

**PANEL OF THE WORLD TRADE ORGANISATION**

**ON**

***EUROPEAN COMMUNITIES – TRADE DESCRIPTION OF SARDINES***

**(WT/DS231)**

**SECOND SUBMISSION OF  
PERU**

*Prepared with the cooperation of the Advisory Centre on WTO Law*

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*“[The EC Regulation ensures] consumer protection through market transparency and fair competition.”*

European Communities<sup>1</sup>

*“[The EC Regulation] does nothing to promote the interests of European consumers.”*

Consumers’ Association, the largest private consumer organisation in Europe.<sup>2</sup>

## I. INTRODUCTION

### A. PURPOSE AND SCOPE OF THIS SUBMISSION

1. The main purpose of this submission is to respond to the arguments presented by the European Communities (EC) in its first submission to the Panel, its statement at the first meeting of the Panel and in its replies to the questions from the Panel and Peru. For the sake of completeness and clarity of exposition, the central facts and arguments presented by Peru in its first submission will be recalled in this submission. Peru will address in this submission also those elements of Article 2 of the Agreement on Technical Barriers to Trade (TBT Agreement) on which there is no dispute between the parties to this proceeding but on which the Panel raised questions. Taking into account the arguments presented by the EC and third parties, the findings and suggestion that Peru is requesting the Panel to make have been slightly reformulated. The reformulations are set out in the section of this submission entitled “Conclusions”.

### B. THE FACTS AT ISSUE

2. The Codex Alimentarius Commission of United Nations Food and Agriculture Organization (“FAO”) and the World Health Organization (“WHO”) is an internationally recognized body with over 160 member countries that develops standards for food products. The Codex Alimentarius, the Commission’s food code, contains more than 200 standards for foods or groups of foods, of which 28 are standards for fish and fishery products. Codex standards are an internationally agreed reference point for consumers, food producers and processors, national food control agencies and the international food trade.<sup>3</sup>

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<sup>1</sup>Para. 95 of the EC’s first submission.

<sup>2</sup>Para. 35 of the open letter of the Consumers’ Association attached as Exhibit PERU-16.

<sup>3</sup> *Understanding the Codex Alimentarius*, available at <http://www.fao.org/docrep/w9114e/w9114e00.htm>.

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3. The Codex Alimentarius Commission has adopted a standard for canned sardines and sardine-type products, the CODEX STAN 94 (the Codex standard).<sup>4</sup> The product to which the Codex standard applies is defined as canned sardines or sardine-type products that are prepared from fresh or frozen fish of 21 different species, including *the Sardina pilchardus*, which populates mainly European waters, and the *Sardinops sagax*, which is found off the coasts of Peru and Chile.<sup>5</sup>

4. The naming of canned sardines is regulated in paragraph 6 of the Codex standard, which reads as follows:

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.

5. According to this naming standard, Peru should be permitted to market its products prepared from fish of the species *Sardinops sagax* under the name “sardines” combined with either:

- the country of origin (“Peruvian Sardines”); or
- the geographic area in which the species is found (“Pacific Sardines”); or
- the species (“Sardines - *Sardinops sagax*”); or
- the common name of the species *Sardinops sagax* customarily used in the language of the Member State of the EC in which the product is sold (such as “Peruvian sardines” in English, or “Südamerikanische Sardininen” in German).

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<sup>4</sup> Exhibit PERU-3.

<sup>5</sup> Article 2.11 of CODEX STAN 94 (Exhibit PERU-3). For maps indicating the distribution of the species see Exhibits EC-2 and EC-3.

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6. On 21 June 1989 the EC adopted Council Regulation No 2136/89 laying down common marketing standards for preserved sardines (EC Regulation). The Regulation establishes quality and other requirements that products marketed as preserved sardines must meet. According to Article 2 of the EC 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'...

7. According to the preamble of the EC Regulation, "the adoption of such standards for preserved sardines is likely to improve the profitability of sardine production in the Community".<sup>6</sup> The EC explained in its first submission that "establishing high quality standards for preserved sardines would improve the reputation of the product in the European Communities and improve its profitability".<sup>7</sup> 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".<sup>8</sup>

8. It follows from the above, that the EC Regulation was not introduced to prescribe a trade name for products made from *Sardina pilchardus*. It establishes minimum quality standards for products that the seller chooses to market as "sardines". The EC Regulation also does not prescribe a trade name for products made from *Sardinops sagax*. However, in order to reserve the commercial benefit of the quality guarantee to products made from sardines of a species populating mainly European waters, it prohibits the use of the term "sardines" in the trade names for products made from any other species.

9. 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 in commonly understood terms that the hermetically sealed containers in which these products are offered contain sardines. *The New Shorter Oxford English Dictionary* defines the term "sardine" as "a young pilchard or similar small usually clupeid marine fish, especially when cured, preserved, and packed for use as food". "Sardine" is thus a generic term used to describe fish belonging to a group of clupeid marine fish sharing the characteristics of young pilchards. According to specialised dictionaries the word "sardines"

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<sup>6</sup> Fifth introductory clause of the EC Regulation.

<sup>7</sup> Paragraph 146 of the EC's first submission.

<sup>8</sup> Commission 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).

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is also a generic term commonly used to describe different species of fish, including *Sardinops sagax*:

- The “Multilingual Illustrated Dictionary of Aquatic Animals and Plants” of the European Commission<sup>9</sup> lists the scientific name of various species of sardines together with the common names of these species in the nine European languages. One of the common names 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 is found. The term sardines in all European countries is thus understood to cover not only *Sardina pilchardus* but a group of species that includes also *Sardinops sagax*.
- According to the electronic publication called “FishBase”<sup>10</sup> the term sardines is used in the Member States of the EC for a variety of fish of different species. FishBase lists as common names for *Sardinops sagax*, inter alia:
  - Pazifische Sardine (Germany),
  - Sardine du Pacifique (France),
  - Perunsardiini (Finland).
- The Multilingual Dictionary of Fish and Fish Products prepared by the OECD<sup>11</sup> indicates the common names for *Sardinops sagax* in 15 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”.

10. The linguistic conventions noted in these dictionaries are reflected the Codex standard, which provides for the use of the term “sardines” to describe products prepared from fresh or

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<sup>9</sup> Exhibit PERU-5.

<sup>10</sup> Exhibit PERU-6.

<sup>11</sup> Exhibit PERU-7.

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frozen fish of a list of 21 species.<sup>12</sup> The drafters of this standard thus used the term “sardines” as a generic term comprising the two species of sardines at issue.

11. It may be concluded from the above that the common names for *Sardinops sagax* identified in dictionaries prepared by the European Commission, FishBase and the OECD consist in all nine European languages of the word sardines combined with a geographical indication, such as “Pacific”. The EC uses in its first submission the word “sardinops” to describe the Peruvian sardines. However, this word is not included in any of the commonly used dictionaries of the English, French, German and Spanish languages.<sup>13</sup> Consequently, in order to inform the consumer in readily understood terms of the contents of a tin containing products made from *Sardinops sagax*, it is necessary to use the term “sardines”. This was possible under EC law until 1989. However, since the adoption of the EC Regulation sellers of products made from sardines of species other than *Sardina pilchardus* are prevented from providing this information.

12. Peruvian exporters felt the full brunt of the EC Regulation when a German importer cancelled all pending orders of Peruvian sardines because he was advised by the German authorities that the EC Regulation did not permit him to market them as “Pazifische Sardinen” (Pacific Sardines).<sup>14</sup> The difficulties that this importer faced are comparable to those that that an importer of tuna or shrimp would face if he could not market these products as tuna or shrimp because the importing country reserved these trade descriptions to species of tuna or shrimp fished in local waters.

13. It is of course legitimate for a government to adopt regulations giving each food product a precise and specific trade description that does not mislead the consumer. However, it is not legitimate to reserve the use of a generic term for a locally produced product. As will be demonstrated below, by accepting the Agreement on Technical Barriers to Trade (“TBT Agreement”), the EC agreed to refrain from creating such an unnecessary obstacle to international trade.

#### C. SUMMARY OF PERU’S CLAIMS AND ARGUMENTS

14. Article 2.4 of the TBT Agreement provides 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

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<sup>12</sup> Article 2.11 of the Codex standard (Exhibit PERU-3).

<sup>13</sup> Peru consulted The New Shorter Oxford English Dictionary, Petit Larousse, Duden and Diccionario de la Lengua Española – Real Academia Española.

<sup>14</sup> The letter cancelling all pending contracts is attached as Exhibit PERU-13.

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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.

15. According to Article 2 of the EC Regulation, products made from *Sardinops sagax* imported into the EC may not be marketed as “sardines” even if this term is combined with the country of origin (“Peruvian Sardines”); or the geographic area in which the species is found (“Pacific Sardines”); or the species (“Sardines - *Sardinops sagax*”); or the common name of the species *Sardinops sagax* customarily used in the language of the Member State of the EC in which the product is sold (such as “Südamerikanische Sardine” in German). The EC therefore failed to use the Codex standard described in paragraph 4 above as a basis for its Regulation even though that standard would be an effective and appropriate means for the fulfilment of the legitimate objective of market transparency that the EC claims to pursue with its Regulation. The EC consequently acted inconsistently with Article 24 of the TBT Agreement.

16. Article 2.2 of the TBT Agreement provides in relevant part that:

technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

Peru considers that the prohibition of the use of the term “sardines” for products made from *Sardinops sagax* altogether - even with a geographical indication informing the consumer of their non-European origin – 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.

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

Peru considers that the prohibition of the use of the term sardines for products made from *Sardinops sagax* altogether - even with a geographical indication informing the consumer of

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the non-European origin – is inconsistent with Article 2.1 of the TBT Agreement because it 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*.<sup>15</sup>

#### D. SUMMARY OF THE EC’S REBUTTAL

18. The EC recognised in its first submission that the EC Regulation is a “technical regulation” within the meaning of paragraph 1 of Annex 1 of the TBT Agreement and that the obligations set out in Article 2 of the TBT Agreement therefore apply.<sup>16</sup> The EC however asserts that its Regulation is consistent with its obligations under this provision.

19. The EC agrees that the Codex standard is an “international standard” within the meaning of Article 2.4.<sup>17</sup> The EC however asserts that there are four reasons why its Regulation does not violate this provision:

- Article 2.4 does not apply to the EC Regulation because it was drawn up before the entry into force of the Agreement Establishing the WTO (WTO Agreement) on 1 January 1995;<sup>18</sup>
- The Codex standard is not a “relevant” international standard because (a) it was prepared after the adoption of the Regulation and (b) the objectives of the Codex standard are not sufficiently close to those of the Regulation;<sup>19</sup>
- The EC could be deemed to have used the Codex standard as a basis for its Regulation;<sup>20</sup> and,

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<sup>15</sup> In its first submission, Peru also claimed that the prohibition is inconsistent with Article III:4 of the GATT 1994. The EC recognised in its first submission that the EC regulation at issue is a “technical regulation” within the meaning of paragraph 1 of Annex 1 of the TBT Agreement and that the obligations set out in Article 2 of the TBT Agreement therefore apply. Consequently, Peru does not consider it necessary to repeat in the present submission its claims and arguments related to Article III:4 of the GATT 1994.

<sup>16</sup> Para. 92 of the EC’s first submission.

<sup>17</sup> See paras. 114 and 115 of the EC’s first submission and the EC’s answer to question no. 13 from the Panel.

<sup>18</sup> See paras. 110 and 113 of the EC’s first submission.

<sup>19</sup> See paras. 114 and 115 of the EC’s first submission.

<sup>20</sup> See paras. 116 and 127 of the EC’s first submission.

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- The Codex standard would in any case not be an effective and appropriate means for the fulfilment of the legitimate objectives of the EC.<sup>21</sup>

20. The EC claims that Article 2.2 of the TBT Agreement applies only to the “application” of the EC Regulation, not to its “preparation” and “adoption”, because the application is the only action that continued under the TBT Agreement. In the view of the EC, the application of the Regulation is consistent with Article 2.2 because it does not have trade-restrictive effects and, in any case, is not more restrictive than necessary to ensure that each food product bears a precise trade description.<sup>22</sup>

21. Finally, the EC claims that its Regulation does not violate Article 2.1 of the TBT Agreement because imported products made from *Sardina pilchardus* and domestic products made from *Sardinops sagax* cannot be considered to be “like” products for trade description purposes and, in any case, the former are not treated less favourably than the latter.

## II. LEGAL ARGUMENT

### A. THE EC REGULATION IS A TECHNICAL REGULATION.

22. 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.

23. According to its title the EC Regulation lays down “common marketing standards for preserved sardines”.<sup>23</sup> Article 2 of the Regulation regulates which characteristics preserved sardines must have if they are marketed in the EC under the name sardines. One of those characteristics is that they must be made from *Sardina pilchardus*. According to its Article 9, Council Regulation No. 2136/89 “shall be binding in its entirety and directly applicable in all Member States”. The EC Regulation is thus mandatory. The EC Regulation consequently constitutes a technical regulation within the meaning of the TBT Agreement.

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<sup>21</sup> See paras. 128 and 130 of the EC’s first submission.

<sup>22</sup> See paras. 114 and 115 of the EC’s first submission.

<sup>23</sup> See the title of Council Regulation No. 2136/89.

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24. The EC stated in its first submission that the EC regulation:

determines the marketing standards for the product “preserved sardines” in the Community. The European Communities has thus nothing against it being considered as a technical regulation within the meaning of Annex 1 of the *TBT Agreement*. On the contrary, the European Communities itself notified the Regulation under the Tokyo Round TBT Code in 1989.<sup>24</sup> However, the European Communities does not consider it possible to single out one aspect of a measure and to classify and analyse it alone as a “technical regulation”.<sup>25</sup>

25. Peru agrees with the EC. Peru considers the whole of the EC Regulation to be a technical regulation because it lays down the characteristics of the products that may be marketed as preserved sardines. However, Peru challenges in this proceeding only the WTO-consistency of the requirement set out in Article 2 of that Regulation, namely, that only products made from *Sardina pilchardus* may be marketed as sardines. Peru considers the other elements of the Regulation nevertheless relevant to the Panel’s consideration of the question of whether this requirement is consistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement.

B. THE EC REGULATION IS INCONSISTENT WITH ARTICLE 2.4 OF THE TBT AGREEMENT.

**1. Article 2.4 applies to regulations adopted prior to 1 January 1995.**

26. The EC argues that:<sup>26</sup>

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.

The Regulation was prepared by the European Communities (and notified under the GATT 1947) in 1989. Article 28 of the *Vienna Convention on the Law of Treaties* is entitled ‘Non-retroactivity of treaties’ and clearly states that:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased

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<sup>24</sup> See Exhibit EC-28.

<sup>25</sup> Paras. 92 and 93 of the EC’s first submission.

<sup>26</sup> Paras. 111 to 113 of the EC’s first submission.

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to exist before the date of the entry into force of the treaty with respect to that party.

The adoption of the Regulation was an ‘act ... which took place ... before the date of the entry into force of the treaty’ and, since there is no expression of contrary intention Article 2.4 does not apply to it. Indeed, the language of Article 2.4 affirmatively makes clear that it is not intended to apply to measures that are already in existence.

27. The EC’s contention is not supported by the language of Article 2.4. This provision does not oblige WTO Members to use international standards as a basis for drawing up their technical regulations when they decide that these are required. It establishes this requirement “where technical regulations are required” (emphasis added). Article 2.4 thus applies in the situations in which technical regulations are required and not merely at the point in time when the decision to adopt them is taken. An international standard can be “used” both in drafting a new technical regulation and in amending an existing regulation. The temporal element that the EC sees in the language of Article 2.4 is simply not there.<sup>27</sup>

28. As Canada pointed out in its third-party submission, EC’s position is also contradicted by Article XVI:4 of the WTO Agreement, which provides that:

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

29. This provision affirms that the WTO Agreement, unlike the GATT 1947, applies to both existing and new legislation. Given this general principle, existing legislation can be deemed to be exempted from WTO law only if a provision in one of the agreements annexed to the WTO Agreement specifically provides for such an exemption.<sup>28</sup> There is however no such exception in the TBT Agreement.

30. As Canada further pointed out, the application of a WTO agreement to a measure imposed before the entry into force of that agreement was addressed by the Appellate Body

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<sup>27</sup> The TBT Agreement refers to the maintenance of existing measures only once, namely in Article 2.3 according to which technical regulation “shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist.” This obligation to amend or abolish technical regulations that have lost their rationale can logically apply only to regulations that exist. The EC’s assertion that “where the WTO Members meant to regulate maintenance, they did so expressly as in Article 2.3 of the TBT Agreement” (reply to question no. 27 from the Panel) is therefore correct but does not substantiate the point that it is attempting to make.

<sup>28</sup> See para. 3 of the definition of the GATT 1994 in Annex 1 A of the WTO Agreement for an example of existing legislation exempted from the obligations under the GATT 1994.

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in *Brazil - Measures Affecting Desiccated Coconut*. The Appellate Body stated with reference to Article 28 of the *Vienna Convention on the Law of Treaties*:

Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force.<sup>29</sup> (emphasis added)

31. Neither the Codex standard nor the EC Regulation “ceased to exist” after the entry into force of the WTO Agreement. Article 2.4 therefore applies to the Regulation.

32. In *EC - Hormones*, the Appellate Body addressed a similar EC contention that provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) did not apply to measures enacted before 1 January 1995 but which continued to be in force thereafter. In that instance, the Appellate Body stated:

If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly.<sup>30</sup>

33. The Appellate Body’s reasoning is equally applicable in this case. It is reasonable to assume that, if the negotiators had wanted to exempt all technical regulations in existence on 1 January 1995 from the obligations under Article 2.4, they would have explicitly done so, in particular in the light of the general principle reflected in Article XVI:4 of the WTO Agreement.

## **2. The Codex standard is an international standard.**

34. All parties to the present proceeding, including the third parties, agree that the Codex standard is an international standard within the meaning of the TBT Agreement. The most cogent explanation why this is so was given by Canada in its third-party submission.<sup>31</sup>

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<sup>29</sup> Report of the Appellate Body, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, p. 15. This issue has also been addressed by the Appellate Body, in: *EC - Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R and WT/DS48/AB/R (“EC – Hormones”) and *Canada – Term of Patent Protection*, WT/DS170/AB/R.

<sup>30</sup> *Ibid*, *EC – Hormones*, para. 128.

<sup>31</sup> Paras. 18 -21 of Canada’s third-party submission.

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The Codex Standard is an “international standard”. The TBT Agreement defines “standard” but not “international standard”. A standard is defined in Annex 1 as a:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.

The Codex Commission is an internationally recognized standard setting body. Codex standards are the internationally agreed global reference point for consumers, food producers and processors, national food control agencies and the international food trade.<sup>32</sup> The Codex Standard in issue is not mandatory.

Moreover, the Codex Standard meets the principles and procedures set out by the TBT Committee in the “Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement” (the “Decision”).<sup>33</sup> That is, the Codex Standard was developed in a manner consistent with the principles of the Decision including transparency, openness, impartiality and consensus. EC Member States were actively involved in the development and adoption of the Codex Standard and the EC acted as an observer throughout this process. In developing and adopting the Codex Standard, a multilateral consensus based approach was applied.<sup>34</sup> The Reports of the Codex Committee show that the process that led to the adoption of the Codex Standard provided all countries involved in the production of sardine products, including EC Member States, an opportunity to participate in establishing this relevant international standard.<sup>35</sup>

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<sup>32</sup> *Understanding the Codex Alimentarius*, available at <http://www.fao.org/docrep/w9114e/w9114e00.htm>.

<sup>33</sup> G/TBT/9, 13 November 2000, Annex 4, pp. 24-28.

<sup>34</sup> The EC has indicated it favours such an approach; see EC’s First Submission, para. 175.

<sup>35</sup> Reports of the Codex Committee on Fish and Fishery Products, 1971 – 1975 and 1977 (Exhibit CDA-3).

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35. Codex standards as such 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 Codex standards.<sup>36</sup> 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 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 part relevant to the technical regulation that the Member decided to adopt. Finally, Members need not base their regulations on international standards if these are not an appropriate and effective means to fulfil their legitimate objectives.

36. Transposed to the case before the Panel, this means that the EC was not obliged to adopt a technical regulation on the naming of products made from sardines other than *Sardina pilchardus*. However, having done so, it was obliged to use the relevant part of the existing international standard on this matter as a basis for its Regulation.<sup>37</sup>

### **3. The Codex standard is a relevant international standard.**

37. While the EC agrees that the Codex standard is an international standard within the meaning of the TBT Agreement, it is of the view that this international standard is not relevant because “it is obvious that a 1994 standard cannot be a ‘relevant standard’ for a Regulation adopted in 1989.”

38. This argument is nothing but the EC’s existing legislation argument in a different guise. As pointed out above, what is decisive is that both the Codex standard and the EC Regulation continued to exist after the entry into force of the WTO Agreement and that the EC was therefore since 1 January 1995 under the obligation to use the Codex standard as a basis for its Regulation. Whether the preparation of the international standard took place before or after the adoption of a technical regulation can therefore not determine its relevance under Article 2.4. Moreover, the EC’s argument is factually baseless because the naming standard incorporated in the Codex standard did exist when the EC adopted its Regulation. The current version of this standard was adopted in 1978, thus 11 years prior to the adoption of the EC

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<sup>36</sup> Contrary to the assertions of the EC at para. 82 of its first submission, the fact that many countries do not prescribe specific trade names for sardines is therefore not an indication of controversies on the Codex standard but of differences in the appreciation of the need to prescribe such trade names.

<sup>37</sup> In its replies to question no. 32 from the Panel, the EC makes the astonishing claim that the “the EC Regulation does not set standards for sardine-type products as referred to in article 6.1.1 (ii) of the Codex standard”. If this were correct, Peru would not have had to bring this dispute.

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Regulation in 1989.<sup>38</sup> Thus, even if the EC's interpretation of the term "relevant" were correct, it would not apply in the present case.

39. The EC also does not consider the Codex standard to be relevant because "the objectives of the Codex standard are [not] sufficiently close to the Regulation" and claims that Peru failed to demonstrate the contrary.<sup>39</sup> *The New Shorter Oxford English Dictionary* defines "relevant" as "bearing on", "connected with" or "pertinent to the matter in hand". The Codex standard regulates the naming of sardines, including *Sardinops sagax*, while Article 2 of the EC Regulation establishes a requirement regarding the naming of sardines, including *Sardinops sagax*. The Codex standard has a bearing on, is connected with or pertinent to the EC Regulation. The EC's unsubstantiated claim that Peru has failed to demonstrate the relevance of the Codex standard should therefore be rejected.

#### **4. The EC has not used the Codex standard as a basis for its Regulation.**

(a) The EC misinterprets the Codex naming standard for *Sardinops sagax*.

(i) *According to the Codex standard the word "sardines" is always part of the name to be given to products made from Sardinops sagax.*

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

English version:<sup>40</sup>

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:<sup>41</sup>

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

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<sup>38</sup> See para. 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.

<sup>39</sup> Peru shares, of course, the view that the objectives of the EC Regulation and those of the Codex standard are not sufficiently close. Peru assumes that what the EC means to say is that the matters covered by its Regulation and by the Codex standard are not sufficiently close.

<sup>40</sup> See Exhibit Peru-3.

<sup>41</sup> See Exhibit EC-30.

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

Spanish version:<sup>42</sup>

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.

41. The EC 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 EC, indicates that "the common name of the species in accordance with the law and customs of the country in which the product is sold" is intended to be a self-standing option independent of the formula "X Sardines". The EC 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. The EC asserts that its interpretation is borne out by the negotiating history of the Codex standard because it had appeared in a compromise solution presented by Canada and the United States in 1973.<sup>43</sup>

42. None of these arguments have any merit. 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. In the view of Peru, the interpretation of the EC fails to take into account the context in which the comma appears and objective of paragraph 6.1.1(ii), which is to regulate the use of the term "sardines" in the marketing of products made from fish of 21 different species.

43. The argument of the EC must also be evaluated against the French and Spanish versions of the Codex standard that are equally authentic. The French text makes it absolutely clear that the Codex standard was not meant to permit countries to choose between "X Sardines"

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<sup>42</sup> See Exhibit EC-31.

<sup>43</sup> Paragraphs 32 to 34 of the EC's statement at the first meeting.

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and the common name of the species. The relevant part of paragraph 6.1.1 (ii) reads in French:<sup>44</sup>

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

Translated word-by-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”.

44. Also clear on this point is the Spanish text, the relevant part of which reads:<sup>45</sup>

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

Translated word-by-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.

45. Contrary to the assertion of the EC, 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 EC claims to have. In 1972, the following proposal for the naming of sardines was put forward:<sup>46</sup>

Fish species covered by this standard shall be designated either:

(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,

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<sup>44</sup> See Exhibit EC-30 for the French version of the Codex standard.

<sup>45</sup> See Exhibit EC-31 for the Spanish version of Codex standard.

<sup>46</sup> See the entry next to 1972 in Exhibit PERU-12.

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

Sub-paragraph (iii) of this proposal provides indeed for the additional option that the EC claims to have under the current standard. 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”.<sup>47</sup> The explicit deletion of the sub-paragraph (iii) therefore confirms that the EC’s interpretation cannot be reconciled with the drafters’ intention.

46. It is not clear to Peru why the EC is presenting to the Panel the argument that it has the option of using the common name even if that common name does not comprise the word “sardines”. As Peru demonstrated in its first submission, in all European countries at least one of common names for fish of the species *Sardinops sagax* consist of the word “sardines” or its equivalent in the national language combined with the name of a country or geographical area (Peru, Chile, Pacific or South America). Thus, the “Multilingual Illustrated Dictionary of Aquatic Animals and Plants” prepared by European Commission identifies a name consisting of the word “sardines” or its equivalent in the national language combined with the name of a country or a geographical area as the common name for fish of the species *Sardinops sagax* in all these nine languages.<sup>48</sup> The EC Regulation prohibits the use of these common names and the EC Member States are therefore obliged to prescribe other names as trade descriptions. Thus, the option that the EC claims to have under the Codex standard is not an option that the EC used as a basis for its Regulation.

(ii) *The application of the Codex standard is not subject to the laws and customs of the country of sale.*

47. Paragraph 6.2.1 (ii) contains the phrase “in accordance with the law and custom of the country in which the product is sold”. The EC draws from this phrase the conclusion that it need not permit the marketing of products made from fish of the species *Sardinops sagax* as

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<sup>47</sup>See 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.

<sup>48</sup> See paragraphs 31 and 32 of Peru’s first submission. In a comment on question no. 17 (b), the EC questions whether “Südamerikanische Sardine” is the common name for *Sardinops sagax*. The EC asserts that the German legislation (Lebensmittelbuch) provides that this species should be marketed as “sardinops” or “pilchard.” The EC asks whether Peru is better placed than the German Lebensmittelbuch to decide what the common name of *Sardinops sagax* is. Peru’s point is that the experts appointed by the EC Commission, FishBase, and the OECD identified “Südamerikanische Sardine” as the common name in German and that the EC Regulation prohibits the German legislator to use this common name as a trade description.

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sardines because this would be contrary to its law and custom.<sup>49</sup> The EC thus claims in effect that the mere adoption of a regulation deviating from the Codex standard can justify a deviation from that standard.

48. This is an untenable proposition. The terms “in accordance with the law and custom” qualify the immediately preceding terms “of a country, a geographic area, the species, or the common name of the species”. This means that selection of the country, area, species or common name may be made in accordance with the domestic law and custom. However, there is nothing in the wording of paragraph 6.2.1 (ii) to suggest that the whole of the standard set out in this provision applies only if and as long as there is no contrary law and custom. The provision gives four options as to the designator (the “X”) with which the term sardines may be combined (country, area, species, common name) and leaves it to each country to choose among those options in accordance with its laws and customs. This is the plain meaning of the terms of the standard in all three languages. There is no logic in the EC’s claim that, because it may apply the Codex standard in accordance with its law and custom, it may not apply it at all. An internationally agreed technical standard would be meaningless if domestic laws and customs could be invoked to justify a deviation. It would be absurd, and hence contrary to the established principles of interpretation, to impute that intention to the drafters of paragraph 6.2.1 (ii).

(b) The EC Regulation frustrates the basic objective of the Codex standard.

49. According to the terms of Article 2.4 of the TBT Agreement, WTO Members shall “use” the relevant international standards “as a basis for” their technical regulations. The EC is therefore correct when it points out in its submission that its Regulation need not conform to, or be identical to, the Codex standard. The ordinary meaning of the word “basis” is “foundation”, “main constituent” or “a determining principle”.<sup>50</sup> The EC could therefore be deemed to have acted consistently with this requirement of Article 2.4 only if it had used the Codex standard as a “foundation”, “main constituent” or “determining principle” in formulating its Regulation. However, 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 EC can therefore not claim that this standard was used as a basis for its naming standard for sardines. The fact of the matter is that the EC, 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*.

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<sup>49</sup> See para. 119 of the EC’s first submission and its answer to question no. 16 of the Panel.

<sup>50</sup> Lesley Brown (ed.) *The New Shorter Oxford English Dictionary*, Volume 1.

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**5. The Codex standard would be an effective and appropriate means for the fulfilment of the objectives the EC claims to pursue with its Regulation.**

(a) The alleged objective of preserving specific and precise trade descriptions

(i) *The EC Regulation does not pursue the objective of preserving specific and precise trade descriptions for sardines.*

50. The EC argues that its Regulation implements its legitimate policy of “preserving specific and precise trade descriptions for food”, a policy different from that of other WTO Members which allow a multiplicity of names. A system whereby a producer can choose its own trade description would undermine this policy. The use of the trade descriptions foreseen in the Codex standard in the EC would be inappropriate because it would prevent the implementation of this policy.<sup>51</sup>

51. This assertion lacks a factual basis. The EC does not prescribe specific and precise trade descriptions for the different species of sardines covered by the Codex standard. The EC Regulation does not prescribe a trade name for products made from *Sardina pilchardus*. It merely establishes minimum quality standards for products that the seller chooses to name “sardines”. The seller may have an economic interest in using the term “sardines” as a trade name for products made from *Sardina pilchardus* but there is nothing in the Regulation that prevents the marketing of those products under other trade names. The EC Regulation consequently does not implement the legitimate policy of preserving specific and precise trade descriptions for food. It establishes a quality guarantee for preserved sardines and reserves the commercial benefit of this guarantee to products made from sardines populating European waters. As explicitly recognised in the Preamble of the EC Regulation and further explained in the EC’s first submission,<sup>52</sup> this is meant to “improve the profitability of sardine production in the Community”. It is not meant to ensure that products made from *Sardina pilchardus* are marketed only under one trade name. There are also no other EC regulations that establish specific and precise trade descriptions for the other species of sardines covered by the Codex standard.

52. The policy that the EC claims to implement with its Regulation simply does not exist.

(ii) *The EC could implement a policy of preserving specific and precise trade descriptions for sardines through a regulation based on the Codex standard.*

53. The EC further argues that the Codex standard would prevent the adoption of a system under which each food product must bear a precise trade description on which the consumer

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<sup>51</sup> Para 154 of the EC’s first submission.

<sup>52</sup> Para. 146 of the EC’s first submission.

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can rely as a guarantee. It is difficult to follow this argument because the Codex standard does not prevent the EC 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, the consumers’ expectations are protected and the Codex standard is met.

(b) The alleged objective of consumer protection.

(i) *The EC Regulation does not pursue the objective of consumer protection.*

54. The EC notified its Regulation in 1989 in compliance with its obligations under the 1979 Agreement on Technical Barriers to Trade. This notification indicates that the objective and rationale of the Regulation is “consumer protection”.<sup>53</sup> However, the Regulations lays down minimum quality standards only for products made from *Sardina pilchardus*. If the concerns of consumers had been at the origin of the Regulation, the EC would not have limited the application of the Regulation to the species of sardines that populates European waters but would have adopted a regulation covering also like products made from sardines harvested in the waters of other WTO Members.<sup>54</sup>

55. 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. Paragraph 6.1.2(i) of the Codex standard takes this into account because the term “sardines” without any qualification may be reserved for that species. However, the European consumers offered a can labelled “Pacific sardines” are not misled because they are clearly informed that the product is not prepared from sardines caught in European waters. Article 6.1.2(ii) of the Codex standard reflects this fact by prescribing that

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<sup>53</sup> See point 7 of the notification reproduced as Exhibit EC-28.

<sup>54</sup> The EC explained in its reply to question no. 11 (c) from the Panel that, according to Article 7(c) of the EC Regulation, a can containing at least 25 % of homogenised *Sardina pilchardus* flesh and the remainder containing the flesh of other fish which have undergone the same treatment can be marketed as sardine paste provided the content of the flesh of other fish is less than 25 %. Fish processors could thus market fish paste using the name sardine provided they add flesh from *Sardina pilchardus* to the flesh from *Sardinops sagax*. This part of the Regulation therefore promotes the market opportunities of European sardine producers. The EC explains in its reply to question no. 11(a) from the Panel that, in spite of the permission to use of the term sardines for products of which up to one half is not made of *Sardina pilchardus*, the consumer would be adequately informed because the list of ingredients would have to indicate the quantities of each of the ingredients used. This explanation cannot be reconciled with the EC’s claim that the use of the term “sardines” for a product made from *Sardinops sagax* must be prohibited to protect the European consumer even if the list of ingredients indicates that it was made from *Sardinops sagax*.

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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 their common name. 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.

56. As pointed out above, the European Commission has prepared a “Multilingual Illustrated Dictionary of Aquatic Animals and Plants”.<sup>55</sup> This Dictionary was produced in close cooperation between the Commission, the Member States and national fishery institutes, *inter alia*, for the purpose of enhancing market transparency.<sup>56</sup> 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 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.

57. The largest private consumer organisation in Europe, the Consumers’ Association, noted the first submissions of Peru and the EC to the Panel on the websites of the Advisory Centre on WTO Law (ACWL)<sup>57</sup> and the European Commission.<sup>58</sup> It decided to express its views on these submission in an open letter addressed to the Executive Director of the ACWL. This letter is attached as Exhibit PERU-16. The facts and arguments that the Consumers’ Association presented on the legal issues before the Panel should be regarded as part of Peru’s submission to the Panel.

58. The Consumers’ Association reaches the conclusion that the EC Regulation “does nothing to promote the interests of European consumers”.<sup>59</sup> It correctly notes that:

If the objectives stated by the Commission had indeed been the main driving force behind the Regulation we would have had a very different Regulation than the one we are faced with today. Europe’s consumers have, for many decades enjoyed a range of sardines from different countries. It is noticeable that when the Commission invokes the spectre of consumer confusion and

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<sup>55</sup> Exhibit PERU-5.

<sup>56</sup> See the foreword by Yannis Paleokrassas, member of the European Commission.

<sup>57</sup> <http://www.acwl.ch>

<sup>58</sup> <http://www.mkaccdb.eu.int/miti/dsu>

<sup>59</sup> Para. 39 of the letter from the Consumers’ Association attached as Exhibit PERU-16.

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distress absolutely no evidence is presented to support their case. This is because the more liberal and internationally consistent regime prior to the adoption of the Regulation did not cause problems for consumers. The Regulation was designed to protect European producers and processors and clearly acts against the economic and information interests of Europe's consumers.<sup>60</sup>

(ii) *The EC could implement a policy of consumer protection through a regulation based on the Codex standard.*

59. The EC asserts that it needs to deviate from the Codex standard because consumers in the EC have “associated the word ‘sardine’ exclusively with *Sardina pilchardus*”.<sup>61</sup> In its answer to question no. 33 from the Panel the EC states that:

The prohibition on the use of the term "sardine" is necessary to allow different products to be distinguished. . . . The use of the term "X Sardines" where the X indicates the name of the country or geographic area would not achieve these objectives in the European Communities since the use of the word “sardine” would suggest to the consumer that the products are the same but come from different countries or geographic areas.

60. The Codex Alimentarius Commission did not agree with this proposition. EC has not presented any facts or considerations that have not been taken into account by the Codex Alimentarius Commission and that would support a different conclusion. There are in particular no developments subsequent to the adoption of the standard that would render the standard generally ineffective or inappropriate. There are also no factors or problems specific to the EC that render this standard ineffective or inappropriate for the EC. The only factor or problem invoked by the EC is that European consumers associate the word sardines with fish of the species *Sardina pilchardus*. This has however already been taken into account by the Codex Alimentarius Commission because the Codex standard permits the EC to require that the country or area of origin, the name of the species or the common name of the species be added to the term “sardines” whenever the product is made from sardines of species other than *Sardina pilchardus*.

61. One of the main purposes of the standard is to ensure that the consumers are not misled. This purpose is reflected in the requirement set out in paragraph 6.1.1(ii) that, whatever trade

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<sup>60</sup> Idem, para.36.

<sup>61</sup> Para. 130 of the EC's first submission

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description is chosen, it must not mislead the consumer. The Codex Alimentarius Commission adopted the naming standard at issue at its 12<sup>th</sup> session in 1978 without any opposition by any of the countries present (as recorded in document ALINORM 78/41).<sup>62</sup> The countries present included Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Portugal, Spain, Sweden and the United Kingdom.<sup>63</sup> Thus all of the present Member States of the EC except Luxembourg participated in the decision to adopt this naming standard. In 1984, Portugal proposed that this standard be revised to ensure that only products obtained from *Sardina pilchardus*, which Portugal described as the only “true” sardine, can be classified as sardines. However, this proposal was not adopted because it was felt that the naming standard set out in paragraph 6.1.1(ii) provided adequate protection for the consumer.<sup>64</sup> The Codex Alimentarius Commission, the experts that advised the Commission and the Member States of the EC that participated in its decisions were thus of the view that the naming standard that they had prepared would not mislead the consumer.<sup>65</sup>

62. It follows from the above that the EC is asking in effect the Panel to re-assess the facts that have already been examined by the Codex Alimentarius Commission and to arrive at a conclusion different from the one reached by that Commission. This amounts to a request that the Panel rule that the naming standard set out in paragraph 6.1.1 (ii) should not have been adopted by the Commission because its application misleads the consumer. However, the Panel should not transform itself into an international standardisation body and re-examine the technical justification of the international standards.<sup>66</sup> Article 2.4 requires the Panel to examine whether the international standard exists, whether it has been used a basis for the technical regulation and, if not, whether there are factors or problems that render this standard ineffective or inappropriate for the Member that has adopted the technical regulation. Article

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<sup>62</sup>Para. 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. See for further details the entries next to 1978 and 1994 in Exhibit Peru-12.

<sup>63</sup> See pages 72 – 84 and Appendix I 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.

<sup>64</sup> See the entry next to 1984 in Exhibit Peru-12.

<sup>65</sup> In its reply to question no. 15 from the Panel, the EC states “it would be wrong to argue that the European Communities has to abide by the positions expressed by it or its Member States individually in the context of such Codex meetings”. No one has presented this argument in this proceeding. What has been argued is that the adoption of the Codex standard in meetings in which all Member States of the EC except Luxembourg participated creates a presumption that the application of the standard within the territory of the EC would not confuse consumers. The EC failed to respond to this argument.

<sup>66</sup> The EC appears to agree with this proposition because, at para. 16 of its statement at the first meeting of the Panel, it rhetorically asked the panelists: “Are you to convert yourselves into a food tasting panel and decide which species taste good enough – or bad enough – to be called sardines? These matters have to be left to the Members of the WTO.” The EC thus seems to agree that the appropriateness of standards should not be decided by WTO panels but by the Members of the WTO acting through international standardisation bodies.

2.4 does not require the Panel to re-examine the effectiveness and appropriateness of the standard as such. In short, the issue before the Panel is not whether the Codex standard misleads consumers but whether there are factors or problems that would render the application of that standard by the EC ineffective or inappropriate. The facts before the Panel demonstrate that there are no factors or problems specific to the EC that provide a plausible basis for the conclusion that there are such factors or problems.

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

##### 1. The EC Regulation is trade-restrictive

(a) Technical regulations are inherently trade-restrictive.

63. The EC claims that Peru, in order to substantiate its claim that the EC Regulation is inconsistent with Article 2.2, would have to demonstrate that it has trade-restrictive effects.<sup>67</sup> The assertion is incorrect because the drafters of Article 2.2 proceeded on the assumption that all technical regulations, including those imposed for legitimate reasons, inevitably have trade-restrictive effects. This is reflected in the choice of the comparative “more trade-restrictive than necessary” in the text of Article 2.2. If the drafters of this provision had been of the view that some technical regulations have trade-restrictive effects and others do not, they would have distinguished between technical regulations that are necessary and those that are not.

64. The EC is of course correct when it pointed out during discussions at the first meeting of the Panel that a good portion of international trade would not take place if governments did not adopt regulations ensuring that the products put on the market meet certain standards and that technical regulations are therefore in principle legitimate and necessary. Indeed, many products could not be sold in the absence of government regulation guaranteeing their safety. However, each regulation that prescribes which characteristics an imported product (or process or production method related to that product) must have, imposes burdens on the manufacturers and traders which have to comply with it and therefore inevitably has trade-restrictive effects. This fact is reflected in the language of Article 2.2.

(b) The EC Regulation is trade-restrictive.

65. The question of whether technical regulations must be presumed to be trade-restrictive need not be answered by the Panel because the particular technical regulation at issue is certainly trade-restrictive. 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

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<sup>67</sup> See para. 47 of the EC’s statement at the first meeting of the Panel.

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commonly understood terms which 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 sardines, including *Sardinops sagax*.<sup>68</sup> 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 – is therefore trade-restrictive.

66. The EC Regulation is also trade-restrictive because it discriminates against imported products. As noted above, the EC Regulation does not prescribe a trade name for products made from *Sardina pilchardus*. It merely establishes minimum quality standards for products that the seller chooses to name “sardines”. There is nothing in the Regulation that prevents the marketing of products made from *Sardina pilchardus* under other trade names. If, for instance, the *Sardina pilchardus* were better known in a particular Member State under the name “pilchard” and products made from *Sardina pilchardus* could therefore be marketed more successfully under that name, the seller would be permitted to choose that name. The seller of products made from *Sardinops sagax*, however, is not given the choice between the trade names “sardines” and “pilchards”.<sup>69</sup> Products made from *Sardina pilchardus* are thus accorded conditions of competition that are more favourable than those accorded to products made from *Sardinops sagax*. The prohibition to use the term sardines for products made from *Sardinops sagax* is consequently trade-restrictive also for this reason.

67. The EC claims 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 EC asserts that “Peru has not even tried to demonstrate that it would sell more preserved *Sardinops sagax* if it could call them sardines.”<sup>70</sup>

68. Even if Peru were required to demonstrate that the EC Regulation is trade-restrictive, it would not be required to demonstrate that its exports had declined as a result of the application of the Regulation. 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

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<sup>68</sup> See below the reply to question no. (1) from the EC to Peru.

<sup>69</sup> In Germany, *Sardina pilchardus* may be sold **either** as “Sardine” **or** as “Pilchard” (see Exhibit EC-25bis). The same appears to be true in the United Kingdom (see sub-paragraph (3) of paragraph 1 of Schedule 1 of the Food Labelling Regulation reproduced in Exhibit EC-24).

<sup>70</sup> Para. 140 of the EC’s first submission.

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recognised under GATT and WTO jurisprudence that the basic provisions governing international trade protect expectations on conditions of competition, not on export volumes.<sup>71</sup> 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”<sup>72</sup> and that nullification or impairment of GATT obligations could be established without “statistical evidence of damage”.<sup>73</sup> 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 imports.<sup>74</sup> 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.**

69. According to consistent 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.<sup>75</sup> One of the purposes of the TBT Agreement is to further the objectives of the GATT.<sup>76</sup> 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.

70. 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

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<sup>71</sup> See Appellate Body report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS50/AB/R), para. 40.

<sup>72</sup> BISD 37S/86.

<sup>73</sup> BISD 1S/56.

<sup>74</sup> BISD 37S/130.

<sup>75</sup> See the Appellate Body reports on *European Communities - Measures Affecting the Prohibition of Asbestos and Asbestos Products*, WT/DS135/AB/R, (“EC - Asbestos”), paras. 170-174; *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, (“Korea - Beef”), paras. 165-166 and *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2, WT/DS4, para. 6.24 and the GATT Panel report on *United States - Section 337 of the Tariff Act of 1930*, BISD 36S/345.

<sup>76</sup> Second clause of the Preamble of the TBT Agreement.

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available, that is consistent with the TBT Agreement and that would fulfil the EC's objective. The objective of consumer protection that the EC 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 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,"<sup>77</sup> for example "Pacific Sardines" or "Peruvian Sardines". By adopting such a measure the EC 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 EC to fulfil its stated objectives while at the same time being less restrictive of trade in preserved sardines.

71. The Consumers' Association also concludes that the Regulation's objectives can be achieved in a less restrictive way. It notes that:<sup>78</sup>

First, there is no good reason to restrict sardines marketed within the EC to the specie *Sardina Pilchardus Walbaum*. The equivalent Regulation for common marketing standards for tuna and bonito is not similarly restrictive, but permits, inter alia, Atlantic or Pacific bonito, Atlantic little tuna, Eastern little tuna, black skipjack "and other species of the genus *Euthynnus*" (see Annex to Regulation 1536/92).<sup>79</sup> If a permissive and wide range of tuna or bonito species can be marketed in the Community under a common standards regime designed "to improve the profitability of tuna production in the Community" and to protect "consumers as regards the contents of packages" of tuna, it is difficult to understand why sardines should be marked out for a particularly restrictive regulatory regime.

The EC's justification is that allegedly traditional association in the minds of European consumers of sardines with a particular species (namely *Sardina Pilchardus Walbaum*) and the consecration of that traditional view in Regulation 2136/89 has led to "uniform consumer expectations throughout the

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<sup>77</sup> The Codex Standard, para. 6.1.1.

<sup>78</sup> Paras. 33 and 34 of the letter from the Consumers' Association attached as Exhibit PERU-16 (footnotes omitted).

<sup>79</sup> Attached as Exhibit PERU-15.

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*European Communities... [with] the term “sardines” referring only to a preserve made from Sardina Pilchardus.”* Commissioner Lamy has even publicly stated (in his reply to a recent European Parliamentary Question) that Council Regulation 2136/89 “*does not exclude from the Community market other types of fishes, like the Sardinops Sagax, nevertheless, it reserves the use of the name “sardine” to the Sardina Pilchardus Walbaum. This reserve in the use of the name “sardine” is in accordance with the traditional use of “sardine” in the Community and it is done in order to ensure market transparency and prevent the consumer from being misled.*” (emphasis added)

Consumers’ Association respectfully submits that this is a particularly egregious example of a self-serving and circular argument. Trade-restrictive legislation cannot be justified on the grounds that it enshrines in statute a consumer taste itself conditioned by the very same restrictive provision complained of: to accept such a justification would allow an easy means of circumventing WTO rules against protectionist legislation, on the grounds that a contested measure was merely “confirming” consumer tastes. The EC defence is also inaccurate in that a wide array of sardines were made available to European consumers for many decades prior to the imposition of this restrictive Regulation.

In any event, there exists simple and easy ways to protect the EC consumer and allow a profitable trade in sardines. As Commissioner Lamy admits in his reply to the Parliamentary Question quoted above, “*other types of sardine-like fishes can be freely marketed in the Community if they use another name that can distinguish them from the Sardina Pilchardus Walbaum.*” While it of course remains for Peru to suggest acceptable solutions to the dispute, Consumers’ Association suggests that one possible method would be for the EC to permit sales of Peruvian sardine exports under the appellation “Pacific Sardines”: this was the appellation used in sales to German consumers, to which the Community objected in 1999, causing the present dispute. To use Commissioner Lamy’s phrase in his reply to the Parliamentary question referred to

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above, this would permit Peruvian sardine exports to be marketed under “*another name that can distinguish them from the Sardina Pilchardus Walbaum*”: indeed, given the different genus of sardines which Pacific-origin sardines represent, that slightly differentiated name would seem:

to be scientifically accurate

to avoid consumer confusion

to preserve the separate identity of sardines caught in Atlantic and/or European waters.

#### D. THE REGULATION IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

##### **1. Domestic products prepared from *Sardina pilchardus* and imported products prepared from *Sardinops sagax* are “like” products.**

72. 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 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 subset of the regulations covered by Article III:4. 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.

73. 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:

Panels must examine fully the physical properties of products.  
In particular, panels must examine those physical properties of

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products that are likely to influence the competitive relationship between products in the marketplace.<sup>80</sup>

74. 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 has 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”.

75. 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.<sup>81</sup>

76. 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 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.

77. The EC 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. EC has merely submitted extensive evidence on the

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<sup>80</sup> *European Communities- Measures Affecting Asbestos and Asbestos-containing Products* (“EC-Asbestos”), WT/DS135/AB/R, para. 114. In a non-paper on Mandatory Labelling for Agricultural Products dated 3 December 2001 (job no. 9106), the EC 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)).

<sup>81</sup> Paras. 8 and 9 of Canada’s third-party statement.

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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 is in a can labelled “sardines” is not based on the “types and number of gillrakes or bony striae on the operculum”.<sup>82</sup> The evidence submitted by the EC is therefore not relevant to the issue of likeness.

78. The EC’s 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”.<sup>83</sup> And, since 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 transparency by giving each product a specific and precise trade description. The EC concludes from this that a more stringent standard of likeness had to be applied in the context of trade description requirements.<sup>84</sup>

79. The objections of the EC 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.<sup>85</sup>

80. 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

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<sup>82</sup> Para. 14 of Canada’s third-party statement.

<sup>83</sup> Para. 163 of the EC’s first submission.

<sup>84</sup> Paras. 161-163 of the EC’s first submission.

<sup>85</sup> BISD 36S/386.

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that the treatment accorded to them is in fact no less favourable.<sup>86</sup>

81. 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.

82. It follows from the above that the EC's suggestion that the Panel apply to trade description regulations a standard of likeness different from the generally applicable standard is based on a misconception.

**2. The prohibition to market products prepared from *Sardinops sagax* as sardines accords such products less favourable treatment than that accorded to products prepared from *Sardinops sagax*.**

83. 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. Moreover, if the *Sardina pilchardus* are better known in a particular Member State under a name other than “sardines” (for instance, under the name “pilchard”) and products made from *Sardina pilchardus* could therefore be marketed more successfully under that name, the seller would be permitted to choose that name. The seller of products made from *Sardinops sagax*, however, is not given that choice.<sup>87</sup> 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*.

84. The “treatment” that the EC Regulation accords to Peruvian sardines is consequently “less favourable” than that accorded to European sardines products. By contrast, it would not

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<sup>86</sup> Idem.

<sup>87</sup> In Germany, *Sardina pilchardus* may be sold **either** as “Sardine” **or** as “Pilchard” (see Exhibit EC-25 bis). The same appears to be true in the United Kingdom (see sub-paragraph (3) of paragraph 1 of Schedule 1 of the Food Labelling Regulation reproduced in Exhibit EC-24).

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be inconsistent with the national-treatment requirement if the trade description for Peruvian sardines were “Pacific sardines” and the trade description “sardines” were 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.

### III. SCOPE OF THE PANEL’S EXAMINATION

#### A. THE PRODUCTS AT ISSUE

85. The EC asserts in its first submission that the dispute brought by Peru does not only concern two species of fish. The family of *Clupeidae* was composed of 216 species. Therefore, if Peru's claims were to be considered well-founded, all these 216 species could be marketed throughout the territories of the 142 WTO Members under the name “sardines”.<sup>88</sup> Peru has not requested the Panel to make rulings on the trade description of fish other than that those of the species *Sardinops sagax*. Peru has also not presented legal claims that would require the Panel to make rulings on all species of the family of *Clupeidae*. Peru has in particular not claimed that the Codex standard covers all species of the family of *Clupeidae* or that the prohibition to market all these species as sardines is an unnecessary obstacle to trade or that the fish of all these species are like products. There is consequently no reason for the Panel to make any finding on these matters.

86. Canada and Venezuela refer in their third-party submissions to fish of the species *Clupea harengus* and *Sardinella aurita*. They claim that the rulings of the Panel would have to cover also these species. It is understandable that Canada and Venezuela would like the Panel to rule also on these products. However, findings specific to products made from fish of these species are not necessary to make findings on the matter referred by Peru to the Dispute Settlement Body in its request for the establishment of the Panel. The consistent practice of GATT panels has been to make findings only on those issues that were raised by the parties to the dispute.<sup>89</sup> This practice is reflected in Article 7:1 of the DSU, which defines the matter to be examined as the matter referred to the DSB by the complainant. Rulings specific to the species *Clupea harengus* and *Sardinella aurita* not part of that matter.

#### B. ALLOCATION OF EVIDENTIARY BURDEN

87. In its first submission, Peru argued that the allocation of the burden of proof by the Panel under Article 2.2 and 2.4 of the TBT Agreement should take into account the terms and

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<sup>88</sup> Para. 3 of the EC’s first submission.

<sup>89</sup> See GATT panel report on *United States – Customs User Fee*, BISD 35S/290.

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objectives of the TBT Agreement.<sup>90</sup> Peru argued in particular that, 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 of the TBT Agreement 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. The EC expressed in its first submission the view that this contention cannot be reconciled with the Appellate Body's jurisprudence in the *EC – Hormones* case.<sup>91</sup> Given the extensive evidence submitted by both parties and Canada, Peru no longer considers it necessary for the Panel to decide whether the burden of proof should be allocated on the basis of the specific provisions and objectives of the TBT Agreement or exclusively on the basis of the generally applicable principles followed by the Appellate Body.

88. 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.<sup>92</sup> 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”.<sup>93</sup>

89. Peru demonstrated that the Codex Alimentarius Commission, the experts that advised the Commission and the Member States of the EC that participated in its decisions reached the conclusion that consumers are not misled if products made from *Sardinops sagax* are named “sardines” combined with an indication of the country geographic area of origin, the species or the common name of the species. Peru therefore believes, by establishing that the EC maintains a standard on the naming of sardines that is not based the Codex standard it has made a *prima facie* case that:

- the EC has failed to use as a basis for its regulation an international standard that fulfils the EC's legitimate policy objectives; and
- the EC's deviating standard is more trade-restrictive than necessary to fulfil a legitimate objective of the EC.

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<sup>90</sup>See paras. 13 -18 of Peru's first submission.

<sup>91</sup>Paras. 96 – 113 of the EC's first submission.

<sup>92</sup> *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Report, WT/DS33/AB/R, page 14.

<sup>93</sup>*European Communities - Measures Concerning Meat and Meat Products*, Appellate Body Report, WT/DS26/AB26/AB/R-WT/DS48/AB/R, para. 104.

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90. It is therefore now up to the EC to demonstrate why it needed to adopt a standard frustrating the objective of the Codex standard. The EC has so far failed to provide such a demonstration.

91. Peru has further provided evidence in the form of two scientific studies demonstrating that the differences between imported products made from *Sardina pilchardus* and domestic products made from *Sardinops sagax* do not influence the competitive relationship between them in the market place and that these two products must therefore be considered to be “like” products. Peru has further demonstrated that the Codex process for the inclusion of new species ensures that only species that are alike from the consumer’s perspective are included in the Codex standard for sardines. Peru has therefore submitted a *prima facie* case that the two products at issue are “like” products within the meaning of Article 2.1 of the TBT Agreement. EC has not rebutted Peru’s claims. It has merely submitted legally irrelevant evidence on the biological differences between *Sardinops sagax* and *Sardina pilchardus*.

92. An application of the generally applicable principles on the distribution of the burden of proof between the complainant and the respondent therefore leads to the conclusion that Peru has presented an un-refuted *prima facie* case of violation of Articles 2.4, 2.2 and 2.1 of the TBT Agreement.

### C. JUDICIAL ECONOMY

93. Peru continues to hope that the dispute before the Panel can be resolved by mutual agreement or by a panel proceeding that is as short as possible. Peru would therefore like to reiterate its request that the Panel determine the scope of its examination in the light of the principle of judicial economy as defined by the Appellate Body, which stated:

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

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recommendations and rulings “in order to ensure effective resolution of disputes to the benefit of all Members”.<sup>94</sup>

94. Peru would in particular like to request the Panel to avoid developing interpretations of the TBT Agreement that are not required to resolve the dispute. Peru would further like to reiterate its request that the Panel address Peru’s subsidiary claims on Articles 2.1 and 2.2 only if it were to reach the conclusion the EC Regulation is consistent with Article 2.4 of the TBT 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.<sup>95</sup>

#### IV. CONCLUSIONS

##### A. FINDINGS REQUESTED BY PERU

95. In the light of the considerations set out above, Peru requests that the Panel find that the measure at issue, that is the prohibition set out in 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”);
- the geographic area in which the species is found (“Pacific Sardines”);
- the species (“Sardines - *Sardinops sagax*”); or
- the common name of the species *Sardinops sagax* customarily used in the language of the Member State of the EC in which the product is sold (such as “Peruvian sardines” in English, or “Südamerikanische Sardininen” in German),

is inconsistent with Article 2.4 of the TBT Agreement because the EC did not use the naming standard set out in paragraph 6.1.2(ii) of CODEX STAN 94 of the Codex Alimentarius Commission as a basis for its Regulation even though that standard would be an effective and

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<sup>94</sup> *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.

<sup>95</sup> However, Peru nevertheless asks the Panel to include in its report all of the evidence submitted to it on the subsidiary legal claims that it does not address because the Appellate Body may only address issues of law and legal interpretations (Article 17:6 of the DSU) and could therefore consider claims not examined by the Panel only to the extent that the underlying facts are reflected in the Panel’s report.

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appropriate means for the fulfilment of the legitimate objectives that the EC claims to pursue with this Regulation.<sup>96</sup>

96. 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.

97. 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*.

98. 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*.

99. 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 measure at issue has nullified or impaired the benefits accruing to Peru under the TBT Agreement or the GATT.

100. 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.

#### B. SUGGESTION ON IMPLEMENTATION REQUESTED BY PERU

101. 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

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<sup>96</sup> The formulation of the request for findings takes into account observations by the EC on the use of the terms "technical regulations" and "labelling requirement" (see paras. 93 and 94 of the EC's first submission and the EC's reply to question no. 21 of the Panel).

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has failed to observe the principle set out in this provision by deliberately creating a naming 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 its Regulation 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".<sup>97</sup>

102. 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. In the light of Article 12 of the TBT and the facts outlined in the preceding paragraph, Peru requests the Panel to suggest that the EC permit Peru without any further delay to market its sardines in accordance with a naming standard consistent with the TBT Agreement.<sup>98</sup> Other panels have suggested that WTO-inconsistent measures adversely affecting exports of developing countries be withdrawn promptly or immediately.<sup>99</sup> There is no reason why the Panel should refrain from making a similar suggestion in the present case.

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<sup>97</sup> WT/DSB/M/106, para. 54.

<sup>98</sup> In its first submission Peru asked the Panel to suggest that the EC permit Peru to market its sardines as "Pacific sardines" without any further delay. Canada expressed concern in its third-party submission that such a suggestion might entail an implementation of the Panel's findings inconsistent with the national treatment and most-favoured-nation principles (para. 56 of Canada's third-party submission). The above request for a suggestion has been reformulated to take into account Canada's concerns.

<sup>99</sup> See reports of the panels on *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, para. 8.3, and on *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, para. 8.5.

## V. LIST OF EXHIBITS SUBMITTED BY PERU

Number of Exhibit	Exhibit <sup>100</sup>
PERU-1	Council Regulation (EEC) No. 2136/89
PERU-2	Extracts from the FAO Species Catalogue, Vol. 7, Part 1, <i>Clupeoid Fishes of the World</i> (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	<i>Multilingual Illustrated Dictionary of Aquatic Animals and Plants</i> prepared by the Commission of the European Communities
PERU-6	Common names for sardines of the species <i>Sardinops sagax</i> according to “FishBase”
PERU-7	<i>Multilingual Dictionary of Fish and Fish Products</i> prepared by the OECD
PERU-8	<i>Fish Products Standards and Methods Manual</i> 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 ( <i>Sardinops sagax sagax</i> ) y la Sardina Europea ( <i>Sardina pilchardus</i> )
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.
PERU-12	Synopsis of the development of the Codex standard for canned sardines and sardine-type products
PERU-13	Letter from German importer cancelling contract due to the EC Regulation
PERU-14	Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission – Rome, 17-28 April 1978
PERU-15	Council Regulation (EEC) No 1536/92 of 9 June 1992 laying down common marketing standards for preserved tuna and bonito
PERU-16	Consumers’ Association’s views on the WTO Panel case European Communities – Trade Description of Sardines (WT/DS231)

<sup>100</sup> The exhibits are submitted as hard copies only.