communities' second Notice of Appeal, the question of whether the

³¹EC's appellant's submission, paras. 230-235.

European Communities is entitled to exercise its right to appeal twice remains to be decided.

2. THE RIGHT TO APPEAL CANNOT BE EXERCISED MORE THAN ONCE IN THE SAME DISPUTE.

53. The position put forward by the European Communities, namely that a Notice of Appeal can be withdrawn and resubmitted in revised form without the consent of the appellee, is legally untenable. According to the Working Procedures, a panel report can only be appealed once. The Working Procedures clearly state that an appeal commences when a Notice of Appeal is filed. There is nothing in the Working Procedures that establishes the right to commence an appeal twice. In the present case, the appellate review proceedings commenced with the filing of a Notice of Appeal by the European Communities on 25 June 2002. Rule 30 of the Working Procedures also makes clear that an appeal can be withdrawn at any time. This was done in the present case by the European Communities through its communication to the Chairman of the DSB dated 28 June 2002. However, nothing in Rule 30 permits the appellant to attach conditions to the withdrawal of an appeal. If an appellant withdraws its appeal subject to conditions, the appeal must therefore be deemed withdrawn irrespective of whether or not the conditions are met.

54. The rules set out in the Working Procedures that establish when an appeal commences and ends must be applied strictly. If an appellant can commence an appeal repeatedly, and if an appellant can withdraw an appeal subject to unilaterally determined conditions, there is immense potential for abuse and disorder in appellate review proceedings. For instance, the appellant could: delay the adoption of a panel report by submitting a new Notice of Appeal each time the panel report is before the DSB; add allegations of error in the light of the arguments of the appellee; or attempt to have a different Division selected for the case or a different date for the oral hearing. As an appeal can be withdrawn at any time during the appellate process, including after the oral hearing, an appellant could in certain circumstances even withdraw its appeal and file a new Notice of Appeal with new allegations of error after having heard the Appellate Body's questions on the original allegations at the oral hearing. Peru is not aware of any domestic appellate review procedure that the same litigant can invoke repeatedly on different grounds. There are no reasons that would justify approaching this matter differently in the WTO.

55. In support of its contentions, the European Communities cites a case in which *all parties to the dispute*, after consulting the Appellate Body, agreed to postpone the date of the commencement of the appeal by withdrawing a Notice of Appeal and resubmitting an identical Notice at a later date.³² Peru notes that a similar procedure was adopted in *United States – Tax Treatment of “Foreign Sales Corporations” (“United States – FSC”)*³³ where the appellant, the United States, withdrew its appeal for scheduling reasons *with the agreement of the European Communities*, which was the appellee in that case. The United States later resubmitted the same identical Notice of Appeal. The parties to a dispute may of course agree to renounce their procedural rights under the DSU and the Working Procedures in order to resolve a procedural problem in a manner convenient to all concerned.³⁴ However, an appellant may not on its own initiative replace an insufficient Notice of Appeal with a reformulated Notice and recommence a new appellate proceeding on the same panel report at a different time and with different claims of legal errors. The case cited by the European Communities, as well as the other case noted above, therefore lend no support to the unilateral approach adopted by the European Communities in the present case.

56. It is regrettable that the European Communities did not correct the insufficiency of its original Notice of Appeal in a more straight-forward manner. Peru made the European Communities aware of its objections to the original Notice at the very moment that it was submitted to the staff of the Appellate Body Secretariat. The European Communities could then have immediately provided the information that was missing in the original Notice and thereby resolved the problem. The Appellate Body could then have reasonably concluded that the full measure of due process to which Peru is entitled under the DSU and the Working Procedures had not been impaired by the European Communities’ original Notice, as it did in the *US – Shrimp* case.³⁵ The legal issue before the Appellate Body would then have been simply whether the *manner in which the*

³²Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, para. 13.

³³Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, para. 4.

³⁴As Peru explains below, the right of the participants in an appellate proceeding to renounce their procedural rights under the Working Procedures is often recognised by the Appellate Body when it permits third parties to attend the oral hearing as passive observer if none of the participants or third participants object. See the cases discussed at [para. below](#).

³⁵Appellate Body Report, *United States – Shrimp*, WT/DS58/AB/R, adopted 6 November 1998, para. 166.

European Communities exercised its right to appeal had impaired Peru's right to due process.

57. However, this is not what the European Communities did. Rather than proceeding in a straightforward and transparent manner, it adopted the completely novel and convoluted approach of withdrawing its appeal and recommencing a new appellate proceeding on the basis of different allegations of error. This approach presupposes *the existence of a fundamental procedural right* that the DSU and the Working Procedures simply do not accord: the right of the same appellant to appeal the same panel report repeatedly on different grounds.

58. Whether a right to repeated appeals exists or not can logically not be made dependent on the consequences of its exercise in a particular case. To illustrate: Article 16 of the DSU permits appeals within 60 days of the circulation of the Panel report. A party to a dispute could not be given the right to appeal on the 61st day on the ground that the delay of one day does not “impair the full measure of due process” to which the appellee is entitled. In the view of Peru, procedural rights can only be created by amendments to the DSU and the Working Procedures. Creating procedural rights on an *ad hoc* basis to address problems caused by one Member of the WTO in an individual case rather than through generally applicable new procedures of which all Members are informed in advance calls into question the principle of equal treatment of all Members of the WTO.

59. Peru believes that opening the door to repeated appeals of the same panel report by the same party would create an immense potential for abuse and disorder in appellate review proceedings. If the Working Procedures had been meant to permit repeated appeals of the same party in respect of the same panel report, they would have established criteria and procedural safeguards designed to prevent abuse. The absence of such criteria and safeguards confirms that the Working Procedures do not provide for repeated appeals by the same party. Such criteria and safeguards could be developed by jurisprudence only at the expense of legal certainty and predictability.

60. The Appellate Body has ruled that the Working Procedures should be read so as to give full meaning and effect to the right to appeal.³⁶ However, the right to appeal is not deprived of meaning and effect if it can only be exercised once. The Appellate Body

³⁶Appellate Body Report, *United States – Shrimp*, WT/DS58/AB/R, adopted 6 November 1998, para. 97.

rightly stated that “the procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes”.³⁷ Only a strict application by the Appellate Body of its own rules governing the commencement of appellate proceedings can ensure that appellate review proceedings do not become an arena for unfortunate litigation techniques that frustrate the objectives of the DSU, and that developing countries such as Peru do not have the resources to deal with.

61. Peru notes further that subsequent to the filing by the European Communities of its second notice of appeal, the Appellate Body requested the European Communities and the third parties not to file responses to Peru’s request for a preliminary ruling. One inference that could be drawn from this is that the Appellate Body has accepted the European Communities’ second appeal. However, this cannot be the case: in the past, when the Appellate Body “added a right” that was not provided for in the Working Procedures, it informed the participants or third participants and proceeded only if there were no objections. This was the case with respect to the creation of “passive observer” status. In particular, while Rule 27(3) of the Working Procedures clearly requires a third party to file a submission in order to attend the oral hearing, in various disputes, participants have been prepared to waive their procedural rights and allow third parties who had not filed written submissions to be “passive observers”.³⁸ Nonetheless, *in each of these circumstances*, the Appellate Body always consulted the participants and third parties before allowing a third party to be a “passive observer”. The Appellate Body has applied the principle that only WTO Members can waive their rights under the DSU and the covered agreements, and that the Appellate Body cannot waive those rights for them. This shows the importance that the Appellate Body accords to the rights of Members.

³⁷Appellate Body Report, *United States – Tax Treatment of “Foreign Sales Corporations”*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

³⁸See Appellate Body Report, *United States – Shrimp*, WT/DS58/AB/R, adopted 6 November 1998; Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, para. 7; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 7; Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb from New Zealand and Australia*, WT/DS177/AB/R; WT/DS178/AB/R, adopted 16 May 2001, paras. 8-9; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)*, WT/DS58/AB/RW, adopted 21 November 2001, Appellate Report Body Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/AB/R, WT/DS175/AB/R, adopted 5 April 2002, para. 12.

62. Peru submits that the procedural issue raised in this appeal, namely, the creation of a second right to appeal, addresses a more fundamental right than the question of passive observer status. The same procedure of informing the participants and third parties on a “no objection basis” could have been followed by the Appellate Body in this case in order to establish whether there were any objections to accepting the European Communities’ second Notice of Appeal. As the Appellate Body did not consult the parties at the time that the second Notice of Appeal was filed, it cannot be concluded that the Appellate Body has accepted the European Communities’ second appeal. Otherwise the Appellate Body would have waived Peru’s procedural rights, which the Appellate Body has no right to do under the DSU or under its Working Procedures.

63. Peru is aware that Rule 16.1 of the Working Procedures allows the Appellate Body to adopt appropriate procedures for the purposes of specific appeals. Peru considers that the circumstances of this case do not allow the Appellate Body to rule that the procedure adopted by the European Communities can be justified under Rule 16.1. Rule 16.1 is supposed to be invoked “in the interests of fairness and orderly procedure in the conduct of an appeal” and not to justify the creation of procedural rights that the DSU does not accord. Peru also notes that Rule 16.1 of the Working Procedures states that procedures under that Rule must not be “inconsistent with the *DSU*, the other covered agreements and these Rules”. For the reasons set out above, Peru considers that the procedure adopted by the European Communities is inconsistent with both the Working Procedures and the DSU.

3. CONCLUSION

64. As explained above, the European Communities has created a situation in which the Appellate Body can rule on the substance of the present appeal only by creating a new procedural right with an enormous potential for abuse, disorder and legal uncertainty for all future appeals. It is deplorable that the European Communities’ unprecedented step has created this dilemma for the Appellate Body. Peru urges the Appellate Body to resolve this dilemma with the integrity of the WTO dispute settlement system in mind and therefore requests the Appellate Body to reject the European Communities’ second appeal.

B. THE APPEAL IS UNFOUNDED

1. THE PANEL CORRECTLY INTERPRETED ARTICLE 2.4 OF THE TBT AGREEMENT.

(a) *The EC Regulation is a technical regulation.*

(i) *The EC Regulation applies to identifiable products.*

65. The European Communities argued before the Panel that, although Article 2 of the EC Regulation provides that the term "sardines" may be used only 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*. The Panel rejected this argument on the following grounds:

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. 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. 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". . . . 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*.³⁹ (footnotes omitted)

66. On appeal the European Communities claims that:

Article 2 of the EC Regulation is drafted in the form of a "positive requirement", namely that "preserved sardines" must be made prepared from *Sardina Pilchardus*, which is actually the fish known as "sardine" in the EC. If, however, this provision was to be regarded as a "negative requirement", it would obviously apply to all products; a tin of beans is just as much prevented from bearing the name

³⁹Panel Report, para. 7.44.-7.45.

preserved sardines as is a tin of preserved *Sardinops sagax* or a tin of anchovies.⁴⁰

67. The European Communities believes that, because of this implication, the Panel's approach cannot be reconciled with the Appellate Body's ruling in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos") that:

A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. . .⁴¹

68. The European Communities concludes from this ruling that a "measure will be considered to be a technical regulation in the sense of the TBT Agreement if, and only if, the products to which it is applied are either identified or identifiable".⁴²

69. The European Communities claims that the Panel:

... has failed to apply (or wrongly applied) the principle that a technical regulation must relate to *identifiable* products and has misunderstood (or misapplied) the principle that technical regulations may specify product characteristics in negative as well as positive terms. This has led the Panel to wrongly qualify the measure at issue as constituting a technical regulation relating to preserved *Sardinops sagax*.⁴³

70. There is no factual basis to this claim of legal error. Contrary to the assertion of the European Communities, the prohibition set out in Article 2 of the EC Regulation does not apply to *any* product but to products clearly identified as "*products . . . marketed as preserved sardines . . .*" These clearly identifiable products must, according to Article 2 of the EC Regulation, have a number of physical characteristics, *inter alia*, that of having been prepared exclusively from fish of the species "Sardina pilchardus (Walbaum)". The products marketed by Peru as preserved sardines do not have the required physical characteristic and are therefore being prevented from being imported in the European Communities. The EC Regulation consequently "lays down product characteristics" for

⁴⁰ EC's appellant's submission, para. 19.

⁴¹ Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, para. 70.

⁴² EC's appellant's submission, para. 35.

⁴³ EC's appellant's submission, para. 27.

products that are clearly identified. Any consumer can identify easily the products marketed as preserved sardines in a supermarket. When the European Commission initiated infringement procedures against Germany for failing to prevent the importation of cans labelled “Pazifische Sardinen”,⁴⁴ it had no difficulty identifying these products as products marketed as preserved sardines.

(ii) *The EC Regulation lays down characteristics for products marketed as sardines.*

71. On appeal, the European Communities asserts that:

The name applied to a product is not however a product characteristic that allows a group of products that are prohibited to be identified. The name applied to a product describes the characteristics of the product. It is not a characteristic in itself. Since the purpose of a name is in fact to *identify* (correctly) the product, it cannot be considered a characteristic in itself without becoming a tautology (“an egg is anything that is called an egg” or “a sardine is anything that the Panel considers to be a sardine”).⁴⁵

72. It is difficult to see the logic of the argument that “the name applied to a product describes the characteristics of the product” and that it is therefore “not a characteristic in itself.” According to Annex 1.1 of the TBT Agreement, any document that lays down product characteristics with which compliance is mandatory is a technical regulation, “*irrespective of the purpose for which the product characteristics are laid down*”. Whether the product characteristics are laid down for the purpose of defining the products that may be sold under a certain name or with a certain label is completely irrelevant. The large variety of purposes that a document prescribing product characteristics may serve is reflected in the provision of Annex 1.1 that states that a “document which lays down product characteristics . . . may . . . include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method”. A regulation that prescribes the characteristics of products marketed under a particular trade name is therefore clearly a “document which lays down product characteristics” and hence a technical regulation as defined in Annex 1.1.

⁴⁴See the answer by Mr. Fischler on behalf of the Commission to a written question by Daniel Varela Suanzes-Carpegna in the Official Journal of the European Communities of 20 March 2001, C89E/15.

⁴⁵EC’s appellant’s submission, para. 43.

73. It is also difficult to understand the relevance of this argument to this dispute. At issue in this dispute is not a technical regulation prescribing a particular name for products made from *Sardinops sagax*. At issue is that part of the EC Regulation that requires that any product marketed as sardines be made from *Sardina pilchardus*. This Regulation could be brought into conformity with Article 2.4 by redefining the products to which it applies, for instance, by limiting its application to products that are marketed as sardines without any indication of their geographical origin or species. It could also be brought into conformity with Article 2.4 by changing the characteristics that the products covered by the Regulation must have, for instance, by permitting that products marketed as sardines may also be made from the other species of sardines. The European Communities would thus not have to prescribe a specific trade name for products made from *Sardinops sagax* to resolve this dispute.

(b) *Article 2.4 of the TBT Agreement applies to regulations adopted before 1995.*

74. Before the Panel, the European Communities argued that Article 2.4 of the TBT Agreement applied only to technical regulations adopted after the entry into force of the WTO Agreement. The Panel rejected this contention, pointing out that 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." The Panel noted that in *Brazil — Measures Affecting 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".⁴⁶

75. The EC Regulation was adopted on 21 June 1989 and the TBT Agreement entered into force on 1 January 1995. 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. The Panel therefore correctly concluded that, absent a contrary intention, the TBT Agreement applies to the EC Regulation. The Panel noted that the TBT Agreement does not reveal any such contrary intentions. It 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.

⁴⁶Appellate Body Report, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, pp. 179-180.

The Panel also noted that 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. For these reasons the Panel found that Article 2.4 of the TBT Agreement applies to measures that were adopted before 1 January 1995 but which have not ceased to exist.

76. On appeal, the European Communities claims that this ruling is in error. According to the European Communities:

Article 2.4 requires WTO Members to *use* existing relevant international standards *as a basis for* drawing up their technical regulations when they decide that these are required. By its clear terms, it therefore only applies to the 'preparation' and 'adoption' of technical regulations, which – in contrast to their 'maintenance' – are "acts or facts which took place, or situations which ceased to exist, before the date of entry into force" of the *TBT Agreement*, within the meaning of Article 28 of the *Vienna Convention*. What is relevant, therefore, for the purpose of interpreting Article 2.4 of the TBT Agreement is the fact that the preparation and adoption of existing technical regulations are acts that took place and now have ceased to exist in the sense of Article 28 of the Vienna Convention, and not that those technical regulations continue to exist.⁴⁷

77. This allegation of error is based on a distinction between the adoption and maintenance of technical regulations that the text of Article 2.4 does not make. The obligation to use the existing international standard as a basis for technical regulations arises, according to the terms of Article 2.4, “*where* technical regulations are required” that is in situations in which the Member considered the adoption of a technical regulation necessary. Contrary to the assertion of the EC, it does not arise “*when* Members consider that they need to introduce technical regulations”.⁴⁸ The temporal element that the European Communities sees in Article 2.4 is simply not there.

78. Contrary to the contention of the European Communities, the terms “use” and “as a basis for” in Article 2.4 do not imply that the obligation under Article 2.4 arises only when a *new* technical regulation is drawn up, drafted or prepared. Of course, Members

⁴⁷EC’s appellant’s submission, para. 59.

⁴⁸EC’s appellant’s submission, para. 62. (emphasis added)

will, as a practical matter, “use” international standards “as a basis for” for their technical regulations by taking them into account in the drafting of the terms of their technical regulations. However, the obligation to use international standards in this manner can be discharged not only by drafting the terms of a *new* regulation but also by drafting the terms of a legal instrument that amends or replaces an existing regulation. The terms “use” and “as a basis for” therefore do not lend support to the European Communities’ contention.

79. The European Communities contends that:

... it was *almost unanimously agreed in literature* that Article 2.2 of the Tokyo Round [TBT Agreement] applied only prospectively, that is it did not covering [sic] existing technical regulations nor did it require existing regulations and standards to be modified. (emphasis added)⁴⁹

80. The European Communities concludes from this that, if the drafters had wanted to deviate from this “almost unanimously agreed” view, they would have expressed this in the text of Article 2.4 of the TBT Agreement.

81. In support of this contention, the European Communities cites the views of *one author*, namely those expressed by Alan Sykes in his book “Product Standards for Internationally Integrated Goods Markets”.⁵⁰ However, the European Communities does not reflect this author’s views accurately. Alan Sykes states that an important limitation on the obligation to use international standards under the Tokyo Round TBT Agreement was that “while it *clearly* applied prospectively, it did not *clearly* require that existing standards and regulations be modified.”⁵¹ (emphasis added). The author however concludes that this ambiguity was resolved by the drafters of the Uruguay Round TBT Agreement because the text of that Agreement:

... makes clear that the obligation to use international standards extends to pre-existing regulations, not just new ones – a signatory may ask another signatory to justify any regulation that it is “preparing, adopting *or applying*”, and that such justification must

⁴⁹EC’s appellant’s submission, para. 68.

⁵⁰The Brookings Institute, Washington, 1995.

⁵¹A. Sykes, “Product Standards for Internationally Integrated Goods Markets”, p. 71.

include an explanation for a decision not to use international standards.⁵² (emphasis added)

82. Just as the Panel did,⁵³ Alan Sykes thus concludes that the references in the TBT Agreement to the *application* of regulations confirm that it was meant to extend to regulations that were adopted before 1 January 1995. As Alan Sykes points out, Article 2.5 of the TBT Agreement obliges Members “preparing, adopting *or applying* a technical regulation” to explain the justification for a technical regulation in terms of Article 2.4. A technical regulation can only be applied if it is in existence. If Article 2.4 were meant to cover only new regulations, as claimed by the European Communities, the drafters of the new requirement set out in Article 2.5 would have required an explanation in terms of Article 2.4 only for Members that prepare or adopt technical regulations.

83. The European Communities claims that, “in the absence of a clear indication in the text of Article 2.4, the Members of the WTO cannot be assumed to have by accident or oversight imposed such an onerous obligation on themselves which in any case they were technically and materially impossible to meet on 1 January 1995”.⁵⁴ This assertion calls for a number of comments.

84. The exemption of existing domestic law from treaty obligations can create significant imbalances in the rights and obligations of the parties to a treaty and therefore needs to be carefully negotiated. This fact is reflected in Article 28 of the Vienna Convention, which requires the treaty interpreter to assume that a “grandfathering” of existing domestic law was not agreed. Most of the clauses in the WTO agreements that exempt existing domestic law contain time-limits, notification requirements and other procedural safeguards that confine the resulting imbalances.⁵⁵ Here, the European Communities is suggesting that the drafters of the TBT Agreement exempted all existing technical regulations without any time limit, notification requirement and other procedural safeguard. This cannot be assumed to have been the intention of the negotiators of a WTO agreement.

⁵²A. Sykes, “Product Standards for Internationally Integrated Goods Markets”, p. 71.

⁵³Panel Report, para. 7.75.

⁵⁴EC’s appellant’s submission, para. 70.

⁵⁵Examples are: Article 5 of the Agreement on Trade-Related Investment Measures and Article 28 of the Agreement on Subsidies and Countervailing Measures.

85. Most of the clauses in the WTO agreements that exempt existing domestic law have been drafted for the benefit of developing countries.⁵⁶ Here, the European Communities is proposing that an exemption be carved out by interpretation that would tend to favour the developed countries, most of which had extensive technical regulations, over the many developing countries that are still in the process of adopting technical regulations. This also cannot be assumed to have been the intention of the negotiators of a WTO agreement.

86. As to the European Communities' assertion that it was technically and materially impossible to meet the obligations under Article 2.4 on 1 January 1995, it should be pointed out that, on that date, virtually all developed contracting parties to the GATT 1947 were party to the Tokyo Round TBT Agreement, which had been in force for over a decade and contained a provision similar to that of Article 2.4 of the TBT Agreement.⁵⁷ Under these circumstances, how can the European Communities claim convincingly that it was technically and materially impossible for it to meet the obligations under Article 2.4 of the TBT Agreement on 1 January 1995? No new "onerous" obligation "technically and materially impossible to meet" has been invoked by Peru in this dispute. The fact is that the European Communities had already violated a treaty obligation to use international standards as a basis for technical regulations when it adopted its Regulation on sardines in 1989 and it continued to do so by maintaining that Regulation after 1 January 1995.

(c) *The Panel's interpretations do not render international standards mandatory.*

87. The European Communities claims in various parts of its submission that the Panel's interpretation of Article 2.4 unduly curtails the regulatory autonomy of the Members of the WTO. Thus, the European Communities concludes that "... the *Sardines* Panel report essentially considers that the rules of the TBT Agreement must be interpreted as having definitively limited State regulatory action when international standards exist".⁵⁸ The European Communities warns the Appellate Body:

⁵⁶See for instance, Article 15 of the Agreement on Agriculture, Article 28 of the Agreement on Subsidies and Countervailing Measures, and Article 65 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

⁵⁷See Article 2.2 of the Tokyo Round Agreement on Technical Barriers to Trade (BISD 26S/8,10)

⁵⁸EC's appellant's submission, para. 104.

... not to confine WTO Members within the rigid formula proposed by the Panel in this case because it is unlikely to work in practice. It risks to discourage the very good work done in many international standard setting bodies, such as the Codex Alimentarius Commission, if their voluntary ‘recommendations’ are to be elevated suddenly to the status of hard law, with the burden of proving the justification for a measure aiming at a higher level of consumer protection placed squarely and entirely on the regulatory authorities of the Member wishing to adopt such legitimate measures.⁵⁹

88. If these were indeed the consequences of the Panel’s interpretations, Peru would be just as concerned as the European Communities is. However, the Panel’s interpretations do not imply that WTO Members abandoned their “sovereign right to pursue legitimate objectives at the level of protection they consider appropriate”⁶⁰. The plain fact is that the Panel found the trade description requirement in the EC Regulation to be inconsistent with Article 2.4 because the European Communities does not pursue a legitimate objective with it. There is nothing in the Panel report that could be interpreted to interfere with the European Communities’ right to pursue legitimate regulatory objectives. The Panel did not elevate non-binding standards “to the status of hard law”. It explicitly acknowledged that WTO Members are under no obligation to adopt regulations in the areas covered by international standards and are entitled to adopt regulations that deviate from international standards for any regulatory purpose.

89. The following rulings of the Panel speak for themselves:

... 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

⁵⁹EC’s appellant’s submission, para. 109.

⁶⁰EC’s appellant’s submission, para. 112.

to use a relevant international standard as "the principal constituent ... or fundamental principle" 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. 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. Thus, a judicious application of the obligations contained in Article 2.4 provides assurances against the over-reaching implied by the European Communities.⁶¹ (footnotes omitted)

- (d) *The Codex standard is a relevant international standard.*
- (i) *The TBT Agreement covers also documents that are not based on consensus.*

90. The Panel ruled that:

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.

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. This provision therefore confirms that even if not

⁶¹Panel Report, para. 7.78.

adopted by consensus, an international standard can constitute a relevant international standard. (footnote omitted)⁶²

91. In view of this finding, the Panel refrained from ruling on the question of whether the Codex standard had in fact been adopted by consensus. It simply stated that “[t]he record does not demonstrate that Codex Stan 94 was not adopted by consensus. In any event, we consider that this issue would have no bearing on our determination in light of the explanatory note of paragraph 2 of Annex 1 of the TBT Agreement which states that the TBT Agreement covers ‘documents that are not based on consensus’”.⁶³

92. The European Communities appeals this finding as an error of law. According to the European Communities, the only logical and reasonable interpretation of the second last sentence of the explanatory Note is that the reference to consensus in that Note was intended to clarify that consensus in the TBT Agreement is relevant only for the standards prepared by the international organizations, not for any other kind of “documents” coming from so many other different sources.⁶⁴ Peru submits that what the European Communities describes as the “only logical and reasonable interpretation” amounts to a rewriting of the text of Annex 1.2.

93. Annex 1.2 of the TBT Agreement defines “standard” as “a document approved by a recognised body”, etc. In the explanatory Note to this provision, the drafters first made the factual statement that “standards prepared by the international standardisation community are based on consensus” but immediately thereafter clarified that “this Agreement covers also documents that are not based on consensus”. The only logical and reasonable conclusion that can be drawn from these two sentences is that the drafters wished to note the practice of consensus making of the international standardisation bodies but at the same time clarify that consensus-making was not an absolute requirement. The reason for this precaution is obvious: they wanted to avoid creating the possibility that an individual WTO Member can single-handedly prevent a standard from being covered by the TBT Agreement simply by forcing the international standardisation body to adopt or revise a standard by a vote.

94. The European Communities claims that the Panel’s interpretation would extend the obligations under Article 2.4 to standards “adopted on a voluntary basis by a few

⁶²Panel Report, para. 7.89-7.90.

⁶³Panel Report, footnote 86.

⁶⁴EC’s appellant’s submission, para. 126.

countries or experts and without consensus.”⁶⁵ This concern is unjustified because the Members of the WTO have not only the means but are also committed to prevent this from happening.

95. “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”. This ensures that the obligations under Article 2.4 of the TBT Agreement apply only to standards adopted by bodies in which each Member of the WTO can participate. In a decision adopted by the Committee on Technical Barriers to Trade, all Members of the WTO committed themselves to ensure that all international standards are adopted, and if necessary revised, in accordance with the principles of transparency, openness, impartiality, consensus, effectiveness and relevance.⁶⁶ This commitment complements the formal obligation assumed by Members under Article 2.6 of the TBT Agreement to play a full part in the preparation of international standards. There is consequently no reason to fear that WTO Members have to face standards adopted over their opposition by “a few countries or experts”.

96. There is no doubt that consensus-based adoption of international standards is extremely important to ensure that the values and interests of all WTO Members are reflected in these standards. However, it is also important to ensure that the international standardisation process is not hampered by decision-making requirements that lend themselves to abuse. Technical standards need to be constantly reviewed and adjusted by the international standardisation bodies to take into account technological and other changes. An absolute consensus requirement would entail the risk that the many of the standards covered by Article 2.4 of the TBT Agreement are out-of-date and therefore no longer reflect the values and interests of all WTO Members.

97. The terms of the last two sentences of Annex 1.2 are carefully negotiated treaty language reflecting a delicate compromise on an extremely complex issue. The European Communities is inviting the Appellate Body to reassess the wisdom of this compromise on the basis of the views and facts presented by the European Commission and Peru in a dispute on the trade description of one fish. However, such a reassessment can

⁶⁵EC’s appellant’s submission, para. 127.

⁶⁶Committee on Technical Barriers to Trade, SECOND TRIENNIAL REVIEW OF THE OPERATION AND IMPLEMENTATION OF THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE, 13 November 2000, (G/TBT/9, Annex 4).

appropriately only be done by the WTO membership as a whole in a decision-making framework in which the values and interests of all Members and the facts available to all of them can be taken into account. The Appellate Body has confirmed on numerous occasions that the balance of rights and obligations reflected in treaty language must be respected. The process of interpretation must therefore be based on the terms actually used in the treaty, not on speculations about drafters' objectives that finds no expression in the final text, or policy concerns that the text does not address.

(ii) *The Codex standard was adopted by consensus.*

98. Rule X of the Rules of Procedure of the Codex Alimentarius Commission states:

The Commission shall make every effort to reach agreement on the adoption or amendment of standards by consensus. Decisions to adopt or amend standards may be taken by voting *only if* such efforts to reach consensus have failed.⁶⁷ (emphasis added)

99. Further, the Guidelines for Codex Committees state:

The chairpersons should always try to arrive at a consensus and should not ask the Committee to proceed to voting if agreement on the Committee's decision can be secured by consensus.⁶⁸

100. The Chairman of the Codex Commission, Thomas J. Billy, emphasized this point in his remarks at the Commission meeting in July 2001 when he stated that: "...it is also important to remember that Codex does operate by consensus and it is only through reaching consensus that we are able to ensure acceptance by all member countries of Codex."⁶⁹

101. There can, for these reasons, be no doubt that Codex standards are, in principle, to be adopted in accordance with the principle of consensus as it is understood in the WTO. In the TBT Committee, the European Communities stated that only the standards of international bodies with international treaty status that respect the same principles of

⁶⁷*Codex Alimentarius Commission, Procedural Manual* (11th ed.), Rules of Procedure of the Codex Alimentarius Commission, Rule X, para. 2, at p. 15 (Exhibit CDA-9).

⁶⁸*Codex Alimentarius Commission, Procedural Manual* (11th ed.), Guidelines for Codex Committees, para. 21, p. 57 (Exhibit CDA-10).

⁶⁹Remarks by Thomas J. Billy, conclusion of Codex Commission Meeting, 2 - 7 July 2001, available at: http://www.fsis.usda.gov/OA/speeches/2001/tb_codex070601.htm (Exhibit CDA-11).

membership and due process that form the basis for WTO membership should be recognised as international standards in the WTO context. The European Communities stated further that the Codex Alimentarius Commission meets these criteria and that it could therefore be considered as developing international standards within the meaning of the TBT Agreement.⁷⁰

102. The Codex Commission also followed the principle of consensus in the adoption of the Codex standard at issue in this dispute. The report of the Codex Alimentarius Commission on the meeting at which the standard was adopted records leaves no doubt that it was adopted without a vote.⁷¹

103. It follows from the above that the Codex Commission observes the principle of consensus, that the European Communities has recognised that the Commission is developing international standards within the meaning of the TBT Agreement and that the standard at issue in this dispute was adopted by consensus. By asking the Appellate Body to rule that standards which have not been adopted by consensus are not covered by the TBT Agreement, the European Communities is therefore asking the Appellate Body to make a ruling on an issue that need not be resolved to settle the present dispute.

(e) The Panel correctly interpreted and applied the terms "as a basis for".

104. The Panel correctly found that "basis" means "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".⁷² The Panel therefore concluded that the European Communities could be deemed to have used the Codex standard as a basis for its Regulation only if it used it as the principal constituent or fundamental principle for the purpose of enacting its technical regulation governing preserved sardines.⁷³

105. The European Communities claims on appeal that:

It is not . . . the dictionary meaning of the words "use" and "basis" that should provide the test in this case, as the Panel erroneously held, but

⁷⁰Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 21 July 2000, G/TBT/M/20, para. 90.

⁷¹Exhibit PERU-14, p. 52, para. 369.

⁷²Panel Report, para. 7.110.

⁷³Panel Report, para. 7.110.

rather the qualitative aspect of the substantive relationship that should exist between the relevant international standard and the technical regulation of the Member in question. In other words, it is not whether the technical regulation used the Codex Stan 94 as "the principal constituent or fundamental principle" for the purpose of enacting the Regulation in question, but whether there is a rational relationship between them on the substantive aspects of the standard in question.

Clearly, the substantive relationship between them is informed by the legitimate objectives pursued by the technical regulation and its place in the legal system of the Member in question. In view of the objectives of consumer protection, market transparency and fair competition pursued by the EC Regulation in question, the European Communities considered that the name "sardines" should be reserved only for *sardina pilchardus*. Such use of part only of the Codex Stan 94 is allowed by Article 2.4 TBT and is explicitly foreseen in paragraph 6.1.1(i) of the standard. The Panel, therefore, was wrong in finding that the Regulation in question did not have a substantive rational relationship with the Codex standard.⁷⁴

106. The European Communities does not explain according to what interpretative principle the terms "as a basis for" could be given the meaning "having a substantive rational relationship". Their ordinary meaning is not "having a substantive rational relationship" and they cannot be given that meaning in the light of their context and the object and purpose of the TBT Agreement. Here again, the European Communities is requesting the Appellate Body to rewrite a central provision of the TBT Agreement. The European Communities should turn to the membership of the WTO with this request and not to the Appellate Body.

107. The European Communities argues that reserving the name "sardines" for fish of the specie *Sardina Pilchardus* has "a substantive rational relationship" with the Codex standard because its paragraph 6.1.1(i) specifically provides for this. The arguments of the European Communities rest on the assumption that the "use of part only of the Codex Stan 94 is allowed by Article 2.4 TBT". However, this provision makes clear that Members shall use "the relevant parts" of international standards. The relevant part here is paragraph 6.1.1(ii). What would need to be established according to the European Communities' own arguments is thus a rational and substantive relationship between

⁷⁴EC's appellant's submission, paras.150-151.

paragraph 6.1.1(ii) of the Codex standard and the European Communities' prohibition against using the term «sardines» in combination with the name of a country or a geographical or the species or the common name. There is, however, no relationship between paragraph 6.1.1(ii) and that prohibition which can be described as “substantive” or “rational”.

108. The European Communities further claims that “despite its finding that ‘use as a basis’ does not mean ‘conform to or comply with’, the Panel applied the ‘as a basis’ test in this case in such a narrow and restrictive manner as to make it, in reality, equivalent to the ‘conform to or comply with’ test.”⁷⁵

109. There is no basis for this claim. There is not a single element of the standard foreseen in paragraph 6.2.1 (ii) of the Codex standard that is reflected in the EC Regulation. The fact of the matter is that the European Communities, by monopolising the term «sardines» for fish of the species *Sardina pilchardus*, deliberately frustrated the basic objective of the Codex standard, which is to permit the use of the term «sardines» with appropriate geographical or other qualifications for fish of species other than *Sardina pilchardus*. By ruling that a technical regulation which completely frustrates the basic objective of the relevant part of the Codex standard was not based on that standard, the Panel therefore did not use the ‘as a basis’ test in such a narrow and restrictive manner as to make it equivalent to the ‘conform to or comply with’ test. The Appellate Body should therefore reject the European Communities’ unsubstantiated claim.⁷⁶

(f) *The Panel correctly allocated the evidentiary burden.*

110. The European Communities claims that the Panel incorrectly allocated to the European Communities the burden of proving that the use of the Codex standard was not an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued by the European Communities. The European Communities argues that the

⁷⁵EC’s appellant’s submission, para. 150.

⁷⁶ In footnote 52 of its appellant’s submission, the European Communities also asks the Appellate Body to interpret the words “shall use as a basis” to mean “should use as a basis” on the grounds that “the word ‘shall’ may sometimes imply an exhortation rather than a strict legal obligation”. The European Communities submits that “this is what the Appellate Body held in the EC –Hormones case ...at para. 165 with regard to Article 3.1 of the SPS Agreement that also contains the word ‘shall’”. Peru would, however, like to point out that in the EC – *Hormones* case cited by the European Communities, the Appellate Body was not called upon to interpret the word shall, but the words “based on”.

Panel failed to qualify which elements of Article 2.4 need to be proved by whom, failed to conduct an analysis of Article 2.4, and “limited itself to establish that the burden of demonstrating that the international standard concerned was ‘ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued upon the European Communities’⁷⁷.

111. The Appellate Body should reject the European Communities’ appeal, and find that the Panel correctly articulated and applied the principles on burden of proof in this dispute. The Panel explained at length its allocation of the burden of proof under Article 2.4 of the TBT Agreement, and stated:

... [I]n the context of Article 2.4 of the TBT Agreement, it is Peru, as 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". 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. (footnotes omitted)⁷⁸

112. Peru considers that this was a correct application of the principle of burden of proof in WTO dispute settlement proceedings. The Panel applied the principle enunciated by the Appellate Body, namely, that the party asserting the affirmative of a particular claim or defence has the burden of proving its claim.⁷⁹ Pertinently, the Panel applied this principle in the context of the wording of Article 2.4 of the TBT Agreement, which is the provision at issue in this dispute. Peru submits that the question of the

⁷⁷EC’s appellant’s submission, para. 190.

⁷⁸Panel Report, para. 7.56.

⁷⁹*United States – Measure Affecting Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, DSR, 1997:I, pp. 15-16.

distribution of the evidentiary burden should not be considered in the abstract, but in the context of the provision at issue in a dispute. Consequently, in allocating the burden of proof, the Panel correctly examined the text of Article 2.4, which 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.

113. It is clear from the wording of this provision that there are two components to Article 2.4. The first part of Article 2.4, which states “[w]here 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...” imposes a positive requirement on WTO Members requiring technical regulations measures to base those technical regulations on relevant international standards. The second part, which states: “except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued ...” does not provide a positive rule but a limited exception to the requirement in the first part.

114. Article 2.4 is therefore expressed in the form of a positive requirement and an exception. Any complaining party alleging a violation of the positive requirement in the first part of Article 2.4 will have to show: that a technical regulation has been taken by the responding member; that a relevant international standard exists, or its completion is imminent, in respect of that regulation, and that the responding Member failed to base its technical regulation on that standard. The second part of Article 2.4 is not a positive requirement, and no claim of violation can be made in respect of it. This part of Article 2.4 is expressed in the form of an affirmative defence, which means that a Member departing from a relevant international standard must show that the relevant international standard is not applicable to its peculiar set of circumstances. It is instructive that among the justifications listed are “fundamental climatic or geographical factors or fundamental technological problems”. This shows that the second part of Article 2.4 addresses itself to matters that are specific to the responding Member and within the knowledge of that Member. Accordingly, it is illogical to ask the complaining party to carry the burden of proof in respect of the second part of Article 2.4.

115. This reading of the second part of Article 2.4 finds support in the jurisprudence of the Appellate Body. The Appellate Body has characterised “exceptions” in other covered agreements as affirmative defences and stated that the burden of proof in respect of such defences rests with the responding Member invoking the exceptions. Thus the Appellate Body stated:

Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.⁸⁰

116. In *United States – FSC*, the Appellate Body interpreted the fifth sentence of Footnote 59 of the Agreement on Subsidies and Countervailing Measures (the “SCM – Agreement”) as follows: “As the fifth sentence of footnote 59 to the SCM Agreement *constitutes an exception* to the prohibition on export subsidies, great care must be taken in defining its scope.”⁸¹ (emphasis added). The Appellate Body stated further:

... as we indicated in *US – FSC*, the fifth sentence of footnote 59 *constitutes an affirmative defence* that justifies a prohibited export subsidy when the measure in question is taken “to avoid the double taxation of foreign-source income”. *In such a situation, the burden of proving that a measure is justified by falling within the scope of the fifth sentence of footnote 59 rests upon the responding party.*⁸² (emphasis added)

117. The Panel correctly considered that the second part of Article 2.4 deals with motives and facts that are privy to the Member taking a technical regulation. The Panel stated:

⁸⁰*United States – Measure Affecting Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, DSR, 1997:I, pp. 15-16. The Appellate Body has applied this principle by requiring responding Members in disputes relating to Article XX of the GATT 1994 to bear the burden of proving that their measures fall within one of the sub-paragraphs of Article XX, and that these measures are not applied inconsistently with the chapeau of that Article. See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996; Appellate Body Report, *United States – Shrimp*, WT/DS58/AB/R, adopted 6 November 1998.

⁸¹Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, para. 140.

[W]e 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.⁸³

118. To accept the argument of the European Communities would be to require a complaining party to explain that the deviation from an international standard is not necessary to pursue a legitimate objective, which would mean requiring a complaining party to prove a negative. Moreover, accepting the European Communities' argument would mean that the complaining party would have to speculate on the legitimacy of the objectives pursued. Peru notes the argument made by the European Communities that the legitimate objectives are normally found in the measures itself, in this case in the preamble of the EC Regulation.⁸⁴).

119. However, it would be unrealistic to distribute the burden of proof under Article 2.4 on the assumption that WTO Members always indicate in the regulation itself the legitimate objectives they are pursuing. For instance, the preamble of the EC Regulation does not indicate one of the objectives invoked by the European Communities in this dispute, namely the objective of specific and precise trade descriptions for food products. On the other hand, the preamble states the objective of improving the profitability of European sardine production, which, however, the European Communities does not claim to be the objective of the monopolisation of the name "sardines" for a species of fish populating European waters.

120. Accordingly, it is only logical that the responding Member should carry the burden of proving that its departure from the international standard is necessary to pursue the legitimate objectives. This preserves an important legitimate right of the responding Member: the right to indicate which legitimate objective it is pursuing with the regulation, and why it could not use the international standard as a basis for this

⁸²Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* – Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW, adopted 14 January 2002, para. 133.

⁸³Panel Report, para. 7.51.

⁸⁴EC's appellant's submission, para. 198.

regulation. Thus, the responding Member determines the policy objectives and the policy constraints against which the Panel evaluates the measure.

121. Article 2.5 of the TBT Agreement provides useful context for understanding the considerations behind the second part of Article 2.4. Article 2.5 states:

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

122. The considerations discussed above, and addressed by the Panel, prompted the drafters of Article 2.5 of the TBT Agreement to impose upon the Member applying the technical regulation the burden of explaining the justification for that technical regulation in terms of Article 2.4. Clearly, the terms of Article 2.5 relate to a pre-dispute settlement situation and therefore do not establish a rule for the allocation of the burden of proof. However, Article 2.5 does reflect the principle that also applies in dispute settlement proceedings, namely, the principle that a party to a dispute cannot be asked to prove the negative, and that the initial burden of making a *prima facie* case must therefore be placed on the party that asserts the affirmative.

123. If the evidentiary burden under Article 2.4 were distributed as suggested by the European Communities, Members adversely affected by technical regulations could no longer assert their rights under that provision because they would have the burden of identifying motives and demonstrating facts that are privy to the regulating Member. The burden of proof would therefore be such as to effectively enfeeble the policies and interests embodied in Article 2.4. What the European Communities proposes is essentially an amendment of a basic provision of the TBT Agreement in the guise of a burden of proof rule that would render the enforcement of Article 2.4 virtually impossible. The Appellate Body should dismiss this appeal: the dispute settlement system of the WTO serves only to clarify the covered agreements and to preserve the existing rights and obligations of Members. Proposals to introduce fundamental changes in the negotiated balance of rights and obligations should be made in trade negotiations in which the values and interests of all Members can be taken into account.

124. Finally, Peru would like to add that, here again, the European Communities is raising an issue that need not be decided to settle this dispute. If the Appellate Body sustains the European Communities' appeal and finds that the Panel incorrectly allocated the burden of proof, it would need to take into account that, even if the burden of proof

were on the complaining party, Peru still adduced evidence sufficient to show that the Codex Standard is not ineffective or inappropriate to fulfil the legitimate objectives of the EC Regulation. During the panel proceedings, the European Communities indicated which objectives it was pursuing with its Regulation, and explained why the Codex standard was not an effective and appropriate means to fulfil those objectives. Peru in turn presented evidence that those objectives could be achieved with a regulation based on Codex standard. The Panel considered evidence presented by Peru on these matters to be conclusive and therefore ruled 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”.⁸⁵ Accordingly, Peru requests the Appellate Body to dismiss the European Communities’ appeal.

125.

126.

2. THE PANEL MADE AN OBJECTIVE ASSESSMENT OF THE FACTS.

(a) The European Communities’ allegations of error.

127. The European Communities argues that the Panel “exceeded the bounds of its discretion as the trier of facts”⁸⁶ and thus failed in its obligation to make an objective assessment of the matter before it under Article 11 of the DSU. In particular, the European Communities considers that the Panel:

- failed in its duty to establish the facts by refusing to request information about the Codex standard from the Codex Commission;⁸⁷
- made arbitrary and improper use of, and distorted the meaning of, definitions in dictionaries;⁸⁸

⁸⁵Panel Report, para. 7.138.

⁸⁶EC’s appellant’s submission, para. 209.

⁸⁷EC’s appellant’s submission, paras. 222-223.

⁸⁸EC’s appellant’s submission, paras. 211-214.

- ignored the evidence concerning the actual names given to sardine-type products in the European Communities;⁸⁹ and
- improperly relied on the “prejudiced opinion” of a consumers association as evidence when this was based on a misapprehension of the law of the country whose consumers that organisation represents.⁹⁰

128. The European Communities also claims that the Panel erred in its interpretation of the Codex standard and asks the Appellate Body to reverse it.⁹¹ The European Communities treats this alleged error as an error in interpretation rather than a failure to conduct an objective assessment of a fact.⁹² This is legally untenable. The Codex standard is not a covered agreement within the meaning of Article 1.1 of the DSU or a treaty or another source of international law. As the Appellate Body recognised, municipal law must be treated by an international tribunal as a fact to be examined, not as law to be interpreted.⁹³ The same is true for international standards. The international standards covered by Article 2.4 therefore do not form part of the provisions of the WTO agreements that panels and the Appellate Body are to “clarify” in accordance with Article 3.2 of the DSU and on which panels develop “interpretations” within the meaning of Article 17.6 of the DSU. The Panel’s determination of the meaning of the Codex standard must therefore be treated as a question of fact and could consequently be reversed only if the Panel failed to assess this fact objectively. Thus we address the European Communities’ appeal on this point together with its appeal relating to Article 11 of the DSU.

(b) The Appellate Body’s jurisprudence on the assessment of facts by panels

129. In support of its contentions under Article 11 of the DSU, the European Communities cites two Appellate Body Reports in which the Appellate Body affirmed the basic principle that, as part of its duty under Article 11 of the DSU, a panel must

⁸⁹EC’s appellant’s submission, paras. 219-221.

⁹⁰EC’s appellant’s submission, paras. 215-218.

⁹¹EC’s appellant’s submission, para. 143.

⁹²EC’s appellant’s submission, paras 130 – 142.

⁹³Appellate Body Report, *India –Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS/ 50/AB/R, para. 65.

consider all the evidence before it.⁹⁴ The European Communities however omits to cite the numerous Appellate Body rulings to the effect that a panel's weighing and assessing of evidence is, in principle, within the scope of a panel's discretion, and outside the scope of appellate review.

130. The Appellate Body articulated the standard applicable to claims under Article 11 as follows:

... Clearly, not every error in the appreciation of the evidence (although it may give rise to a question of law) may be characterized as a failure to make an objective assessment of the facts. ... The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.⁹⁵

131. The Appellate Body confirmed this standard in *Japan – Measures Affecting Agricultural Products* ("Japan – Agricultural Products") when it stated that:

... not every failure by the Panel in the appreciation of the evidence before it can be characterized as failure to make an objective assessment of the facts as required by Article 11 of the DSU. Only

⁹⁴EC's appellant's submission, para. 204.

⁹⁵Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("European Communities – Hormones") WT/DS26/AB/R; WT/DS48/AB/R, adopted 13 February 1998, para 133.

egregious errors constitute a failure to make an objective assessment of the facts as required by Article 11 of the DSU.⁹⁶

132. Thus, only if an appellant can show that a panel has committed “egregious errors” including the “deliberate disregard”, “refusal to consider” evidence or the “wilful distortion or wilful misrepresentation” of evidence will it succeed in an Article 11 claim. In the absence of such egregious errors, the Appellate Body has made it clear that panels enjoy significant discretion in the weighing and assessing of evidence. It is noteworthy that several appellants have requested the Appellate Body to review the weighing and assessing of evidence by panels, and the Appellate Body has consistently refused to do so.⁹⁷ Thus, in *European Communities – Hormones*, the Appellate Body stated:

Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.⁹⁸

133. And in *Korea – Dairy*, the Appellate Body stated that:

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.⁹⁹

⁹⁶Appellate Body Report, WT/DS76/AB/R, adopted 15 March 1999, para. 141.

⁹⁷See Appellate Body Report, *European Communities – Hormones*; Appellate Body Report, *Japan – Agricultural Products*; Appellate Body Report, *Korea – Taxes on Alcoholic Beverages* (“*Korea – Alcoholic Beverages*”), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* (“*Australia – Salmon*”), WT/DS18/AB/R, adopted 6 November 1998; Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999; and Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, (“*Korea – Dairy*”), WT/DS98/AB/R, adopted 12 January 2000.

⁹⁸Appellate Body Report, WT/DS26/AB/R; WT/DS48/AB/R, adopted 13 February 1998, para. 132.

⁹⁹Appellate Body Report, WT/DS98/R, adopted 12 January 2000, para. 137. See also Appellate Body Report, *Korea – Alcoholic Beverages*, WT/DS75/AB/R; WT/DS84/AB/R, adopted 17 February 1999, paras. 161-162, where the Appellate Body stated: “The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review”; Appellate Body Report, *Australia – Salmon*, WT/DS18/AB/R,

134. There is nothing in this case to justify the Appellate Body from departing from this line of reasoning. There are good reasons for the Appellate Body's reasoning that a panel's weighing of evidence is a matter within the discretion of a panel. It is logical that parties involved in a process of litigation will try to convince the neutral arbiter, the Panel, of the weight or value that is to be ascribed to the evidence that they adduce. In as much as Peru wished the Panel to attribute particular meaning to certain evidence as part of its claims, the European Communities also wanted the Panel to agree with the value that the European Communities placed on certain evidence. Having heard both parties, the Panel proceeded to carry out its duty, namely the weighing and assessing of the evidence before it. The European Communities may believe that the Panel should have accorded more weight to certain evidence, or less weight to other evidence, but as the Appellate Body stated: "[i]t is not an error, let alone an egregious error, for the Panel to fail to accord the weight to the evidence that one of the parties believes should be accorded to it".¹⁰⁰ Indeed, the Appellate Body has ruled that "panels ... are not required to accord to factual evidence of the parties the same meaning and weight as do the parties. ..."¹⁰¹

135. As shown above, the Appellate Body has stated that a panel's discretion to weigh and assess evidence is limited by the requirement that the Panel must make an objective assessment of the matter before it. Thus, in requesting the Appellate Body to review the Panel's weighing and assessing of evidence, the European Communities must show, as stated in *European Communities – Hormones*, that the Panel was guilty of "deliberate disregard of, or refusal to consider, the evidence", that there was "wilful distortion or misrepresentation of the evidence", or that the Panel committed an "egregious error that calls into question the good faith" of the Panel.

adopted 6 November 1998, para. 261, where the Appellate Body stated: "The Panel's consideration and weighing of the evidence in support of Canada's claims relates to its assessment of the facts and, therefore, falls outside the scope of appellate review under Article 17.6 of the DSU" and Appellate Body Report, *India – Quantitative Restrictions*, WT/DS90/AB/R, adopted 22 September 1999, paras. 143-144 where the Appellate Body stated "We believe that this second mistake alleged by India relates to the weighing and assessing of the evidence adduced by the United States, and is, therefore, outside the scope of appellate review".

¹⁰⁰Appellate Body Report, *Korea – Alcoholic Beverages*, WT/DS75/AB/R; WT/DS84/AB/R, adopted 17 February 1999, para. 164.

¹⁰¹Appellate Body Report, *Australia - Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para. 267.

(c) *Application of the Appellate Body's jurisprudence to the European Communities' claims*

(i) *The Panel made an objective assessment of the meaning of the Codex standard.*

136. As pointed out above, the issue before the Appellate Body is not whether the Panel arrived at a legally correct interpretation of paragraph 6.1.(ii) but whether its examination of this standard involved “egregious errors” including the “deliberate disregard”, “refusal to consider” evidence or the “wilful distortion or wilful misrepresentation” of evidence. The European Communities, however, merely asks the Appellate Body to reverse the Panel’s “interpretation” of paragraph 6.1(ii) of this standard. It argues that the Panel should have arrived at the conclusion that the meaning of the standard is ambiguous and that the Panel should therefore have taken into account the drafting history. It does not claim - and therefore does not attempt to demonstrate - that the Panel’s determination of the meaning of this standard constitutes an error in the assessment of a fact.

137. For this reason alone, the European Communities’ claim that the Panel’s interpretation of the Codex standard was incorrect should be rejected. However, even if the Appellate Body were to conclude that its task is to determine whether the Panel’s interpretation of the standard is in error, the EC’s claim should be rejected. This will be demonstrated below.

138. The Codex standard was prepared in the three official languages of the Codex Alimentarius Commission, all of which are equally authentic. The three versions are:

English version:¹⁰²

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

French version:¹⁰³

6.1.1 (ii) "Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce en

¹⁰² See Exhibit PERU-3.

¹⁰³ See Exhibit EC-30.

conformité des lois et usages du pays où le produit est vendu, de manière à ne pas induire le consommateur en erreur.

Spanish version:¹⁰⁴

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

139. The European Communities points out that, in the English version of the naming standard, the phrase “or the common name of the species in accordance with the law and customs of the country in which the product is sold” is found between commas. This, in the view of the European Communities, indicates that the phrase “the common name of the species in accordance with the law and customs of the country in which the product is sold” is intended to be a self-standing option independent of the formula “X Sardines”. The European Communities therefore claims that the intent expressed in this naming standard is that countries have the choice between (a) “X Sardines” and (b) the common name of the species even if that common name does not comprise the word sardines.¹⁰⁵

140. The Panel correctly rejected this argument. Paragraph 6.1.1(ii) clearly states that the name of the sardines other than *Sardina pilchardus* shall be “X sardines”. The text after “X sardines” can therefore only be interpreted to define what is meant by “X”. Moreover, both sub-paragraphs of paragraph 6.1.1 indicate the name to be given to sardines in inverted commas. It would therefore be completely artificial to conclude from the comma before the words “or the common name of the species” that “X” does not apply to this alternative.

141. Whatever ambiguity may result from the use of the comma in the English text, the French and Spanish versions of the Codex standard, which are equally authentic, leave no uncertainty on this point. The French text makes it absolutely clear that the Codex standard was not meant to permit countries to choose between “X Sardines” and the common name of the species. The relevant part of paragraph 6.1.1 (ii) reads in French:¹⁰⁶

¹⁰⁴See Exhibit EC-31.

¹⁰⁵EC’s appellant’s submission, para. 136.

¹⁰⁶See Exhibit EC-30 for the French version of the Codex standard.

“Sardines X”, “X” désignant un pays, une zone géographique, l’espèce ou le nom commun de l’espèce.

142. Translated word-for-word, this French text would read in English: “‘X sardines’, ‘X’ designating a country, a geographic area, the species or the common name of the species.” The French text thus leaves no doubt that the common name is not an option separate from the “X Sardines” option but is one of the four designators defined by “X”.

143. Also clear on this point is the Spanish text, the relevant part of which reads:¹⁰⁷

“Sardinas X” de un país o una zona geográfica, con indicación de la especie o el nombre común de la misma.

144. Translated word-for-word, this Spanish text would read in English: “‘Sardines X’ from a country or a geographic area, with an indication of the species or the common name of the species.” The Spanish text thus clarifies that the drafters of the Codex standard meant to create the option of adding the common name to the word “sardines”, not the option of replacing the word “sardines” by a common name.¹⁰⁸

145. It follows from above that the Panel’s conclusion that the Codex standard unambiguously requires the term “sardines” to be part of the trade name for products made from *Sardinops sagax* is based on an objective examination of the standard in all the three authentic languages.

146. For these reasons, the Panel was correct in refraining from basing its interpretation on the drafting history. In any case, contrary to the assertion of the European Communities,¹⁰⁹ the drafting history of the Codex standard confirms that the final version of the Codex standard was not meant to give countries the choice the European Communities claims to have. In 1972, the following proposal for the naming of sardines was put forward:¹¹⁰

Fish species covered by this standard shall be designated either:

¹⁰⁷See Exhibit EC-31 for the Spanish version of Codex standard.

¹⁰⁸The Spanish version also makes clear that the common name can be *added* to the name sardines and does not have to be used as a qualifier of the term «sardines» as the European Communities suggests at para. 135 of its appellant’s submission.

¹⁰⁹EC’s appellant’s submission, paras. 139 – 143.

¹¹⁰See the entry next to 1972 in Exhibit PERU-12.

(i) as “sardines” (to be reserved exclusively for Sardina pilchardus (Walbaum), or

(ii) as X sardines, where “X” is the name of a country, a geographical area or the species; or

(iii) by the common name of the species laid down for the species,

whichever is required by the country in which the product is sold, and in a manner so as not to mislead the consumer.

147. Sub-paragraph (iii) of this proposal could possibly be interpreted to provide for the additional option that the European Communities claims to have under the current standard, namely, the use of a common name laid down by law that does not contain the term “sardines”. However, this separate paragraph does not appear in the text of the standard as it was finally adopted. The report on the session at which the current standard was adopted specifically notes with reference to sub-paragraph (iii) that “the remainder of the text of 6.1.1 was deleted”.¹¹¹ The explicit deletion of the sub-paragraph (iii) therefore confirms that the European Communities’ interpretation cannot be reconciled with the drafters’ intention.

148. The change in the draft text is described officially in the minutes as “editorial”.¹¹² The European Communities concludes from this that this confirms that the drafter wished to maintain the option provided for under the proposal put forward in 1972. However, editorial changes are made to *improve* the expression of a thought. Since the drafters of the final version described the change from the earlier version as “editorial” rather than substantive, they were obviously of the view that the earlier version had already expressed what they intended to state in the final version, albeit imperfectly. The reference to the editorial nature of the change therefore clearly implies that, in the view of the drafters, both versions were meant to express similar thoughts but that the final version expressed them more clearly. The suggestion of the European Communities that the Panel should have relied on the 1972 version as a better expression of the meaning of the final version therefore lacks a logical basis.

¹¹¹See paragraph 369 on page 52 of the Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission – Rome, 17-28 April 1978 attached as Exhibit PERU-14.

¹¹²See Exhibit EC-43.

(ii) *The Panel properly refrained from seeking opinions and facts from the Codex Alimentarius Commission.*

149. The European Communities also chides the Panel for not requesting information from the Codex Alimentarius Commission. The European Communities requested the Panel “to ask the Codex Alimentarius to provide its view on the meaning of this text”.¹¹³ On appeal, the European Communities claims that the Panel’s refusal to do so constitutes an error of law.¹¹⁴

150. However, Article 13.2 of the DSU states that Panels “*may* seek information from any relevant source, and *may* consult experts.” It is clear that Article 13.2 leaves it to the discretion of panels to determine whether or not to seek expert opinion in particular cases. As the Appellate Body has stated:

... The DSU gives panels different means or instruments for complying with Article 11; among these is the right to “seek information and technical advice” provided in Article 13 of the DSU.... Article 13.1 of the DSU gives a panel “... the right to seek information and technical advice from any individual or body which it deems appropriate.”... Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision.¹¹⁵

151. Additionally, Article 14.2 of the TBT Agreement gives panels discretion in deciding whether or not to establish a technical expert group. As will be demonstrated below, the Panel properly exercised its discretion and determined that it did not need to consult the Codex Alimentarius Commission. Thus, in declining to consult the Codex Alimentarius Commission on the meaning and the drafting history of the standard, the Panel did not act inconsistently with its duty to make an objective assessment of the facts under Article 11 of the DSU.

¹¹³EC’s statement at the second meeting of the Panel, para. 20.

¹¹⁴EC’s appellant’s submission, para. 143.

¹¹⁵Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, (WT/DS56/AB/R), adopted 22 April 1998, paras. 82, 84. See also Appellate Body Report, *European Communities – Hormones*, para. 147.

152. According to Article 13 of the DSU, a panel may seek factual information and expert opinions but it may not transfer its task of examining the meaning of an existing international standard to the body that drafted it. Article 2.4 of the TBT Agreement applies to international standards as written. There is nothing in the TBT Agreement and the DSU that makes Peru's right to seek rulings on Article 2.4 of the TBT Agreement dependent on the right or willingness of the Codex Commission to provide an authoritative interpretation of the standard at issue. It could not be reconciled with the most basic principles of procedural justice if findings on the meaning of a Codex Commission standard were made dependent on the outcome of a consensus-making process in the Commission, in which the Member States of the European Communities favouring the EC Regulation at issue can participate.
153. There was no reason for the Panel to consult the Commission on the drafting history of the standard. According to Article 32 of the Vienna Convention on the Law of Treaties, the meaning of a treaty may be determined by taking recourse to the preparatory work if, and only if, an interpretation based on the text leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. While Article 32 of the Vienna Convention is not directly applicable to Codex standards because they are not treaties, the basic legal principle reflected in this provision is nevertheless relevant to the interpretation of those standards as well. Governments must be able to rely on the Codex standards as drafted. Only if their meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, can they be expected to have recourse to supplementary means of interpretation. Codex standards could simply not fulfil their function if governments always had to examine their drafting history in order to determine their meaning. The reference to "international standards" in Article 2.4 can therefore only be understood to be a reference to those standards as drafted.
154. In the present case, the French text clarifies the point in dispute as to the meaning of the English text by explicitly providing in relevant part: "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 ou le produit et vendu, de manière à ne pas induire le consommateur en erreur." The English and French texts, which together remove any ambiguity or obscurity, are equally authentic. There was consequently no reason for the Panel to take recourse to the drafting history and to consult the Commission on this issue.
155. The European Communities further suggests that the Codex Alimentarius Commission, when adopting the standard for sardines, may have violated its procedural

rules, according to which substantive changes to proposed standards can only be made under certain circumstances, and that the Panel erred in law by not seeking an opinion of the Codex Commission on this matter.¹¹⁶

156. It is for the members of the Codex Alimentarius Commission to examine whether the procedural requirements for the adoption of standards have been observed and, if necessary, to request corrective action in accordance with the rules and procedures of the Commission. Peru notes that none of the members of the Commission has requested such an examination.¹¹⁷ As a result, the standard at issue, having been adopted, therefore “exists” within the meaning of Article 2.4 of the TBT Agreement. It is difficult to see how Article 2.4 could fulfil its function if panels had to examine not only whether a relevant international standard exists but also whether the international standardisation body has adopted it in accordance with its internal decision-making procedures.

157.

(iii) *The Panel made proper use of dictionaries.*

158. Under its Article 11 appeal, the European Communities claims that the Panel made an improper use of, and twisted, the meanings in dictionaries. The European Communities argues that the Panel erred because “dictionaries cannot be probative of consumer expectations of the names under which preserved foodstuff are sold in a particular country”.¹¹⁸ Here again, the European Communities mischaracterises the Panel Report. The Panel correctly considered that:

... the use of 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

¹¹⁶EC’s appellant’s submission, para. 222.

¹¹⁷In fact, the members that participated in the drafting explicitly and unanimously agreed that the change was not substantive but editorial. Peru notes that, in these proceedings, the EC Commission takes a position on this issue different from that taken by all its Member States (except Luxembourg) on the occasion of the adoption of the Codex standard.

¹¹⁸EC’s appellant’s submission, para. 211.

Communities for the purposes of, *inter alia*, improving market transparency.¹¹⁹ (underlining added)

159. Peru submitted evidence to show that the term «sardines» is a common term for *Sardinops sagax* in the European Communities. In support of this claim, Peru referred the Panel to a number of technical dictionaries published in association with the European Commission and its Member States. In determining whether Peru had met its burden of proof, the Panel referred to this evidence as well as other evidence presented by the parties. The Panel stated:

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

¹¹⁹Panel Report, para. 6.12.

thereof in the national language combined with the country or geographical area of origin.¹²⁰

160. The Panel assessed the evidence before it, and concluded that Peru had demonstrated that the term “sardines”, either by itself or combined with the name of a country or geographic region, is a common name for *Sardinops sagax* in the European Communities. The purpose of the Panel’s assessment was not, as suggested by the European Communities, to arrive at a definitive conclusion as to the common name for *Sardinops sagax* in each Member State of the European Communities. The purpose was to determine whether European consumers would be misled if the trade description of products made from *Sardinops sagax* comprises the word sardines *and* a geographical qualifier. The Panel used the dictionaries in an appropriate and objective manner to make this determination, consistent with its obligations under Article 11 of the DSU.

161. The European Communities also implies that the Panel erroneously and exclusively relied on dictionaries. This is a further mischaracterisation of the Panel Report. As the Panel explained:

... 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 Consumer’s Association and the trade description used by Canadian exporters of *Clupea harengus harengus* to the Netherlands and the United Kingdom.¹²¹ (underlining added)

(iv) *The Panel considered the evidence concerning the actual names.*

162. The European Communities claims that the Panel ignored the evidence concerning the actual names given to sardine-type products in the European Communities. Again, the European Communities misrepresents the Panel Report. The Panel did not ignore the evidence submitted by the European Communities, it only disagreed with it. It is clear from paragraphs 7.125-7.129 of the Panel Report that the Panel looked at the evidence presented by the European Communities as to the “actual names” given to sardine-type products. The Panel observed:

¹²⁰Panel Report, para. 7.131.

¹²¹Panel Report, para. 6.12.

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, we will proceed on the assumption that domestic legislation pre-dating the EC Regulation may indeed have such probative value regarding consumer expectations.¹²² (footnotes omitted)

163. Having considered the evidence presented by the European Communities, the Panel also considered the evidence presented by Peru, weighed and assessed this and other evidence, and found 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*".¹²³ Thus, in making this finding, the Panel considered all the evidence before it consistently with its functions under Article 11 of the DSU.

(v) *The Panel properly took into account the evidence provided by the Consumers' Association.*

164. The European Communities contends that the Panel improperly relied on the opinion of Consumers' Association as evidence "when this was based on a

¹²²Panel Report, para. 7.128.

¹²³Panel Report, para 87.

misapprehension of the law”.¹²⁴ This association, which is the largest of its kind in Europe, arrived at the conclusion that European consumers would not be misled if sardines from Europe and sardines from Peru were distinguished by the addition of a geographical indication in the trade name and that the EC Regulation “does nothing to promote the interests of European consumers.”¹²⁵ Contrary to the assertion of the European Communities, these are factual, not legal conclusions that the Panel could appropriately consider as part of the wide range of evidence submitted to it on this question.

165. Neither before the Panel nor in its appellant’s submission has the European Communities substantiated its claim that the Consumer Association’s views are based on a misapprehension of the facts. Peru submits that it was within the discretion of the Panel to accord weight and value to this evidence, as long as there was no wilful distortion of this evidence. The Appellate Body has previously ruled that “... it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings.”¹²⁶ The European Communities has not shown that the Panel distorted this evidence, or that it used this evidence in bad faith.¹²⁷

(vi) *Conclusion*

166. In conclusion, Peru emphasises that a claim under Article 11 of the DSU amounts to a claim that the Panel abused its discretion and amounts to accusing the Panel of bad faith. The Appellate Body has stated that an allegation that a panel has failed to make an objective assessment of the matter before it as required by Article 11 of the DSU “...is a very serious allegation. Such an allegation goes to the very core of the integrity of the

¹²⁴EC’s appellant’s submission, paras. 215-217.

¹²⁵Open letter of the Consumers’ Association , para. 35. (Exhibit PERU-16).

¹²⁶Appellate Body Report, *EC- Hormones*, para. 135.

¹²⁷The European Communities attempted to introduce evidence from other European consumers’ associations, but this evidence was rejected by the panel on the ground that it had been filed late, contrary to the working schedule drawn up by the Panel with the agreement of the parties. (See Panel Report, para. 6.16.). In para. 218 of its appellant’s submission, the European Communities claims that the Panel erred in law by rejecting these opinions. Peru submits that it cannot possibly be an error of law for a panel to collect evidence in accordance with its own working procedures.

WTO dispute settlement process itself.”¹²⁸ The European Communities has not succeeded in showing that the Panel has committed any egregious errors that can be characterized as a failure to make an objective assessment of the matter before it. The European Communities’ arguments, when read together with the Panel Report and the record of the Panel proceedings, do not disclose that the Panel has distorted, misrepresented or disregarded evidence. Peru therefore submits that the Appellate Body should dismiss the European Communities’ appeal as it relates to Article 11 of the DSU.

3. THE PANEL’S FINDING THAT THE EC REGULATION IS MORE TRADE-RESTRICTIVE THAN THE CODEX STANDARD IS SUBSTANTIVELY CORRECT.

167. At the interim review stage, the European Communities requested the Panel to remove the term “trade-restrictive” from paragraph 6.127 (now paragraph 7.127) of the Panel Report. This paragraph states, in pertinent part:

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.

168. In response to this question, the Panel stated:

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*.¹²⁹

¹²⁸Appellate Body Report, *European Communities – Poultry*, WT/DS69/AB/R, adopted 23 July 1998, para. 133.

¹²⁹Panel Report, para. 6.11.

In footnote 85 to paragraph 6.11, the Panel explained further:

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

169. On appeal the European Communities requests the Appellate Body to reject these statements.¹³⁰ Peru wishes to draw attention to the following sequence of events that need to be taken into account in addressing the European Communities' claim of legal error.

170. Peru made claims of violation under Articles 2.1, 2.2 and 2.4 of the TBT Agreement, as well as under Article III:4 of the GATT 1994. Peru requested the Panel to address its claims under Articles 2.1 and 2.2 only if it reached the conclusion that the EC Regulation is consistent with Article 2.4 of the TBT Agreement.¹³¹ Peru also requested the Panel to examine its Article III:4 claim only if it found that the EC Regulation was consistent with the TBT Agreement.¹³² Having found a violation of Article 2.4 of the TBT Agreement, the Panel stated:

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

¹³⁰EC's appellant's submission, paras. 225-229.

¹³¹Panel Report, para. 4.139.

¹³²Panel Report, para. 4.139.

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.¹³³

171. The statements appealed by the European Communities should be considered against this background. In particular, one of Peru's subsidiary claims, on which the Panel exercised judicial economy, was a claim under Article 2.2 of the TBT Agreement which states:

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. For this purpose, technical regulations *shall not be more trade restrictive than necessary* to fulfil a legitimate objective, taking into account the risks non-fulfilment would create". (emphasis added)

172. The Panel's description of the EC Regulation as trade-restrictive is for the reasons indicated in the introductory section of the present submission entirely accurate.¹³⁴ However, the statements appealed by the European Communities therefore are not necessary to the Panel's analysis under Article 2.4. Thus, to the extent that the Appellate Body agrees with the Panel's analysis under Article 2.4, Peru would request that the Appellate Body should decline to address these statements, or rule that the statements of the Panel were not necessary or pertinent to the disposition of the issues before it.¹³⁵ If, however, the Appellate Body sustains the European Communities' appeal and reverses the Panel's findings and conclusions under Article 2.4, Peru would request that the Appellate Body complete the analysis with respect to Article 2.1 and 2.2 of the TBT Agreement. If the Appellate Body does complete the analysis, Peru submits that these statements by the Panel should be considered in an analysis under Articles 2.1 and 2.2 of the TBT Agreement.

¹³³Panel Report, para. 7.151.

¹³⁴See para. 14 above.

¹³⁵See Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, paras. 89-90. However, Peru is not asking that the Appellate Body rule that the statements “are of no legal effect”, but to rule only that the statements made by the Panel were not necessary steps in the Panel's analysis to Article 2.4, or alternatively, to decline to address them.

III. RESOLUTION OF THE DISPUTE IN THE EVENT THAT THE APPELLATE BODY REVERSES THE PANEL'S FINDINGS UNDER ARTICLE 2.4 OF THE TBT AGREEMENT

A. INTRODUCTION

173. If the Appellate Body comes to the conclusion that the EC Regulation is consistent with Article 2.4, it would be appropriate for the Appellate Body to complete the Panel analysis and to settle the dispute by making findings on those provisions of Article 2 of the TBT Agreement on which the Panel did not make any findings.

174. As pointed out above, Peru asked the Panel to exercise judicial economy in accordance with the guidance given by the Appellate Body to panels to address only those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings “in order to ensure effective resolution of disputes to the benefit of all Members”.¹³⁶ At the same time, Peru asked the Panel to include in its report all of the arguments and evidence submitted to it on the legal claims that it does not address so as to provide the Appellate Body with the factual basis necessary to rule on those claims if this became necessary.¹³⁷ The Panel accepted Peru’s approach and was therefore able to complete its work within the exceptionally short period of seven months.

175. As the Appellate Body has confirmed, a panel may decide, for reasons of judicial economy, not to make further findings of violation.¹³⁸ In these circumstances, if the

¹³⁶See Appellate Body Report, *Australia - Measures Affecting the Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para. 223 and Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R - WT/DS142/AB/R, adopted 19 June 2000, para. 115.

¹³⁷Peru asked the Panel to follow this approach because, as Peru explained before the DSB on 20 June 2001(WT/DSB/M/106, para. 53), the measure at issue has contributed to a significant decline in the activities of sardine processing plants and a rise in unemployment, coupled with the corresponding adverse social effects in many towns dependent upon this industry. The DSU does not oblige the EC to compensate Peru for the damage it is causing to Peru’ industry while the DSU procedures take their course. By minimising the number of provisions on which the Panel needed to make findings, Peru hoped to enable the Panel to resolve the dispute quickly.

¹³⁸See Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses*, WT/DS33/AB/R, adopted 23 May 1997, pp. 18-19.

Appellate Body reverses a panel's finding of violation, it has gone on to “complete the legal analysis” to resolve the dispute. As the Appellate Body stated:

In certain appeals, when we reverse a panel's finding on a legal issue, we may examine and decide an issue that was not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties.¹³⁹

176. Thus, in *European Communities – Measures Affecting the Importation of Certain Poultry Products*, the Appellate Body reversed the Panel’s finding under Article 5.1(b) of the Agreement on Agriculture. The Appellate Body also reversed the Panel’s findings under Article 9.1 and 3.3 of the Agreement on Agriculture. The Appellate Body stated: “we believe we should complete our analysis ... by making a finding with respect to the consistency of the EC Regulation with Article 5.5, which was not addressed by the Panel for judicial economy.”¹⁴⁰ The Appellate Body found that the EC Regulation at issue in that dispute was inconsistent with Article 5.5 of the Agreement on Agriculture.

177. The Appellate Body also completed the legal analysis In *United States – FSC*. In that appeal, the Appellate Body noted that the European Communities had made the alternative claim that the FSC measure at issue in that dispute violated Article 10.1, as read with Article 8 of the Agreement on Agriculture. The Appellate Body said it was “necessary for [it] to examine this alternative claim”. It completed the analysis and found that the measure was inconsistent with the United States’ obligations under Article 10.1 and Article 8 of the Agreement on Agriculture.¹⁴¹

178. Peru’s main requests for legal findings that the Panel did not address for reasons of judicial economy were the following:¹⁴²

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

¹³⁹Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, para. 117.

¹⁴⁰Appellate Body Report, WT/DS69/AB/R, adopted 23 July 1998, para. 156.

¹⁴¹Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, para.133 ff.

¹⁴²See Panel Report, paras. 3.1 and 7.147-7.152.

the legitimate objective of market transparency that the European Communities claims to pursue.¹⁴³

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*.¹⁴⁴

179. Articles 2.1, 2.2 and 2.4 of the TBT Agreement establish different but closely related legal standards that technical regulations must meet. The fundamental rationale of these three provisions is the same, namely to prevent technical regulations that create unnecessary obstacles to trade, so that the facts required to rule on the consistency of a measure with Article 2.4 include those required to rule on the consistency of that measure with Articles 2.1 and 2.2.

180. If the Appellate Body concludes that the EC Regulation is consistent with Article 2.4, Peru therefore requests the Appellate Body to complete the Panel's analysis and find that the EC Regulation is inconsistent with Article 2.2. If the Appellate Body concludes that the EC Regulation is consistent with Article 2.2, Peru requests the Appellate Body to complete the Panel's analysis and find that that the EC Regulation is inconsistent with Article 2.1. Both the facts and arguments that were submitted by the parties on Articles 2.2 and 2.1 are reflected in Sections E. and F. of the Panel Report. Peru will present a brief summary of these facts and arguments below.

B. THE EC REGULATION IS INCONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT.

1. THE EC REGULATION IS TRADE-RESTRICTIVE.

181. As pointed out above, the marketing of a product in a hermetically sealed can is rendered difficult if the seller is prevented from informing the buyer in commonly understood terms what product the can contains. In the nine European languages, the word sardines is commonly used as a generic term covering a range of species of

¹⁴³Panel Report, para. 3.1

¹⁴⁴Panel Report, para. 3.2

sardines, including *Sardinops sagax*.¹⁴⁵ The common names for *Sardinops sagax* identified in the dictionaries prepared by the EC, FishBase and the OECD consist of the word sardines combined with a geographical indication, such as “Pacific”. In order to inform the consumer in commonly understood terms of the contents of a tin containing products made from *Sardinops sagax*, it is therefore necessary to use the term «sardines». The outright prohibition to use the term «sardines» for products made from *Sardinops sagax* - even with a geographical indication informing the consumer of the non-European origin of the product – is therefore trade-restrictive.

182. The European Communities claimed before the Panel that Peru has not demonstrated that the monopolisation of the name sardines for sardines of the species populating European waters has in fact adversely affected its exports. The European Communities asserted that “Peru has not even tried to demonstrate that it would sell more preserved *Sardinops sagax* if it could call them sardines.”¹⁴⁶ However, Peru is not required to furnish this proof. There is nothing in the wording of Article 2.2 of the TBT Agreement to suggest that this provision protects expectations on export volumes. The party asserting that this provision has been violated therefore does not have to wait until its exports declined before it can bring a complaint under the DSU. Moreover, it has long been recognised under GATT and WTO jurisprudence that the basic provisions governing international trade protect expectations on conditions of competition, not on export volumes.¹⁴⁷ Thus, GATT panels correctly stated that the commitments exchanged under the GATT “are commitments on conditions for competition for trade, not on volumes of trade”¹⁴⁸ and that nullification or impairment of GATT obligations could be established without “statistical evidence of damage”.¹⁴⁹ The 1990 Panel report on *EEC - Payments and Subsidies to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* concluded on this basis that “an import quota constitutes an import restriction within the meaning of Article XI:1 whether or not it actually impeded

¹⁴⁵See Peru’s reply to question no. (1) from the European Communities.

¹⁴⁶EC’s first submission, para. 140.

¹⁴⁷See Appellate Body report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS50/AB/R), adopted 16 January 1998, para. 40.

¹⁴⁸Payments and Subsidies paid to Processors and Producers of Oilseeds and related Animal-Feed Proteins, Report of the Panel adopted on 25 January 1990, BISD 37S/130, para. 150-151.

¹⁴⁹Treatment by Germany of Imports of Sardines, Report adopted by the CONTRACTING PARTIES on 31 October 1952 (G/26) BISD 1S/56, para. 9

imports”.¹⁵⁰ Any measure adversely affecting the conditions of competition for imported products can therefore be deemed to be “trade-restrictive” within the meaning of Article 2.2, irrespective of its actual trade impact. It is consequently not incumbent upon Peru to demonstrate that it would sell more preserved *Sardinops sagax* if it could call them sardines.

2. THE EC REGULATION IS MORE TRADE-RESTRICTIVE THAN NECESSARY.

183. According to GATT and WTO jurisprudence, a measure cannot be justified as “necessary” under Article XX (b) and (d) of the GATT if an alternative measure is reasonably available that is not inconsistent with, or is less inconsistent with, other GATT provisions.¹⁵¹ One of the purposes of the TBT Agreement is to further the objectives of the GATT.¹⁵² The jurisprudence of the CONTRACTING PARTIES to GATT and the WTO on the term “necessary” in Article XX (b) and (d) of the GATT is therefore relevant to the interpretation of the terms “more trade-restrictive than necessary” in Article 2.2 of the TBT Agreement. A measure should therefore be deemed to be more trade restrictive than necessary within the meaning of Article 2.2, if there is a reasonably available, less trade restrictive alternative measure that fulfils the Member’s legitimate objective and that is consistent with, or less inconsistent with, the TBT Agreement.

184. In the view of Peru, the EC Regulation is more trade restrictive than necessary because there is a less trade-restrictive alternative, namely the Codex standard, that is reasonably available, that is consistent with the TBT Agreement and that would fulfil the European Communities’ objective. The objective of consumer protection that the European Communities claims to pursue with the Regulation can be met in a less trade-restrictive manner by allowing species other than *Sardina pilchardus* to be marketed as preserved sardines in accordance with the Codex standard; that is, by including

¹⁵⁰Payments and Subsidies paid to Processors and Producers of Oilseeds and related Animal-Feed Proteins, Report of the Panel adopted on 25 January 1990, BISD 37S/86. BISD 37S/131, para 152.

¹⁵¹See Appellate Body Report, *European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Products*, WT/DS135/AB/R, adopted 5 April 2001, paras. 170-174; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras. 165-166 and Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2, WT/DS4, adopted 20 May 1996, para. 6.24 and the GATT Panel report on *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345.

¹⁵²Second clause of the Preamble of the TBT Agreement.

designations that inform consumers of the “country, geographic area, the species or the common name of the species in accordance with the law and custom of the country in which the product is sold,”¹⁵³ for example “Pacific Sardines” or “Peruvian Sardines”. By adopting such a measure, the European Communities could provide EC consumers with the most precise information possible and reserve the use of the term “sardine” without any descriptor for products made from *Sardina pilchardus*. This alternative is reasonably available, consistent with the TBT Agreement and would permit the European Communities to fulfil its stated objectives while at the same time being less restrictive of trade in preserved sardines.

C. THE EC REGULATION IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT.

1. PRODUCTS PREPARED FROM *SARDINOPS SAGAX* AND PRODUCTS PREPARED FROM *SARDINA PILCHARDUS* ARE “LIKE” PRODUCTS.

185. Article 2.1 of the TBT Agreement incorporates the national treatment and most-favoured-nation principles set out in Articles I:1 and III:4 of the GATT 1994 into the TBT Agreement. The wording of the national treatment requirement set out in Article 2.1 of the TBT Agreement is identical to that of Article III:4 of the GATT 1994. The purpose of Article III:4 is to ensure that internal regulations are not applied so as to afford protection to domestic production. This is also the purpose of the national-treatment requirement in Article 2.1. The two provisions differ only in their scope: while Article III:4 of the GATT 1994 is broadly worded to cover all regulations affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products, Article 2.1 is limited to technical regulations as defined in Annex 1 of the TBT Agreement. The regulations covered by Article 2.1 are therefore a sub-set of the regulations covered by Article III:4. The object and purpose of Article 2.1 is identical to those of Article III:4 except for the focus of Article 2.1 on only one category of the internal regulations covered by Article III:4. For this reason the jurisprudence developed by the Appellate Body under Article III:4 should be taken into account in interpreting Article 2.1.

186. The Appellate Body emphasised that, in determining the likeness of products under the national treatment requirement set out in Article III:4 of the GATT 1994:

¹⁵³The Codex standard, para. 6.1.1.

Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace.¹⁵⁴

187. Peru submitted as Exhibit PERU-10 a report entitled “La Sardina Peruana (*Sardinops sagax sagax*) y la Sardina Europea (*Sardina pilchardus*)”, which provides a detailed technical analysis comparing the two species of sardines at issue from a biological and technical point of view. This report demonstrates that the two species of fish are physically very similar and that there is no scientific or technical reason that would justify a commercial distinction. Peru further submitted as Exhibit PERU-11 the opinion of the “Institut Nehring” in Braunschweig, Germany, and the “Federal Research Centre for Fisheries, Institute of Biochemistry and Technology” of Germany which also found that “the characteristics in taste and smell [of the product made from *Sardinops sagax*] are very similar to the products of *Clupea pilchardus* which come from Europe and North-Africa”.

188. As Canada pointed out in its statement at the first meeting of the Panel, the inclusion of species in the Codex standard for sardines is subject to rigorous, scientific criteria. The Member proposing a new species must submit reports from at least three independent laboratories stating that the organoleptic properties, such as texture, taste and smell, of the proposed species after processing conform with those of the species already included in the standard. Once a species has been found to meet these criteria, the Codex Alimentarius Commission takes its final decision. This process ensures that only species that are alike from the consumer’s perspective are included in Codex standard for sardines.¹⁵⁵

189. The reports submitted by Peru and the process of inclusion of species in the Codex standard thus confirm that products made from *Sardina pilchardus* and those made from *Sardinops sagax* are “like” products from the perspective that the Appellate Body considers to be relevant, namely, from the perspective of the consumers’ tastes and

¹⁵⁴Appellate Body Report, *European Communities- Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 114. In a non-paper on Mandatory Labelling for Agricultural Products dated 3 December 2001 (job no. 9106), the European Communities recognised that this ruling of the Appellate Body “confirmed consumers’ tastes and habits as a general criterion for determining ‘likeness’ of a product” (para. 4 (b)).

¹⁵⁵Canada’s third-party statement, paras. 8 and 9.

habits. A comparison of the physical properties of the two products at issue cannot but lead to the conclusion that the differences between the two do not influence their competitive relationship in the market place. The two products must therefore be considered to be “like products” within the meaning of Article 2.1.

190. The European Communities has not submitted any evidence to the Panel demonstrating that the differences in physical properties of the two products at issue influence the competitive relationship between them in the marketplace. The European Communities has merely submitted extensive evidence on the biological differences between *Sardinops sagax* and *Sardina pilchardus*. However, as Canada pointed out in its statement at the Panel’s meeting with the third parties, consumers are not ichthyologists and their expectation of what a can labelled “sardines” contains is not based on the “types and number of gillrakes or bony striae on the operculum”.¹⁵⁶ The evidence submitted by the European Communities is therefore not relevant to the issue of likeness.

2. PRODUCTS PREPARED FROM *SARDINOPS SAGAX* ARE ACCORDED TREATMENT LESS FAVOURABLE THAN THAT ACCORDED TO PRODUCTS PREPARED FROM *SARDINA PILCHARDUS*.

191. As noted above, the effect of monopolising the name “sardines” for products made from fish of the species *Sardina pilchardus* is that European consumers of Peruvian preserved sardines cannot be informed that the hermetically sealed containers in which these products are offered contain sardines. However, the consumers of products made from *Sardina pilchardus* may be given this information. The monopolisation of the term «sardines» for products prepared from *Sardina pilchardus* consequently accords competitive conditions to those products that are more favourable than those accorded to products prepared from *Sardinops sagax*. The “treatment” that the EC Regulation accords to Peruvian sardines is, consequently, “less favourable” than that accorded to European sardines products. The European Communities’ reacted to Peru’s claim of likeness by asserting that, according to Peru’s logic, all directly competitive products would have to be given the same trade name. Thus, “all ‘preserved sea food’ could be called sardines”.¹⁵⁷ And, as shochu and vodka had been found to be directly competitive or substitutable by a WTO panel, they would have to be given the same trade name. Peru’s argumentation would therefore run counter to the legitimate objective of creating market

¹⁵⁶Canada’s third-party statement, para. 14.

¹⁵⁷EC’s first submission, para. 163.

transparency by giving each product a specific and precise trade description. The European Communities concludes from this that a more stringent standard of likeness had to be applied in the context of trade description requirements.¹⁵⁸

192. The objections of the European Communities would be valid if all products found to be “like” products had to be treated identically under the national treatment provisions of the TBT Agreement and the GATT. However, national treatment does not mean identical treatment. It means no less favourable treatment. A GATT panel therefore correctly found that:

The mere fact that imported products are subject ... to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment.¹⁵⁹

193. The same panel noted that:

... there may be cases where application of formally identical provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded to them is in fact no less favourable.¹⁶⁰

194. These rulings make clear that the national treatment provisions are not violated if two like products are subject to different naming regulations. In such cases, it has to be assessed whether the different regulations accord imported products less favourable treatment than that accorded to the like domestic product. For instance, imported vodka is not accorded conditions of competition less favourable than domestic shochu if the trade description of vodka is different from that of shochu. It also follows from the above that the national-treatment requirement is not necessarily met if two like products have to be given the same trade name. For instance, imported vodka would certainly be treated less favourably than domestic shochu if it had to be marketed as shochu.

¹⁵⁸EC’s first submission, paras. 161-163.

¹⁵⁹United States Section 337 of the Tariff Act of 1930, Report by the Panel adopted on 7 November 1989, (L/6439) BISD 36S/386, para. 5.11.

¹⁶⁰United States Section 337 of the Tariff Act of 1930, BISD 36S/386, para. 5.11.

195. It follows from the above that it would not be inconsistent with the national-treatment requirement if the trade description for Peruvian sardines was “Pacific sardines” and the trade description “sardines” was reserved to European sardines because this difference would not accord Peruvian sardines less favourable treatment. In brief, what renders the EC Regulation inconsistent with the national-treatment requirement is not that it treats imported products differently but that the difference in treatment entails less favourable conditions of competition for imported products.

IV. CONCLUSIONS

196. In light of the considerations set out above, Peru requests the Appellate Body to reject the European Communities’ second appeal of the Panel Report on *European Communities – Trade Description for Sardines* as inadmissible because neither the DSU nor the Working Procedures accord an appellant the right to appeal the same panel report twice on different grounds.

197. If the Appellate Body considers the European Communities’ second appeal admissible, Peru requests the Appellate Body to uphold the legal interpretations developed by the Panel with respect to Article 2.4 of the TBT Agreement and to find that the Panel made an objective assessment of the matter before it consistently with its obligations under Article 11 of the DSU.

198. If the Appellate Body reverses the Panel’s findings and concludes that the EC Regulation is consistent with Article 2.4 of the TBT Agreement, Peru requests the Appellate Body to resolve this dispute by completing the Panel’s analysis and examining the EC Regulation in the light of Article 2.2 of the TBT Agreement and, if necessary, in the light of Article 2.1 of the TBT Agreement.