PANEL OF THE WORLD TRADE ORGANISATION

ON

EUROPEAN COMMUNITIES – TRADE DESCRIPTION OF SARDINES

(WT/DS231)

FIRST SUBMISSION OF PERU

Prepared with the cooperation of the Advisory Centre on WTO Law

15 OCTOBER 2001

Table of Contents

I. INTRODUCTION 3

A. PROCEDURAL BACKGROUND 3

B. FACTUAL BACKGROUND 3

II. LEGAL ARGUMENT 5

A. INTRODUCTION 5

1. The measure at issue 5

2. The provisions of the TBT Agreement and the GATT at issue 6

3. Allocation of the burden of proof 7

B. THE EC LABELLING REQUIREMENT FOR SARDINES IS INCONSISTENT WITH ARTICLE 2:4 OF THE TBT AGREEMENT. 9

1. The EC labelling requirement for sardines is a technical regulation 9

2. International standards relevant to the labelling of preserved sardines exist 9

3. The objective of ensuring market transparency could be achieved through labelling requirements based on the relevant international standard. 11

C. THE EC LABELLING REQUIREMENT FOR SARDINES IS INCONSISTENT WITH ARTICLE 2:2 OF THE TBT AGREEMENT. 14

D. THE EC LABELLING REQUIREMENT FOR SARDINES IS INCONSISTENT WITH ARTICLE 2:1 OF THE TBT AGREEMENT. 16

E. THE EC LABELLING REQUIREMENT FOR SARDINES IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT. 20

III. JUDICIAL ECONOMY 21

IV. CONCLUSIONS 23

A. PRINCIPAL FINDING REQUESTED BY PERU 23

B. SUBSIDIARY FINDINGS REQUESTED BY PERU 23

C. RECOMMENDATION REQUESTED BY PERU 24

D. SUGGESTION ON IMPLEMENTATION REQUESTED BY PERU 24

V. LIST OF EXHIBITS SUBMITTED BY PERU 26

I. INTRODUCTION

A. Procedural background

1. In a communication dated 20 March 2001, Peru requested the European Communities ("EC") to hold consultations under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT") and Article 14 of the Agreement on Technical Barriers to Trade ("TBT Agreement").[1] The request concerned the labelling requirement for sardines set out in Article 2 of Council Regulation (EEC) No. 2136/89 of 21 June 1989 laying down common marketing standards for preserved sardines ("Council Regulation No. 2136/89"), of which a copy is submitted as Exhibit PERU-1. The consultations, which were held on 31 May 2001, failed to resolve the dispute. At the request of Peru[2], the Dispute Settlement Body ("DSB") established a Panel to examine the matter at its meeting on 24 July 2001.[3] Efforts to reach agreement on the composition of the Panel failed. Pursuant to Article 8:9 of the DSU, Peru therefore requested the Director-General of the World Trade Organisation ("WTO") on 31 August 2001 to determine the composition of this Panel. In a communication dated 10 September 2001, the Director-General informed the parties to the dispute that he had determined that the following individuals should serve as panellists:

Chairperson:	Ms. Margaret Liang (Singapore)
Members:	Ms. Merit Janow (United States)
	Mr. Mohan Kumar (India)

2. Canada, Chile, Colombia, Ecuador, the United States and Venezuela reserved their third-party rights under Article 10 of the DSU to participate in the Panel's proceedings.[4]

B. Factual Background

3. The sardine is a small fish of the family of the herrings (*clupeidae*) that populates in large schools almost all oceans. There are two species of sardines at issue in this dispute. The first is the *Sardina pilchardus* Walbaum, which is found mainly in European waters and off the coast of Morocco. The second species is the *Sardinops sagax* found mainly in the eastern Pacific along the coasts of Peru and Chile. The characteristics of the two species and their geographical distribution is described in detail in the Species Catalogue of the Food and Agriculture Organisation ("FAO"), of which extracts are submitted as Exhibit PERU-2.

[1] WT/DS231/1,G/L/449, G/TBT/D/22
[2] WT/DS231/6.
[3] WT/DSB/M/107, para. 32.
[4] WT/DSB/M/107, para. 33.

4. The Codex Alimentarius Commission of the FAO and the World Health Organisation ("WHO") adopted a standard for sardines as "CODEX STAN 94". A copy of this standard is presented as Exhibit PERU-3. The labelling of canned sardines is regulated in paragraph 6 of CODEX STAN 94, which reads as follows:

> 6. LABELLING
>
> In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following specific provisions shall apply:
>
> 6.1 NAME OF THE FOOD
>
> 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. (Emphasis added)

5. A German company bought Peruvian sardines of the species *Sardinops sagax* and marketed them under the label "Pazifische Sardinen" (Pacific sardines) with an indication of the country of origin and the species of sardines from which it was produced. The package used by the company is the first in the collection of packages used by Peruvian exporters of sardines presented as Exhibit PERU-4. In July 1999, the company was advised by the competent German authorities that it had to cease marketing the Peruvian sardines under the name "sardines" because, under Article 2 of Council Regulation No. 2136/89, only sardines of the species *Sardina pilchardus* (Walbaum) could be marketed as "sardines" even if this name was used in combination with an indication of the origin of the product and the species of the fish from which it was prepared.

6. The relevant part of Article 2 of Council Regulation No. 2136/89 reads as follows:

> Only products meeting the following requirements may be marketed as preserved sardines . . .:

> they must be prepared exclusively from fish of the species "Walbaum". . . (Emphasis added).

7. The company addressed a letter to Director General Cavaco of the Directorate General XIV, Fisheries, of the European Commission pointing out that the intended labelling was consistent with the Codex Alimentarius standard and fully transparent for the consumer. In his reply dated 28 July 1999, Director General Cavaco rejected the importer's arguments as irrelevant, especially those relating to the Codex Alimentarius standard, and confirmed that, according to the European Commission, only preserved fish of the species *Sardina pilchardus* Walbaum could be marketed under the name "sardines". He indicated in his reply that, as a result of certain complaints from the fish industry, the Commission had asked the German administration to strictly control that the relevant rules be observed. According to the German Regulation on Marketing Standards for Fish Products of 22 December 1997, an infringement of Council Regulation No. 2136/89 constitutes an offence subject to a fine up to DM 20'000.[5] Against this background, the company had no option but to stop marketing the Peruvian sardines as sardines.

II. LEGAL ARGUMENT

A. INTRODUCTION

1. The measure at issue

8. The measure at issue in this dispute is the prohibition set out in Article 2 of Council Regulation No. 2136/89 to market products prepared from fish of the species *Sardinops sagax* originating in Peru:

- under the name "sardines" combined with an indication of the name of either:
  - the country of origin ("Peruvian Sardines"); or
  - the geographic area in which the species is found ("Pacific Sardines"); or
  - the species ("*Sardinops sagax*"); or
- under the common name of the species *Sardinops sagax* customarily used in the language of the Member State of the EC in which the product is sold (such as "Peruvian sardine" in English, or "Südamerikanische Sardine" in German).

[5] Neufassung der Verordnung über Vermarktungsnormen für Fischereierzeugnisse, BGBl. I, page 3369.

9. Council Regulation No. 2136/89 establishes not only a labelling requirement for sardines but also minimum quality standards for sardines. According to the first recital in the preamble of this Regulation, the quality standards are "to keep products of unsatisfactory quality off the market". These quality standards are not measures at issue in these proceedings. First of all, Peruvian sardines meet and exceed those standards. During the course of the consultations preceding the establishment of the Panel, the EC confirmed that it had no evidence that Peruvian sardines were of unsatisfactory quality. More importantly, the EC informed Peru during the consultations preceding the establishment of the Panel that the quality standards set out in Council Regulation No. 2136/89 do not apply to sardines of the species *Sardinops sagax* but exclusively to sardines of the species *Sardina pilchardus* Walbaum. The species of sardines exported by Peru was, according to the EC, covered by the general food regulations of the EC. It follows from the above that, according to the terms Council Regulation No. 2136/89 and the explanations given by the EC, neither the object nor the objective of this Regulation is the prevention of the marketing of unsatisfactory products prepared from fish of the species *Sardinops sagax*.

2. The provisions of the TBT Agreement and the GATT at issue

10. Peru's principal legal claim is that the EC labelling requirement for sardines is inconsistent with Article 2.4 of the TBT Agreement, which reads as follows:

> 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.

11. Peru shall demonstrate below that the EC's labelling requirement for sardines is inconsistent with Article 2.4 of the TBT Agreement because: (a) it constitutes a technical regulation within the meaning of the TBT Agreement; (b) international standards relevant to that regulation exist; and (c) the EC failed to base the regulation on those standards even though they would be an effective and appropriate means for the fulfilment of the objective of market transparency that the EC claims to pursue.

12. Peru considers that the EC's labelling requirement for sardines is not only inconsistent with Article 2:4 of the TBT Agreement but also with Articles 2:1 and 2:2 of that Agreement as well as Article III:4 of the GATT. However, for reasons of judicial economy further

explained in Section III below, Peru would like to present these additional legal claims as subsidiary claims, to be addressed only if the Panel were to reach the conclusion that the measures at issue is not inconsistent with Article 2:4 of the TBT Agreement.

3. Allocation of the burden of proof

13. According to the jurisprudence of the Appellate Body, the burden of proof with respect to a particular claim or defence rests with the party that asserts such a claim or defence.[6] The Appellate Body ruled that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[7] Peru will therefore present in this submission the evidence necessary to permit the Panel, in the absence of any refutation by the EC, to rule in favour of Peru.

14. Peru is of the view that, in allocating the evidentiary burden on the specific elements of Articles 2.2 and 2.4 of the TBT Agreement, the provisions of Article 2.5 of the TBT Agreement as well as the object and purpose of that Agreement need to be taken into account. Article 2:5 of the TBT Agreement reads:

> 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. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade. (Emphasis added)

15. According to Article 2.5 of the TBT Agreement the EC, as the party to this dispute that is applying the technical regulation at issue, is thus required to "explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4" of Article 2. The EC owes the performance of this obligation not only during bilateral consultations but also during panel proceedings. Peru has vainly requested explanations during its consultations with the EC and has therefore no option but to request the EC now to provide the necessary

[6] *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* Appellate Body Report, WT/DS33/AB/R, page 14.

[7] *European Communities - Measures Concerning Meat and Meat Products*, Appellate Body Report, WT/DS26/AB26/AB/R-WT/DS/48/AB/R, para. 104.

explanations in its submission to the Panel. The rights and obligations of Peru and the EC under Article 2.5 must be respected by the Panel in the distribution of the evidentiary burden between Peru and the EC. The Panel should therefore determine that it is up to the EC to present evidence explaining why the monopolisation of the name sardine for sardines of the species *Sardina pilchardus* is necessary to achieve the declared objective of market transparency.

16. The allocation of the evidentiary burden by the Panel must furthermore be consistent with the objectives of the TBT Agreement. The overall objective of the TBT Agreement is to ensure that technical barriers to trade are imposed only for legitimate reasons.[8] Given this objective, the evidentiary burden of the party challenging a technical regulation under Articles 2.2 and 2.4 should be confined to the presentation of evidence demonstrating the existence of "a technical regulation which may have a significant effect on trade of other Members". Once that demonstration has been made, it should up to the party applying a technical regulation with such effects to provide evidence demonstrating that the regulation serves a legitimate objective.

17. An important objective of the TBT Agreement, as explicitly recognised in its Preamble, is to promote the use of international standards. By specifying that the complaining party has the burden of overcoming a presumption of consistency of a regulation based on international standards, Article 2:5 suggests by implication that, whenever a regulation is not based on international standards, as in the case before the Panel, the burden is on the respondent to show that the international standards are not an effective and appropriate means for the fulfilment of the legitimate objectives that it pursues.

18. Peru concludes from the above that, in the case of Article 2.4 of the TBT Agreement, the elements of the *prima facie* case to be presented by Peru include the presentation of evidence demonstrating the existence of:

- a technical regulation;
- a relevant international standard; and
- the failure of the EC to base its technical regulation on the international standard.

In the case of Article 2.2 of the TBT Agreement the elements of the *prima facie* case to be presented by Peru include the presentation of evidence demonstrating the existence of:

- a technical regulation; and

[8] See the second and third sentences in the preamble and Article 2.2 of the TBT Agreement.

- the trade-restrictive consequences of that regulation.

Once a *prima facie* case has been made by the complainant on the basis of such evidence, the burden of persuasion shifts to the respondent. It is then the EC as the Member imposing the technical regulations that must justify in terms of its own legitimate objectives the failure to base the technical regulation on the international standard in the case of Article 2.4 and the need to impose a trade-restrictive technical regulation in the case of Article 2.2.

B. THE EC LABELLING REQUIREMENT FOR SARDINES IS INCONSISTENT WITH ARTICLE 2:4 OF THE TBT AGREEMENT.

1. The EC labelling requirement for sardines is a technical regulation

19. Paragraph 1 of Annex 1 of the TBT Agreement defines the term "technical regulation" as a:

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

20. Article 2 of Council Regulation No. 2136/89 lays down characteristics that products marketed as preserved sardines must meet. By its own terms, it lays down "common marketing standards for preserved sardines".[9] It regulates which characteristics preserved sardines must have if they are marketed in the EC under the name sardines and hence establishes a technical regulation in the form of a labelling requirement. According to its Article 9, Council Regulation No. 2136/89 "shall be binding in its entirety and directly applicable in all Member States". Article 2 of Council Regulation No. 2136/89 is thus mandatory. There can for these reasons be no doubt that it constitutes a technical regulation within the meaning of the TBT Agreement.

2. International standards relevant to the labelling of preserved sardines exist.

21. The Codex Alimentarius Commission established by the FAO and the WHO adopts standards, *inter alia*, to facilitate international trade in food. In 1998, the membership of the Commission comprised 163 countries, representing 97 percent of the world's population.[10]

[9] See the title of Council Regulation No. 2136/89.
[10] See "*Understanding the Codex Alimentarius*", http://www.fao.org/docrep/w9114e/W9114eO1.htm

The EC has taken the position that only the standards of international bodies with international treaty status that respect the same principles of membership and due process that form the basis for WTO membership should be recognised as international standards in the WTO context. The EC has, however, recognised 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.[11]

22. A standard for canned sardines and sardine-type products, the CODEX STAN 94,[12] was adopted by the Commission in 1981 and revised in 1995. At the time of the revision, all Member States of the EC were members of the Codex Alimentarius Commission.[13] The products to which CODEX STAN 94 applies are defined as canned sardines or sardine type products that are prepared from fresh or frozen fish of a list of species that includes *Sardina pilchardus* and *Sardinops sagax*.[14] As pointed out in the introductory section of this submission, the labelling of canned sardines is regulated in paragraph 6.2.1 of CODEX STAN 94, the relevant part of which reads:

> The name of the products shall be:
>
> 6.2.1 (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.

23. It would be consistent with sub-paragraph (i) of paragraph 6.2.1 if the EC were to require that the term "sardines", <u>when used without any qualification</u>, be reserved to sardines of the species *Sardina pilchardus* (Walbaum). However, all other species may be marketed according to sub-paragraph (ii) of paragraph 6.2.1 as "X sardines" where "X" is either a country, or a geographic area, or the species, or the common name of the species. <u>It is thus clearly inconsistent with sub-paragraph (ii) of paragraph 6.2.1 if sardines of the species *Sardinops sagax* may not be marketed under the name "sardines" even if the name of the</u>

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

[12] Exhibit PERU-3.

[13] Comision del Codex Alimentarius, *Informe del Vigésimo Primer Período de Sesiones,* Roma 3- 8 de julio de 1995.

[14] Article 2.11 of CODEX STAN 94 (Exhibit PERU-3).

29. It should be noted that Article 6.1.2(i) of CODEX STAN-94 accords the EC a privilege enjoyed by no other WTO Member. It permits the EC 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 CODEX STAN-94 that would permit other WTO Members to reserve the unqualified use of the term "sardines" to the species of sardines found primarily off their own coasts. For instance, it would be inconsistent with CODEX STAN-94 if Peru were to reserve the unqualified use of the term sardines for products prepared from *Sardinops sagax*. It would be equally inconsistent with that standard if the United States were to reserve that term "sardines" for products prepared from *sardinops caeruleus*, which is a species of sardines found mainly off the coast of California.[15] However, all these countries must ensure that their domestic food labelling regulations permit the marketing of *Sardina pilchardus* as sardines <u>without</u> any qualification as to their origin.

30. It is difficult to understand why the non-European countries represented in the Codex Alimentarius Commission accepted this obvious imbalance between their rights and those of the EC. After all, their consumers, too, might expect that a can merely marked sardines contains a product made from fish of a species that is found off their coasts. It is even more difficult to understand why the EC found it in its interest to ignore that standard and to undermine thereby the acceptability and use of that standard by other WTO Members. How can the EC seriously claim that an international standard that accords the EC a privilege and has therefore obviously been drafted with its particular situation and interests in mind is an ineffective or inappropriate means for the fulfilment of its legitimate objectives?

31. If the word "sardines" were not part of the common name for *Sardinops sagax* in the European languages, European consumers might arguably be misled by the use of the word "sardines" even if combined with a geographical indication. However, this is not the case. <u>At least one of common names for fish of the species *Sardinops sagax* in all European countries consist of the word "sardines" or its equivalent in the national language combined with the name of the country or the area of origin (Peru, Chile, Pacific or South America)</u>. Thus, in English one of the common names is "Peruvian sardine" and in German the common name is "Südamerikanische Sardine".

32. The European Commission has prepared a "Multilingual Illustrated Dictionary of Aquatic Animals and Plants", of which the relevant pages are reproduced as Exhibit PERU-5. 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.[16] The Dictionary lists the scientific name of various species of sardines together with the

[15] See the FOA Species Catalogue, pages 57 and 58, annexed as Exhibit PERU-2.
[16] See the foreword by Yannis Paleokrassas, member of the European Commission.

common names 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 the geographical area in which this species if found. The EC cannot convincingly claim 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.

33. The common names for the species *Sardinops sagax* that the European Commission recorded in its "Multilingual Illustrated Dictionary of Aquatic Animals and Plants" are similar to those listed in the electronic publication called "FishBase" that is available on the website www.fishbase.org. This publication, which was prepared with the support of, *inter alia,* the European Commission,[17] lists 110'000 common names for fish. The list of the common names for sardines of the species *Sardinops sagax* is attached as Exhibit PERU-6. It shows that in Italy, the Netherlands, Germany, France, Sweden and Spain, the common name for the species *Sardinops sagax* consists of the word "sardine" (or its equivalent in the national language) combined with an indication of a country or the geographical area in which this species is found, such as "Peru", Chile" or "Pacific". Thus, according to the FishBase, the common name for the species *Sardinops sagax* is in Finland "Peruunsardiini" and in France "Sardine du Pacifique".

34. The Multilingual Dictionary of Fish and Fish Products prepared the OECD, of which extracts are attached as PERU-7, indicates the common names for *Sardinops sagax* in several languages. In English one of the common names for this species is "Pacific sardine", in French "Sardine du Pacifique", in German "Sardine", in Portuguese "Sardinha", in Swedish "Sardin" and in Spanish "sardina".

35. It follows from the above that dictionaries prepared by the EC, international organisations and specialised institutions confirm that in all European countries at least one of the common names for fish of the species *Sardinops sagax* consists of the word "sardines" (or its equivalent in the national language) qualified by one of the countries or the geographic area in which this species is found. According to the labelling standard set out in paragraph 6.1.2(ii) of CODEX STAN 94, sardines of the species *Sardinops sagax* may be marketed as sardines of a country or as sardines from a geographic area. The common names of *Sardinops sagax* in European countries are thus identical to the names to be used for that species according to CODEX STAN 94. It is therefore not credible when the EC claims that it had to prohibit the use of the word "sardines" for fish of the species *Sardinops sagax* altogether to ensure that the European consumer is not misled.

[17] See the main page of the website.

36. Peru has not encountered difficulties in marketing its sardines under the name sardines in markets other than those of the EC. Exhibit PERU-4 presents a collection of packages that have been used in 21 different markets for cans with products made from Peruvian sardines, including Argentina, Australia, Brazil, Canada, Chile, Colombia, Dominican Republic, Gabon, Germany, Haiti, Kiribati, Malaysia, New Zealand, Pacific Islands, Panama, the Philippines, Romania, Samoa, Singapore, Tahiti, and the United States. The first package in the collection is the one that the German authorities considered to be inconsistent with Article 2 of Council Regulation No. 2136/89 because displays the word "sardines". All the other packages have been used without any problems in the other 20 markets even though they also display the word "sardines".

37. The regulations setting out the canned sardine standard adopted by Canada are reproduced in Exhibit PERU-7. This standard applies to canned sardines in hermetically sealed containers prepared from a range of species including *Sardina pilchardus* and *Sardinops sagax*. It establishes the following labelling requirement:

> The name of the product shall be:
>
> "Sardines"; or
>
> "X sardines" where "X" is the name of a country, a geographic area, the species or the common name of the species in accordance with the applicable sections of the Recommended International Standard for Canned Sardines (CAC/RS94-1978) and the Fish Inspection Regulations.

Canada thus has found it possible to base its labelling standard for sardines on the applicable international standard.

38. The U.S. Food and Drug Administration compiled in cooperation with the National Marine Fisheries Service acceptable market names for imported and domestically available seafood. This compilation is called "The Seafood List". Relevant extracts from this list are reproduced in Exhibit PERU-9. According to this List one of the acceptable market names for *Sardinops sagax* is "sardine".

C. THE EC LABELLING REQUIREMENT FOR SARDINES IS INCONSISTENT WITH ARTICLE 2:2 OF THE TBT AGREEMENT.

39. Article 2:2 of the TBT Agreement provides in relevant part:

> 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 account of the risks non-fulfilment would create.

40. According to the first sentence of the above provision, the EC must 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. However, the declared objective of Council Regulation No. 2136/89 is to create an obstacle to trade affording protection to domestic production. According to the second recital in the preamble of this Regulation,

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

41. The objective of improving "the profitability of sardine production in the Community" is not a "legitimate" objective within the meaning of the TBT Agreement. While the TBT Agreement does not define the term "legitimate", its purpose is to further the objectives of the GATT 1994 and to avoid restrictions on international trade disguised as technical regulations.[18] If the improvement of the profitability of domestic production through labelling requirements were deemed to be "legitimate", the TBT Agreement would be turned on its head. Under WTO law, the EC may use tariffs to protect its fishery industry against competition from abroad[19], but it may not use technical regulations for this purpose.

42. There is no rational connection between the objective of ensuring market transparency and the monopolisation of the name "sardines" for fish of a species found mainly off the coasts of the EC and Morocco. In fact, the effect of monopolising the name "sardines" for one species of sardines is that importers of Peruvian sardines are prevented from informing the European consumers in commonly understood terms what the hermetically sealed containers offered to them contain. As a result, market transparency is reduced.

43. There is however a rational connection between this monopolisation and the objective of favouring producers of sardines in the EC and Morocco over producers in other parts of the world. The prohibition to use the common name for Peruvian sardines makes it impossible for importers of canned sardines from Peru to inform the consumer of the content of the cans in readily understood terms. 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

[18] See the second and fifth clause in the preamble of the TBT Agreement.
[19] Subject, of course, to any tariff binding the EC may have assumed with respect to sardines.

terms which product the can contains. The prohibition of any reference to "sardines" in the labelling of products made from Peruvian sardines therefore constitutes an obstacle to trade.

44. The labelling requirement for sardines must be seen against the background of other WTO-inconsistent policies favouring producers of sardines in the EC and Morocco. Thus, the processors of sardines of the species *Sardina pilchardus* in the Canary Islands receive a payment of ECU 56 per tonne of sardine[20], which is clearly inconsistent with the national-treatment provisions of Article III:4 of the GATT.[21] The EC further decided to exempt sardines originating in Morocco from customs duties as from 1 January 1999. This preference is clearly inconsistent with the most-favoured-nation provisions of Article I of the GATT and not covered by Article XXIV of the GATT or the Enabling Clause because it was granted outside a free trade area agreement or customs union and the Generalised System of Preferences. Peru is not asking the Panel to rule on these matters. They are mentioned here merely to illustrate that the illegal monopolisation of the term sardine for products produced mainly in the EC and Morocco goes hand-in-hand with other WTO-inconsistent measures affording protection to producers in the EC and preferential treatment to producers in Morocco.

45. It follows from the above that the declared purpose and the practical effect the EC's labelling requirement for sardines is "to improve the profitability of sardine production in the Community" by monopolising the name "sardine" for fish of a species found mainly off the coasts of the EC and Morocco and thereby creating an obstacle to the marketing of products made from species of sardines found in other parts of the globe. As demonstrated above, if cans with products made from Peruvian sardines are labelled as "Pacific Sardines" market transparency is ensured. There can for these reasons be no doubt that the labelling requirement has been adopted "with a view to or with the effect of creating unnecessary obstacles to international trade" within the meaning of the first sentence of Article 2.2 and that it is "more trade-restrictive than necessary to fulfil a legitimate objective" within the meaning of the second sentence of that provision.

D. THE EC LABELLING REQUIREMENT FOR SARDINES IS INCONSISTENT WITH ARTICLE 2:1 OF THE TBT AGREEMENT.

46. Article 2:1 of the TBT Agreement reads as follows:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be

[20] See Article 2:3(c) of Council Regulation (EC) No 1587/98 of 17 July 1998.

[21] See the panel report on *EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins,* BISD 37S/124-125.

> accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

47. The purpose of this provision is to incorporate the national-treatment and most-favoured-nation principles set out in Articles I:1 and III:4 of the GATT 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. 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 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.

48. It follows from the above that the object and purpose of Article 2.1 are 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 for Article III:4 should be taken into account in interpreting Article 2.1.

49. The Appellate Body has described the overall purpose of the national-treatment requirement as follows:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported and domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions for imported products in relation to domestic products* … Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. … [22] (emphasis added)

[22]The Appellate Body reiterated this ruling in *European Communities- Measures Affecting Asbestos and Asbestos-containing Products* ("*EC-Asbestos*"), WT/DS135/AB/R, para. 97.

50. As pointed out 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 can being offered to them contains sardines. For the reasons explained above, the monopolisation of the term sardine for products prepared from *Sardina pilchardus* accords competitive conditions to those products that are more favourable than those accorded to products prepared from fish of the species *Sardinops sagax*. The "treatment" that that EC's labelling requirement accord to Peruvian sardines is consequently "less favourable" than that accorded to European sardines products within the meaning of the national- treatment requirement.

51. How a treaty interpreter should proceed in determining whether products are "like" under Article III:4 was explained by the Appellate Body in its rulings on *EC – Asbestos.* After pointing out that in this determination had to be made on a case-by-case basis, the Appellate Body states:

> The Report of the Working Party on *Border Tax Adjustments* outlined an approach for analyzing "likeness" that has been followed and developed since by several panels and the Appellate Body. This approach has, in the main, consisted of employing four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products. We note that these four criteria comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes. These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the "likeness" of particular products on a case-by-case basis.[23] (Emphasis added)

[23] *European Communities- Measures Affecting Asbestos and Asbestos-containing Products* ("*EC-Asbestos*"), WT/DS135/AB/R, para. 101 (footnotes omitted).

52. Peru submits 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. It demonstrates that the two species of fish are physically very similar and that there is no scientific or technical reason that would justify a difference in commercial value.

53. The company that sold Peruvian sardines in Germany until July 1999 had asked prior to the marketing of these products a German food inspection institute, the "Institut Nehring" in Braunschweig, Germany, and the "Federal Research Centre for Fisheries, Institute of Biochemistry and Technology" of Germany for an opinion on the quality and the appropriate commercial name of those Peruvian sardines.[24] This opinion is as attached as Exhibit PERU-11. The Institute and the Federal Research Centre 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". They further found that "the Peruvian product is, regarding the appearance superior to most of the corresponding products from Moroccan and European production which have been offered in Germany." They concluded that the consumer would not be misled if the Peruvian sardines were sold as "Pazifische Sardinen" (Pacific sardines) with an indication of the Peruvian origin and a list of ingredients indicating the name of the species.

54. These expert opinions demonstrate that Peruvian sardines and European sardines are "like" products according to three of the four criteria considered relevant by the Appellate Body: The physical properties of these products are very similar, and as a result of these similarities, they are capable of serving the same or similar end-uses and consumers perceive and treat the products as alternative means to satisfy the demand for preserved sea food.

55. Appellate Body emphasised that:

> Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace.[25]

56. A comparison of the physical properties of the two products at issue cannot but lead to the conclusion that the differences between them are of interest to biologists but not to the consumer and therefore do not influence the competitive relationship between them in the

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[24] Nehring Institute, Laboratorien für Lebensmittel, Bedarfsgegenstände und Umwelt. Institut für Konserventechnologie.

[25] *European Communities- Measures Affecting Asbestos and Asbestos-containing Products* ("*EC-Asbestos*"), WT/DS135/AB/R, para. 114.

market place. The two products therefore must therefore be considered to be "like" products within the meaning of Article 2.1 of the TBT Agreement.

57. As to the fourth criterion that has been used for determining likeness - the international classification of the products for tariff purposes – the Appellate Body rightly pointed out that a tariff binding "does not necessarily indicate similarity of the products covered by a binding. Rather, it represents the results of trade concessions negotiated among Members of the WTO."[26] The Appellate Body concluded from this that there were therefore risks in basing a determination of likeness on tariff concessions. It should be added that the very purpose of narrow tariff classifications is to single out particular products for the purpose of protecting domestic production. The use of tariffs for this purpose is in principle permitted under Article II of the GATT. However, the use of internal regulations for that purpose runs counter to the purpose of Article III, according to which internal regulations "should not be applied to imported or domestic products so as to afford protection to domestic production".[27] Taking narrowly defined tariff classifications as the basis for determining likeness therefore entails the risk of condoning product distinctions under internal regulations that serve protectionist purposes.[28] This danger is particular great when closely related species of fish that populate different oceans are distinguished for customs purposes.

58. For these reasons, Peru does not believe that this fourth criterion can provide useful guidance in this case. Nevertheless, Peru would like to point out that the Harmonised System does not distinguish between sardines of different species and that WTO Members generally distinguish in their customs tariffs between fresh, frozen and canned sardines but not between sardines of different species.

E. THE EC LABELLING REQUIREMENT FOR SARDINES IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT.

59. The first sentence of Article III:4 reads as follows:

> The products of the territory of any [Member of the WTO] imported into the territory of any other [Member of the WTO] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all

[26] *Japan – Taxes on Alcoholic Beverages* WT/DS8/AB/R, WT/DS10/AB/R WT/DS11/AB/R, Section H.1.(a).

[27] See Article III:1.

[28] An example of tariff distinctions between different species of fish serving such purposes can be found in the report of the GATT CONTRACTING PARTIES on *Treatment by Germany of Imports of Sardines* (BISD1S/53).

> laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

60. As pointed out above, the national-treatment requirements set out in Article 2.1 of the TBT Agreement and Article III:4 of the GATT are identically worded and have the same objective. The arguments presented above on the less favourable treatment of Peruvian sardines and on the likeness of the species *Sardinops sagax* and *Sardina pilchardus* therefore apply equally to Article III:4 of the GATT. Peru is therefore of the view that the labelling requirement is also inconsistent with this provision. A finding of the Panel to that effect would however be required only if the Panel were to conclude that the EC's labelling requirement for sardines is not a technical regulation and therefore does not fall under the national treatment requirement set out in Article 2.1 of the TBT Agreement.

III. JUDICIAL ECONOMY

61. Peru has demonstrated above that that the EC's labelling requirement for sardines is inconsistent with Article 2:4 of the TBT Agreement. In addition, Peru has demonstrated that this requirement is inconsistent with Articles 2:1 and 2:2 of that Agreement as well as Article III:4 of the GATT. However, for reasons of judicial economy, Peru would like to present these additional claims as subsidiary claims, to be addressed only if the Panel were to reach the conclusion that the measures at issue is consistent with Article 2:4 of the TBT Agreement. Peru would further like to ask the Panel to examine the consistency of the labelling requirement with Article 2:1 of the TBT Agreement only if it were to conclude that it is consistent with Article 2:2 of that Agreement and to examine the consistency of the measure with Article III:4 of the GATT only if it were to conclude that it is consistent with the TBT Agreement.[29] Essentially, Peru requests the Panel to determine the scope of its examination in the light of the principle of judicial economy as defined by the Appellate Body, which ruled:

> The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and to "secure a positive solution to a dispute". To provide only a partial resolution of the dispute would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings

[29] However, Peru must ask the Panel to include in its report all of the evidence submitted to it on the subsidiary legal claims that it does not address. This is because the Appellate Body may only address issues of law and legal interpretations (Article 17:6 of the DSU) could therefore consider claims not examined by the Panel only to the extent that the underlying facts are reflected in the Panel's report.

> 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".[30]

62. Peru is asking the Panel to follow the approach outlined above because, as Peru explained before of the DSB on 20 June 2001, the measure at issue in the Panel's proceeding 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.[31] 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 legal and factual issues on which the Panel needs to make findings, Peru hopes to enable the Panel to resolve the dispute quickly, if possible prior to the lapse of the normal six-month period for panel proceedings.

63. Canada, Chile, Colombia, Ecuador, the United States and Venezuela have reserved their third-party rights. The interests of some of the third parties in this proceeding are possibly broader than those of Peru or different from those of Peru. With this in mind, Peru would like to recall that the Panel has completed its tasks if it resolves the dispute as defined by the claims that Peru submitted to it. The Appellate Body made this clear in its recent report on *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, in which it refused to make a finding on an issue on the ground that the findings it did make "resolve the dispute as defined by Pakistan's claims before the Panel".[32] A ruling by the Panel on issues raised only by a third party would be inappropriate because the consistent practice of GATT panels has been to make findings only on those issues that were raised by the parties to the dispute.[33] This practice is reflected in Articles 7:1 and 11 of the DSU, which define the matter to be examined as the matter referred to the DSB by the complainant.

64. At the organisational meeting of the Panel, Peru noted with concern that other panels had collected evidence and had asked numerous questions on matters on which they subsequently had not made any rulings or on issues which neither party had raised and that this had entailed delays and unnecessary commercial, financial and administrative burdens for the parties concerned. In response, the Chairperson of the Panel assured Peru that the Panel would conduct its proceedings with the greatest possible efficiency. Peru would like to express its appreciation for the Chairperson's positive reaction to Peru's concerns.

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[30] *Australia - Measures Affecting the Importation of Salmon*, WT/DS18/AB/R, para. 223. The Appellate Body confirmed this jurisprudence in *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R - WT/DS142/AB/R, para. 115.

[31] WT/DSB/M/106, para. 53.

[32] WT/DS192/AB/R, para. 127.

[33] See GATT panel report on *United States – Customs User Fee*, BISD 35S/290.

IV. CONCLUSIONS

A. PRINCIPAL FINDING REQUESTED BY PERU

65. In the light of the considerations set out above, Peru respectfully requests the Panel to find that the measure at issue, that is the prohibition set out in Article 2 of Council Regulation No. 2136/89 to market products prepared from fish of the species *Sardinops sagax* originating in Peru:

- under the name "sardines" combined with an indication of the name of:
  - the country of origin ("Peruvian Sardines"); or
  - the geographic area in which the species is found ("Pacific Sardines"); or
  - the species ("*Sardinops sagax*"); or
- under the common name of the species *Sardinops sagax* customarily used in the language of the Member State of the EC in which the product is sold (such as "Peruvian sardine" in English, or "Südamerikanische Sardine" in German),

is inconsistent with Article 2:4 of the TBT Agreement because it is not based on the labelling standard set out in paragraph 6.1.2(ii) of CODEX STAN 94 of the Codex Alimentarius Commission even though the application of that standard would be an effective and appropriate means for the fulfilment of the legitimate objective that the EC claims to pursue with this labelling requirement.

66. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered, according to Article 3:8 of the DSU, to constitute *a prima facie* case of nullification or impairment of benefits under that agreement. Accordingly, Peru requests the Panel to find that the EC labelling requirement for sardines has nullified or impaired the benefits accruing to Peru under the TBT Agreement.

B. SUBSIDIARY FINDINGS REQUESTED BY PERU

67. In case the Panel were to rule that the measure at issue is consistent with Article 2.4 of the TBT Agreement, Peru requests the Panel to find that this measure is inconsistent with Article 2:2 of the TBT Agreement because it is more trade-restrictive than necessary to fulfil the legitimate objective of market transparency that the EC claims to pursue.

68. If the Panel were to find that the measure at issue 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* Walbaum.

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

C. RECOMMENDATION REQUESTED BY PERU

70. According to Article 19:1 of the DSU, where a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. Accordingly, Peru requests the Panel to recommend that the DSB request the EC to bring the measure at issue into conformity with the TBT Agreement.

D. SUGGESTION ON IMPLEMENTATION REQUESTED BY PERU

71. According to Article 12:2 of the TBT Agreement Members shall give particular attention to developing country Members' rights under that Agreement and shall take into account the trade needs of those countries in the implementation of that Agreement. The EC has failed to observe the principle set out in this provision by deliberately creating a labelling requirement designed to protect its producers at the expense of producers in developing countries in South America. Over a period of two years, Peru attempted to resolve the dispute amicably. However, the EC ignored all of Peru's representations and proposals. Moreover, during the whole of this period, the EC did not once respond to Peru's request for an explanation of the justification of the labelling requirement in terms of paragraphs 2 to 4 of Article 2 of the TBT Agreement, notwithstanding the EC's obligation to provide such an explanation under Article 2.5 of the TBT Agreement. When Peru, after two years of vain efforts to reach a mutually satisfactory solution, requested the DSB to establish a panel, the EC did not shun from stating that it was still "in the process of collecting all the necessary information concerning this matters" and from characterising Peru's request as a "hasty decision".[34]

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[34] WT/DSB/M/106, para. 54.

72. There is a glaring discrepancy between the treatment of Peru in this case and the statement of the EC Trade Commissioner reaffirming the EC's commitment to ensuring that the interests and needs of developing countries were a core component of the multilateral trading system. How can a developing country lend credence to this statement if the EC does not even attempt to justify in terms of WTO law the impediments it creates to the exports of developing countries? Since the EC consumes more sardines than it produces, the EC's failure to meet its obligations towards Peru is not only regrettable from a legal and political perspective but also difficult to understand from a commercial perspective.

73. According to the second sentence of Article 19:1 of the DSU, the Panel may suggest ways in which the EC could implement the Panel's recommendation. Peru requests the Panel to suggest in the light of Article 12 of the TBT Agreement and the facts outlined in the preceding paragraph that the EC permit Peru to market its sardines as "Pacific sardines" without any further delay.

V. LIST OF EXHIBITS SUBMITTED BY PERU

Number of Exhibit	**Exhibit**[35]
PERU-1	Council Regulation (EEC) No. 2136/89
PERU-2	Extracts from the FAO Species Catalogue, Vol. 7, Part 1, *Clupeoid Fishes of the World* (Rome:FAO, 1985)
PERU-3	Codex Standard for Canned Sardines and Sardine-type Products (CODEX STAN 94 – 1981 Rev.1 1995) prepared by the Codex Alimentarius Commission
PERU-4	Collection of packages used by Peruvian exporters of sardines
PERU-5	*Multilingual Illustrated Dictionary of Aquatic Animals and Plants* prepared by the Commission of the European Communities
PERU-6	Common names for sardines of the species *Sardinops sagax* according to "FishBase"
PERU-7	*Multilingual Dictionary of Fish and Fish Products* prepared by the OECD
PERU-8	*Fish Products Standards and Methods Manual* of the Canadian Food Inspection Agency, Chapter 2 Standards 2, Canned Sardine Standard
PERU-9	"The Seafood List" of the U.S. Food and Drug Administration
PERU-10	La Sardina Peruana (*Sardinops sagax sagax*) y la Sardina Europea (*Sardina pilchardus*)
PERU-11	Opinion on the quality and the appropriate commercial name of Peruvian sardines by the German food inspection institute, the "Institut Nehring" in Braunschweig, and the Federal Research Centre for Fisheries, Institute of Biochemistry and Technology of Germany.

[35] The exhibits are submitted as hard copies only.