

**EUROPEAN COMMUNITIES – TRADE DESCRIPTION OF SARDINES**

**AB-2002-3**

*Report of the Appellate Body*



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WORLD TRADE ORGANIZATION  
APPELLATE BODY

**European Communities – Trade Description  
of Sardines**

European Communities, *Appellant*  
Peru, *Appellee*

Canada, *Third Participant*  
Chile, *Third Participant*  
Ecuador, *Third Participant*  
United States, *Third Participant*  
Venezuela, *Third Participant*

AB-2002-3

Present:

Bacchus, Presiding Member  
Abi-Saab, Member  
Baptista, Member

**I. Introduction**

1. The European Communities appeals from certain issues of law and legal interpretations in the Panel Report, *European Communities – Trade Description of Sardines* (the "Panel Report").<sup>1</sup>

2. This dispute concerns the name under which certain species of fish may be marketed in the European Communities. The measure at issue is Council Regulation (EEC) 2136/89 (the "EC Regulation"), which was adopted by the Council of the European Communities on 21 June 1989 and became applicable on 1 January 1990.<sup>2</sup> The EC Regulation sets forth common marketing standards for preserved sardines.

3. Article 2 of the EC Regulation provides that:

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

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
- *they must be prepared exclusively from fish of the species "Sardina pilchardus Walbaum";*
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
- they must be sterilized by appropriate treatment. (emphasis added)

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<sup>1</sup>WT/DS231/R, 29 May 2002, WT/DS231/R/Corr.1, 10 June 2002.

<sup>2</sup>OJ No L 212, 22.07.1989, reproduced as Annex 1 to the Panel Report, pp. 79–81.

4. *Sardina pilchardus* Walbaum ("*Sardina pilchardus*"), the fish species referred to in the EC Regulation, is found mainly around the coasts of the Eastern North Atlantic Ocean, in the Mediterranean Sea, and in the Black Sea.<sup>3</sup>

5. In 1978, the Codex Alimentarius Commission (the "Codex Commission"), of the United Nations Food and Agriculture Organization and the World Health Organization, adopted a world-wide standard for preserved sardines and sardine-type products, which regulates matters such as presentation, essential composition and quality factors, food additives, hygiene and handling, labelling, sampling, examination and analyses, defects and lot acceptance. This standard, CODEX STAN 94–1981, Rev.1–1995 ("Codex Stan 94"), covers preserved sardines or sardine-type products prepared from the following 21 fish species:

- *Sardina pilchardus*
- *Sardinops melanostictus*, *S. neopilchardus*, *S. ocellatus*,  
*S. sagax*[,] *S. caeruleus*
- *Sardinella aurita*, *S. brasiliensis*, *S. maderensis*, *S. longiceps*,  
*S. gibbosa*
- *Clupea harengus*
- *Sprattus sprattus*
- *Hyperlophus vittatus*
- *Nematalosa vlaminghi*
- *Etrumeus teres*
- *Ethmidium maculatum*
- *Engraulis anchoita*, *E. mordax*, *E. ringens*
- *Opisthonema oglinum*.<sup>4</sup>

6. Section 6 of Codex Stan 94 provides as follows:

6. LABELLING

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

6.1 NAME OF THE FOOD

The name of the product shall be:

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

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<sup>3</sup>Panel Report, para. 2.2.

<sup>4</sup>Codex Stan 94, as reproduced in Annex 2 to the Panel Report, section 2.1.1.

- (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.*

6.1.2 The name of the packing medium shall form part of the name of the food.

6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.

6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer.<sup>5</sup> (emphasis added)

7. Peru exports preserved products prepared from *Sardinops sagax sagax* ("*Sardinops sagax*"), one of the species of fish covered by Codex Stan 94. This species is found mainly in the Eastern Pacific Ocean, along the coasts of Peru and Chile.<sup>6</sup>

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<sup>5</sup>We note, however, that the text of Codex Stan 94, published in the print version of the Codex Alimentarius, presents certain differences in respect to the version used by the Panel and submitted by Peru to the Panel as Exhibit PERU-3. Section 6 published in the print version of the Codex Alimentarius reads as follows:

6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, *Rev. 1-1991*) the following *specific* provisions apply:

6.1 NAME OF THE FOOD

The name of the product shall be:

- 6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or
- (ii) *"X sardines" where "X" is the name of a country, a geographic area, 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.*

6.1.2 The name of the packing medium shall form part of the name of the food.

6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.

6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer. (emphasis added)

(Codex Alimentarius (Secretariat of the Joint FAO/WHO Food Standards Programme, 2001), Volume 9A, Fish and Fishery Products, pp. 75–81)

<sup>6</sup>Panel Report, para. 2.2.

8. *Sardina pilchardus* and *Sardinops sagax* both belong to the *Clupeidae* family and the *Clupeinae* subfamily. As their scientific name suggests, however, they belong to different genus. *Sardina pilchardus* belongs to the genus *Sardina*, while *Sardinops sagax* belongs to the genus *Sardinops*.<sup>7</sup> Additional factual aspects of this dispute are set forth in paragraphs 2.1–2.9 of the Panel Report.

9. The Panel in this dispute was established on 24 July 2001. Before the Panel, Peru argued that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*") and Article III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").<sup>8</sup>

10. In the Panel Report circulated to Members of the World Trade Organization (the "WTO") on 29 May 2002, the Panel found that the EC Regulation is inconsistent with Article 2.4 of the *TBT Agreement*, and exercised judicial economy in respect of Peru's claims under Articles 2.2 and 2.1 of the *TBT Agreement* and III:4 of the GATT 1994.<sup>9</sup> The Panel, therefore, recommended that the Dispute Settlement Body (the "DSB") request the European Communities to bring its measure into conformity with its obligations under the *TBT Agreement*.<sup>10</sup>

11. On 25 June 2002, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 27 June 2002, we received a communication from Peru requesting a Preliminary Ruling pursuant to Rule 16(1) of the *Working Procedures*. Peru requested that we exclude from the appeal four of the nine points raised in the European Communities' Notice of Appeal, because these points allegedly did not meet the requirements of Rule 20(2)(d) of the *Working Procedures*.

12. In a letter dated 27 June 2002, we invited the European Communities and the third parties to submit, by 2 July 2002, written comments on the issues raised by Peru in its Request for a Preliminary Ruling.

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<sup>7</sup>Panel Report, para. 2.3.

<sup>8</sup>*Ibid.*, para. 3.1.

<sup>9</sup>*Ibid.*, paras. 8.1 and 7.152.

<sup>10</sup>*Ibid.*, para. 8.3.



13. On 28 June 2002, the European Communities sent letters to the Chairman of the DSB and to the Appellate Body, indicating its intention to withdraw the Notice of Appeal of 25 June 2002, pursuant to Rule 30 of the *Working Procedures*, conditionally on the right to file a new Notice of Appeal. The European Communities filed a new Notice of Appeal on the same day.

14. In a letter dated 1 July 2002, we informed the participants and third parties that neither the European Communities nor the third parties should file written submissions on the issues raised in the Request for a Preliminary Ruling submitted by Peru.

15. Peru submitted a letter, dated 2 July 2002, in which it challenged the right of the European Communities to withdraw conditionally the Notice of Appeal of 25 June 2002, and to file a second Notice of Appeal on 28 June 2002.

16. On 4 July 2002, we informed the participants and third parties that it was our intention to conduct the appellate proceedings in conformity with the Working Schedule drawn up further to the Notice of Appeal of 28 June 2002, without prejudice to the right of the participants and the third participants to present in their submissions arguments relating to the matters raised in Peru's letter dated 2 July 2002.

17. The European Communities filed an appellant's submission on 8 July 2002.<sup>11</sup> Peru filed an appellee's submission on 23 July 2002.<sup>12</sup> Ecuador filed a third participant's submission on 22 July 2002.<sup>13</sup> Canada, Chile, the United States, and Venezuela filed third participant's submissions on 23 July 2002.<sup>14</sup>

18. On 23 July 2002, we received a letter from Colombia indicating that, although it would not file a third participant's submission, it had an interest in attending the oral hearing in this appeal. Colombia had participated in the proceedings before the Panel as a third party which had notified its interest to the DSB under Article 10.2 of the DSU. By letter of 7 August 2002, we informed the participants and third participants that we were inclined to allow Colombia to attend the oral hearing as a passive observer, and to notify us if they had any objection. The European Communities had no objection to Colombia attending the oral hearing as a third participant, but did object to Colombia attending as a passive observer. Ecuador had no objection to Colombia attending the hearing, but found there was no legal basis to apply a passive observer status and deny them the right to attend as a

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<sup>11</sup>Pursuant to Rule 21 of the *Working Procedures*.

<sup>12</sup>Pursuant to Rule 22 of the *Working Procedures*.

<sup>13</sup>Pursuant to Rule 24 of the *Working Procedures*.

<sup>14</sup>*Ibid.*

third participant. On 9 August 2002, we informed the participants and third participants that Colombia would be permitted to attend the oral hearing as a passive observer.

19. An *amicus curiae* brief was received, on 18 July 2002, from a private individual. The Kingdom of Morocco also filed an *amicus curiae* brief on 22 July 2002. In a letter dated 26 July 2002, Peru objected to the acceptance and consideration of both *amicus curiae* briefs. Ecuador expressed similar objections in a letter received on 2 August 2002. Canada submitted a letter, on 26 July 2002, requesting that we decide whether or not to accept the briefs in advance of the oral hearing.

20. By letter of 31 July 2002, the participants and third participants were informed that they would have an opportunity to address the issues relating to the *amicus curiae* briefs during the oral hearing, without prejudice to their legal status or to any action the we might take in connection with these briefs.

21. The oral hearing in the appeal was held on 13 August 2002. The participants and third participants presented oral arguments and responded to questions put to them by Members of the Division hearing the appeal.

## **II. Arguments of the Participants and the Third Participants**

### **A. *Claims of Error by the European Communities – Appellant***

#### **1. Procedural Issues**

22. The European Communities argues that the preliminary objections raised by Peru on the adequacy of the Notice of Appeal filed by the European Communities on 25 June 2002 are now moot and settled. The European Communities responded to this objection by Peru with its letter to the Appellate Body of 28 June 2002 and the replacement of that Notice of Appeal with a new one of the same day. The European Communities asserts that, in conditionally withdrawing its initial Notice of Appeal and then filing a new Notice of Appeal, it proceeded in conformity with the DSU, the *Working Procedures* and previous practice.

23. The European Communities also underscores that it proceeded expeditiously and that the issues listed in the Notice of Appeal of 28 June 2002 were identical to those in the Notice of Appeal of 25 June 2002. The only difference between the two Notices of Appeal is that the Notice of Appeal of 28 June 2002 included additional information on the issues being appealed, which was provided in response to Peru's request.

24. The European Communities asserts that it is absolutely clear that Peru's rights of defence have not been harmed in any way by the replacement of the original Notice of Appeal with a new one and by the new Working Schedule drawn up by the Appellate Body. It also rejects Peru's allegation that the European Communities was engaging in litigation tactics.

25. The European Communities states that, in any event, the objection submitted by Peru on 27 June 2002 was clearly unfounded.

2. The Characterization of the EC Regulation as a "Technical Regulation"

26. The European Communities acknowledges that the EC Regulation is a "technical regulation" for purposes of the *TBT Agreement*, because it lays down product characteristics for preserved *Sardina pilchardus*. The European Communities claims, however, that the Panel erred in finding that the EC Regulation is a "technical regulation" relating to preserved *Sardinops sagax*.

27. According to the European Communities, the EC Regulation does not lay down product characteristics for *Sardinops sagax*. The European Communities thus argues that, with respect to *Sardinops sagax*, the EC Regulation does not apply to an identifiable product as required by the Appellate Body in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos").<sup>15</sup>

28. The European Communities also argues that a name—as opposed to a label—is not a product characteristic for purposes of the definition of a "technical regulation" in the *TBT Agreement*. It explains that the requirement to state the name of a product on a label is a labelling requirement. In its view, however, the requirement to state a certain name on a label involves not only a labelling requirement, but also a substantive naming rule that is not subject to the *TBT Agreement*. The European Communities claims that Article 2 of the EC Regulation contains such a substantive naming requirement for preserved *Sardina pilchardus* and does not contain any labelling requirements for preserved *Sardinops sagax*.

3. The Temporal Scope of Application of Article 2.4 of the *TBT Agreement*

29. The European Communities argues that the Panel erred in finding that Article 2.4 of the *TBT Agreement* applies to technical regulations prepared and adopted before the *TBT Agreement* entered into force, and in considering that Article 2.4 applies to the maintenance of a technical regulation and not just to its adoption. In its view, the text of Article 2.4 indicates no obligation to reassess existing technical regulations in the light of the adoption of new international standards.

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<sup>15</sup>Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001.

30. According to the European Communities, Article 2.4 applies only to the preparation and adoption of technical regulations, not to their maintenance. The preparation and adoption of the EC Regulation is an act that had "ceased to exist" when the obligation in Article 2.4 became effective. Article 28 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")<sup>16</sup> states that provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which "ceased to exist" before the treaty came into effect.

31. The European Communities objects to the Panel's use of *EC Measures Concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*")<sup>17</sup> to support its finding because the Appellate Body, in that case, based its conclusion on the wording of Articles 2.2, 2.3, 3.3, and 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), all of which include the word "maintain".<sup>18</sup> Article 2.4 of the *TBT Agreement*, however, does not include the word "maintain".

32. The terms "use" and "as a basis for" in Article 2.4 of the *TBT Agreement* and the introductory language "where technical regulations are required" imply, according to the European Communities, that this provision relates to the drawing up, drafting or preparation of technical regulations. This conclusion, furthermore, is supported by the inclusion of the word "imminent" in Article 2.4. The European Communities notes that Article 2.4 does not impose an obligation to use a draft international standard whose completion is not imminent. It argues, therefore, that it could not have been intended that an existing technical regulation would become inconsistent with Article 2.4 once completion of the draft international standard became "imminent", or even once the standard is actually adopted and becomes "existing".

33. The European Communities further alleges that Article 2.5 of the *TBT Agreement* provides contextual support for a conclusion that is the complete opposite of that reached by the Panel. According to the European Communities, Article 2.5 shows that when provisions of the *TBT Agreement* are intended to cover the *application* of technical regulations, they say so explicitly. Similar contextual support is found in Article 12.4, which uses the word "adopt", and in paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards, included as Annex 3 to the *TBT Agreement*, which uses the word "develops". The European Communities also rejects the Panel's conclusion that Article 2.6 of the *TBT Agreement* would be redundant if

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<sup>16</sup>Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

<sup>17</sup>Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.

<sup>18</sup>We note that, although the European Communities refers to Article 2.3 of the *SPS Agreement* in its appellant's submission, this provision does not include the word "maintain".

Article 2.4 did not apply to existing measures. The objective of Article 2.6 is the harmonization of technical regulations. Thus, for the European Communities, it is obvious that WTO Members who have technical regulations on a subject should be encouraged to participate in the preparation of an international standard.

34. The European Communities, in addition, disagrees with the Panel's assertion that excluding existing technical regulations from the scope of application of Article 2.4 would create "grandfather rights", given that these measures would be subject to other obligations in the *TBT Agreement* that do relate to their maintenance, such as Article 2.3.

4. The Characterization of Codex Stan 94 as a "Relevant International Standard"

35. The European Communities claims that the Panel erred in concluding that Codex Stan 94 is a relevant international standard for purposes of Article 2.4 of the *TBT Agreement*.

36. The European Communities contends that only standards adopted by international bodies by consensus may be considered relevant international standards. According to the European Communities, this is evident from the penultimate sentence of the Explanatory note to the definition of "standard" in Annex 1.2 to the *TBT Agreement*, which states that standards prepared by the international standardization community are adopted by consensus. In its view, the reference to documents not based on consensus found in the last sentence of the Explanatory note covers documents adopted by entities other than international bodies. The European Communities asserts that the Panel erred in failing to verify whether Codex Stan 94 was adopted by consensus.

37. The European Communities alleges further that the Panel erred in law when interpreting the meaning of Codex Stan 94. According to the European Communities, the drafting history of Codex Stan 94 demonstrates that section 6.1.1(ii) should be interpreted as allowing the common name for the species of fish to be a possible name for the preserved "sardine-type" product, and that the word "sardine" does not have to be part of that name.

38. The European Communities notes that the draft of Codex Stan 94 at Step 7 of the elaboration procedures for Codex standards, listed "the common name for the species" in a subsection separate from that which referred to the name "X sardines". It then explains that because only editorial changes are allowed between Steps 7 and 8 of the elaboration procedures, the final text of Codex Stan 94, which contains both "names" in the same subsection, must be interpreted as providing that the common name of the species is an option independent from "X sardines". The European Communities contends that the Panel's contrary reading of the standard, which does not recognize "the common name" as separate from "X sardines", is not feasible because it would imply that an

invalid, substantive change (as opposed to an editorial one) was made to the draft standard at Step 8 of the elaboration procedures.

39. The European Communities adds that Codex Stan 94, interpreted consistently with its drafting history, is not a relevant international standard in this case for purposes of Article 2.4 of the *TBT Agreement*, because its scope is different from that of the EC Regulation. It explains that Article 2 of the EC Regulation contains only a naming requirement for preserved sardines. For its part, Codex Stan 94, correctly interpreted, includes as a naming option for preserved "sardine-type" products the common name of the species alone, without the word "sardine".

5. Whether Codex Stan 94 was Used "As a Basis For" the EC Regulation

40. The European Communities claims that the Panel erred in concluding that Codex Stan 94 was not used "as a basis for" the EC Regulation. The European Communities argues that, despite the finding that the term "use as a basis" does not mean "conform to or comply with", the Panel applied the "as a basis" test in this case in such a narrow and restrictive manner as to make it, in practice, equivalent to the "conform to or comply with" test. In its view, the Panel erroneously considered that to meet the "as a basis" test, almost every single section and sentence of Codex Stan 94 must have been used in the technical regulation.

41. According to the European Communities, the EC Regulation covers only *Sardina pilchardus* and does not regulate *Sardinops sagax*, nor fish of other species. The European Communities thus argues that the relevant part of Codex Stan 94, for purposes of Article 2.4 of the *TBT Agreement*, is section 6.1.1(i), which states that the name "Sardines" is to be used exclusively for *Sardina pilchardus*. According to the European Communities, section 6.1.1(i) of Codex Stan 94 is used "as a basis for" the EC Regulation. The European Communities contends that section 6.1.1(ii) is not a relevant part of the standard because it refers to products that are not regulated by the EC Regulation. Therefore, it need not be used "as a basis for" the EC Regulation.

42. The European Communities also alleges that the Panel performed an incorrect analysis to determine whether the relevant international standard was used "as a basis for" the technical regulation. The appropriate analysis, in its view, is not whether the European Communities used Codex Stan 94 as the "principal constituent or fundamental principle" for the purpose of enacting the EC Regulation, but whether there is a "rational relationship" between them on the substantive aspects of the standard in question.

43. The European Communities explains that, pursuant to its legitimate objectives, the EC Regulation reserves the name "sardines" for *Sardina pilchardus*. Given that this is expressly

foreseen in section 6.1.1(i) of Codex Stan 94, the European Communities asserts that the EC Regulation has a substantial relationship with Codex Stan 94. The European Communities concludes by stating that the substantial relationship between the two documents demonstrates that Codex Stan 94 was used "as a basis for" the EC Regulation.

6. The Question of the "Ineffectiveness or Inappropriateness" of Codex Stan 94

44. The European Communities claims that the Panel applied an incorrect burden of proof with respect to the second part of Article 2.4 of the *TBT Agreement* and that it erred in finding that Codex Stan 94 is not an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued".

45. According to the European Communities, there is no general rule-exception relationship between the first and second parts of Article 2.4 and, therefore, there is no shift in the burden of proof from the complainant to the respondent. The European Communities rejects the Panel's claim that only the respondent can spell out the objectives pursued through a regulation, explaining that the objectives are usually described in the measure itself, as the EC Regulation demonstrates. Nor are the Panel's concerns regarding the lack of information on the part of the complainant sufficient, in the European Communities' view, to shift the burden to the respondent. The European Communities explains that, in addition to the obligation on a Member to justify a measure under Article 2.5 of the *TBT Agreement*, the complaining party may also enquire about a measure during consultations. The European Communities asserts, furthermore, that the Panel's finding on the burden of proof is not consistent with how the Appellate Body applied this burden regarding a similar provision of the *SPS Agreement* in the *EC – Hormones* case.

46. The European Communities argues that the Panel arrived at an incorrect finding with respect to the effectiveness or appropriateness of Codex Stan 94, because it misunderstood the objectives of the EC Regulation. In this regard, the European Communities explains that the purpose of the EC Regulation is to lay down marketing standards for preserved *Sardina pilchardus* and that the European Communities does not pursue thereby any objectives in relation to preserved *Sardinops sagax*.

47. The European Communities claims that the Panel erred in basing its conclusion regarding the effectiveness or appropriateness of the EC Regulation on the validity of the factual assumption that consumers in the European Communities have not always associated the term "sardines" exclusively with *Sardina pilchardus*. The European Communities states that even if consumers have different opinions with respect to what is a sardine, there may still be the possibility of confusion and the need for measures to improve market transparency, protect consumers, and maintain product diversity.

48. The European Communities also rejects the Panel's reliance in its reasoning on whether or not "sardines" is a common name for *Sardinops sagax*. According to the European Communities, even if "sardines" were a common name for preserved *Sardinops sagax*, this does not change the need to ensure that this product bears a *unique* name in the European Communities market.

49. The European Communities argues, finally, that the Panel erred in dismissing as irrelevant to the question of consumer expectations the domestic legislation of the member States of the European Communities. In its view, consumer expectations are generally based on some kind of legal protection.

7. The Objectivity of the Assessment of Certain Facts by the Panel

50. The European Communities claims that the Panel did not conduct "an objective assessment of the facts of the case" as required by Article 11 of the DSU. According to the European Communities, the Panel deliberately and without motivation refused to consider facts that were brought to its attention, although panels are obliged to examine all relevant facts and evidence presented to them by the parties or obtained through their own initiative. In the European Communities' view, the Panel also failed to provide an adequate and reasonable explanation for its findings. The European Communities then refers to four specific instances where the Panel allegedly failed to discharge its duty under Article 11 of the DSU.

51. The first instance referred to by the European Communities is the Panel's conclusion that the Spanish and French dictionaries submitted by the European Communities supported the view that the term "sardines" is not limited to *Sardina pilchardus*. The European Communities claims next that the Panel should not have treated as evidence the letter of the United Kingdom Consumers' Association submitted by Peru, because it was prejudiced and contained a manifestly incorrect appreciation of United Kingdom law.

52. As a third instance, the European Communities alleges that the Panel disregarded evidence concerning the actual names given to "sardine-type" products in the European Communities. This evidence consisted of tins and supermarket receipts for preserved herring, sardinellas, sprats, mackerel and anchovies, as well as labels of preserved *Sardinops sagax* sold in the European Communities under the name "Pacific Pilchards". The European Communities finally claims that the Panel erred in refusing to ask the Codex Commission for its opinion concerning the meaning, status and validity of Codex Stan 94.



8. The References in the Panel Report to Trade-Restrictiveness

53. The European Communities submits that the Panel erred in qualifying the EC Regulation as trade-restrictive. It rejects the qualification and asserts that the EC Regulation is neither trade-restrictive with respect to preserved *Sardinops sagax*, nor with respect to preserved *Sardina pilchardus*.

54. In addition, the European Communities argues that the issue of trade-restrictiveness is not relevant to the analysis under Article 2.4 of the *TBT Agreement* and that, having exercised judicial economy with respect to Peru's other claims, it was improper for the Panel to have examined this issue.

55. The European Communities states, moreover, that Article 15.2 of the DSU does not permit panels to make additional legal findings at the interim review stage.

9. Completing the Legal Analysis

56. The European Communities asserts that there are insufficient undisputed facts in the Panel record for the Appellate Body to complete the legal analysis in respect of Peru's other claims. It further argues that Articles 2.2 and 2.1 of the *TBT Agreement* involve complex issues of law that, contrary to Peru's contention, are completely different from those related to Article 2.4 of the *TBT Agreement*, and which have not been clarified by the Appellate Body or by dispute settlement panels.

B. *Arguments of Peru – Appellee*

1. Procedural Issues

57. Before addressing the merits of the appeal, Peru challenges the admissibility of what it terms is a second appeal by the European Communities—that is, the proceedings that began with the Notice of Appeal filed by the European Communities on 28 June 2002, after withdrawing the Notice of Appeal it had filed on 25 June 2002.

58. According to Peru, a notice of appeal cannot be withdrawn and resubmitted in revised form without the consent of the appellee. It notes that there is nothing in the *Working Procedures* that establishes the right to commence an appeal twice. Peru asserts that, although Rule 30 of the *Working Procedures* makes clear that an appeal can be withdrawn at any time—which the European Communities did through its communication of 28 June 2002—nothing in that Rule permits the appellant to attach conditions to the withdrawal. Peru submits that if an appellant withdraws its

appeal subject to conditions, the appeal must therefore be deemed withdrawn, irrespective of whether or not the conditions are met.

59. Peru argues that unless the *Working Procedures* are strictly enforced to prevent an appellant from commencing an appeal repeatedly or withdrawing an appeal subject to unilaterally determined conditions, there is immense potential for abuse and disorder in appellate review proceedings.

60. Peru also states that the facts of *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("US – Line Pipe")<sup>19</sup>, which the European Communities cites as precedent, are distinguishable from those involved in the present dispute. It explains that in *US – Line Pipe*, as well as in *United States – Tax Treatment for "Foreign Sales Corporations"* ("US – FSC")<sup>20</sup>, the Notices of Appeal were withdrawn with the agreement of the appellees, while in this case the European Communities adopted a unilateral approach. Moreover, in the two previous cases, the appellants resubmitted an *identical* Notice of Appeal, which is not the case in this appeal.

61. In Peru's view, the approach adopted by the European Communities in the present appeal presupposes the existence of a fundamental procedural right that neither the DSU nor the *Working Procedures* accords. Peru asserts that creating procedural rights on an *ad hoc* basis to address problems caused by one WTO Member in an individual case, rather than through generally applicable new procedures of which all Members are informed in advance, calls into question the principle of equal treatment of all WTO Members.

62. Peru further notes that, even though the Appellate Body has ruled that the *Working Procedures* should be read so as to give full meaning and effect to the right to appeal, this right is not deprived of meaning and effect just because it can be exercised only once. Peru states, in addition, that when the Appellate Body has addressed an issue that is not provided for in the *Working Procedures*, the Appellate Body has consulted the participants and third parties. Peru asserts that, as the Appellate Body did not consult the parties at the time that the second Notice of Appeal was filed, it cannot be concluded that the Appellate Body has accepted the European Communities' second appeal. Otherwise, the Appellate Body would have waived Peru's procedural rights, which the Appellate Body has no authority to do under the DSU or under its *Working Procedures*.

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<sup>19</sup>Appellate Body Report, WT/DS202/AB/R, adopted 8 March 2002.

<sup>20</sup>Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619.

63. Peru argues, moreover, that the circumstances of this case do not allow the Appellate Body to rule that the procedure adopted by the European Communities can be justified under Rule 16(1) of the *Working Procedures*, because that Rule does not justify the creation of procedural rights that the DSU does not accord.

64. Peru requests, therefore, that the Appellate Body reject the European Communities' second appeal.

65. Peru further objects to the acceptance and consideration of the *amicus curiae* briefs submitted in this appeal. It states that, while it welcomes non-Member submissions where they are attached to the submission of a WTO Member engaged in dispute settlement proceedings, the DSU makes clear that only WTO Members can make independent submissions to panels and to the Appellate Body. Peru argues further that the DSU already provides conditions under which WTO Members can participate as third parties in dispute settlement proceedings. According to Peru, accepting *amicus curiae* briefs from WTO Members that did not notify their third party interest to the DSB would be allowing a WTO Member impermissibly to circumvent the DSU.

66. Peru thus requests that the Appellate Body reject the *amicus curiae* briefs submitted in this appeal.

## 2. The Characterization of the EC Regulation as a "Technical Regulation"

67. Peru submits that, contrary to the European Communities' contention, the EC Regulation is a "technical regulation" that applies to identifiable products and lays down characteristics for products marketed as sardines. Peru explains that Article 2 of the EC Regulation does not apply to *any* product, but to products clearly identified as *products marketed as preserved sardines*. It further claims that these clearly identified products must, according to Article 2 of the EC Regulation, have a number of physical characteristics, including that of having been prepared exclusively from fish of the species *Sardina pilchardus*. Peru asserts, therefore, that the EC Regulation lays down product characteristics for products that are clearly identified.

68. Peru rejects the European Communities' claim that a name applied to a product is not itself a characteristic of that product. According to Peru, Annex 1.1 to the *TBT Agreement* provides that any document that lays down product characteristics with which compliance is mandatory is a "technical regulation", irrespective of the purpose for which the product characteristics are laid down. In Peru's view, a regulation that prescribes the characteristics of products marketed under a particular trade name is, therefore, clearly a document which lays down product characteristics and hence a "technical regulation" as defined in Annex 1.1 to the *TBT Agreement*.

69. According to Peru, the European Communities' argument on this issue is irrelevant to this dispute. It explains that at issue in this dispute is not a "technical regulation" prescribing a particular name for products made from *Sardinops sagax*, but rather that part of the EC Regulation that requires any product marketed as sardines to be made from *Sardina pilchardus*. Peru submits that the European Communities would thus not have to prescribe a specific trade name for products made from *Sardinops sagax* to resolve this dispute.

3. The Temporal Scope of Application of Article 2.4 of the *TBT Agreement*

70. Peru submits that the Panel correctly relied on Appellate Body rulings and on Article 28 of the *Vienna Convention* in concluding 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 to exist before the date of the entry into force of the treaty with respect to that party. Peru claims that the EC Regulation is a situation that has not ceased to exist and, therefore, Article 2.4 of the *TBT Agreement* is applicable to the EC Regulation.

71. Peru disagrees with the European Communities' allegation that Article 2.4 of the *TBT Agreement* applies only to the preparation and adoption of technical regulations. According to Peru, this allegation is based on a distinction between the adoption and maintenance of technical regulations that the text of Article 2.4 does not make. Peru asserts that the obligation to use the existing international standard as a basis for technical regulations arises according to the terms of Article 2.4 "where technical regulations are required"—that is, in situations in which the Member considered the adoption of a technical regulation necessary—and not when Members consider they need to introduce technical regulations, as the European Communities alleges. Peru contends, moreover, that the terms "use" and "as a basis for" in Article 2.4 do not imply that the obligation under that provision arises only when a new technical regulation is drawn up, drafted or prepared.

72. Peru submits that the Panel correctly concluded that the references in other Articles of the *TBT Agreement* to the *application* of technical regulations confirm that this Agreement was meant to extend to existing technical regulations.

4. The Characterization of Codex Stan 94 as a "Relevant International Standard"

73. Peru states that the Panel correctly concluded that the *TBT Agreement* covers international standards that are not based on consensus. Peru notes, in this regard, the last two sentences of the Explanatory note to the definition of the term "standard" in Annex 1.2 to the *TBT Agreement*. It then asserts that the only logical and reasonable conclusion that can be drawn from these last two sentences is that the drafters wished to note the practice of consensus-based decision-making of the international

standardization bodies, but at the same time clarify that consensus-based decision-making was not an absolute requirement.

74. Peru maintains that, in any event, the Codex Commission observes the principle of consensus and followed this principle in the adoption of the Codex standard at issue in this dispute. According to Peru, the report of the Codex Commission on the meeting at which the standard was adopted leaves no doubt that it was adopted without a vote. Peru concludes, therefore, that by asking the Appellate Body to rule that standards which have not been adopted by consensus are not covered by the *TBT Agreement*, the European Communities is asking the Appellate Body to make a ruling on an issue that need not be resolved to settle the present dispute.

75. In respect of the European Communities' argument that the Panel incorrectly interpreted Codex Stan 94, Peru asserts that the European Communities mistakenly treats this alleged error as an error in interpretation, rather than a failure to conduct an objective assessment of a fact. According to Peru, the Codex standard is not a covered agreement within the meaning of Article 1.1 of the DSU, nor is it a treaty or another source of international law. Peru thus contends that, like municipal law, the Codex standard must be treated by an international tribunal as a fact to be examined, not as law to be interpreted. Peru then states that the European Communities does not claim—and therefore does not attempt to demonstrate—that the Panel's determination that the meaning of this standard is not ambiguous constitutes an error in the assessment of a fact.

76. Peru argues that, even if the Appellate Body were to conclude that its task is to determine whether the Panel's interpretation of the standard is in error, the European Communities' claim should be rejected. In Peru's view, section 6.1.1(ii) of Codex Stan 94 clearly states that the name of sardines other than *Sardina pilchardus* shall be "X sardines" and, therefore, the text after "X sardines" can only be interpreted as defining what is meant by "X". Peru states, moreover, that whatever ambiguity may result from the use of the comma in the English text of Codex Stan 94—to separate the phrase "or the common name of the species in accordance with the law and custom of the country in which the product is sold"—the French and Spanish versions of the standard, which are equally authentic, leave no uncertainty on this point. Peru thus concludes that the Panel was correct in refraining from basing its interpretation on the standard's drafting history. In any event, Peru submits that the drafting history does not support the European Communities' interpretation of Codex Stan 94.

5. Whether Codex Stan 94 was Used "As a Basis For" the EC Regulation

77. Peru states that the Panel correctly interpreted and applied the term "as a basis for" in Article 2.4 of the *TBT Agreement*. It agrees with the Panel's conclusion that "basis" means "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".

78. Peru submits that the European Communities does not explain according to what interpretative principle the term "as a basis for" could be given the meaning "having a substantive rational relationship". Peru asserts that the ordinary meaning of this term is not "having a substantive rational relationship" and it cannot be given that meaning in the light of its context and the object and purpose of the *TBT Agreement*.

79. Peru contends, furthermore, that the EC Regulation would not meet the "as a basis" test even if the terms were interpreted according to the definition submitted by the European Communities. In Peru's view, the relevant part of Codex Stan 94 is section 6.1.1(ii) and thus, according to the European Communities' own argument, what would need to be established is a rational and substantive relationship between section 6.1.1(ii) of Codex Stan 94 and the European Communities' prohibition against using the term "sardines" in combination with the name of a country or a geographical area or the species or the common name. Peru asserts that there is no relationship between section 6.1.1(ii) and that prohibition that can be described as "substantive" or "rational".

80. Peru rejects the European Communities' claim that, despite its finding that the term "use as a basis" does not mean "conform to or comply with", the Panel applied the "as a basis" test in this case in such a narrow and restrictive manner as to make it, in practice, equivalent to the "conform to or comply with" test. Peru states, in response, that there is not a single element of the standard foreseen in section 6.1.1(ii) of Codex Stan 94 that is reflected in the EC Regulation.

6. The Question of the "Ineffectiveness or Inappropriateness" of Codex Stan 94

81. Peru asserts that the Panel correctly articulated and applied the principle on burden of proof in this dispute. Peru explains that the Panel applied the principle enunciated by the Appellate Body, namely, that the party asserting the affirmative of a particular claim or defence has the burden of proving its claim. It further states that the question of the distribution of the evidentiary burden should not be considered in the abstract, but in the context of the provision at issue in the dispute.

82. According to Peru, Article 2.4 of the *TBT Agreement* is expressed in the form of a positive requirement and an exception. It explains that the second part of Article 2.4, which states "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued", is not a positive requirement, but is rather expressed in the form of an affirmative defence. This means, in Peru's view, that a Member departing from a relevant international standard must show that the relevant international standard is not applicable to its particular set of circumstances.

83. Peru states, additionally, that the Panel correctly considered that the second part of Article 2.4 addresses motives and facts that are privy to the Member imposing a technical regulation. Peru argues that to accept the argument of the European Communities would be to require a complaining party to explain that the deviation from an international standard is not necessary to pursue a "legitimate objective", which would mean requiring a complaining party to prove a negative. Moreover, accepting the European Communities' argument would mean, in Peru's view, that the complaining party would have to speculate on the legitimacy of the objectives pursued by the responding party. Peru therefore argues that it is only logical that the responding Member should carry the burden of proving that its departure from the international standard is necessary to pursue the "legitimate objectives".

84. Peru claims that, even if the Appellate Body were to find that the Panel incorrectly allocated the burden of proof, Peru nevertheless adduced evidence sufficient to show that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

7. The Objectivity of the Assessment of Certain Facts by the Panel

85. Peru submits that the Panel made "an objective assessment of the matter before it" consistently with its obligations under Article 11 of the DSU. According to Peru, to succeed in this claim the European Communities must show, as stated in *EC – Hormones*<sup>21</sup>, that the Panel was guilty of "deliberate disregard of, or refusal to consider, the evidence", that there was "wilful distortion or misrepresentation of the evidence", or that the Panel committed an "egregious error that calls into question the good faith" of the Panel. Peru asserts that the European Communities has not shown this.

86. Peru rejects the European Communities' claim that the Panel erred in refraining from seeking the opinion of the Codex Commission. Peru argues that Article 13.2 of the DSU leaves it to the discretion of panels to determine whether or not to seek expert opinion in particular cases and that Article 14.2 of the *TBT Agreement* gives panels discretion in deciding whether or not to establish a technical expert group. Peru further submits that, because the English text, together with the French and Spanish texts, remove any ambiguity or obscurity regarding the meaning of section 6.1.1(ii) of Codex Stan 94, there was no reason for the Panel to have recourse to its drafting history or to consult the Codex Commission on this issue.

87. Peru asserts that the Panel made proper use of dictionaries and that, in its claim on appeal, the European Communities is mischaracterizing the Panel Report. Peru explains that it referred to several

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<sup>21</sup>Appellate Body Report, *supra*, footnote 17.

technical dictionaries to support its claim that the term "sardines" is a common term for *Sardinops sagax* in the European Communities. The Panel referred to this evidence, as well as other evidence presented by the parties, in determining whether Peru had met its burden of proof. According to Peru, the purpose of the Panel's assessment was not, as suggested by the European Communities, to arrive at a definitive conclusion as to the common name for *Sardinops sagax* in each member State of the European Communities, but to determine whether European consumers would be misled if the trade description of products made from *Sardinops sagax* comprised the word "sardines" and a geographical qualifier. Peru therefore submits that the Panel used the dictionaries in an appropriate manner to make this determination, consistent with its obligations under Article 11 of the DSU.

88. Peru argues that the Panel did not ignore the evidence submitted by the European Communities concerning the actual names given to "sardine-type" products in the European Communities. Peru states that it is clear from paragraphs 7.125–7.129 of the Panel Report that the Panel looked at this evidence, but disagreed with it.

89. Peru claims that the Panel properly took into account the evidence provided by the United Kingdom Consumers' Association. Peru explains that the Association arrived at the conclusion that European consumers would not be misled if sardines from Europe and sardines from Peru were distinguished by the addition of a geographical indication in the trade name and that the EC Regulation does nothing to promote the interests of European consumers. Contrary to the assertion of the European Communities, Peru argues that these are factual, not legal, conclusions that the Panel could appropriately consider as part of the wide range of evidence submitted to it on this question. Peru therefore concludes that the European Communities has not shown that the Panel distorted this evidence, or that it used this evidence in bad faith.

#### 8. The References in the Panel Report to Trade-Restrictiveness

90. Peru explains that the Panel's statements on trade-restrictiveness should be considered keeping in mind, as background, the fact that Peru requested the Panel to exercise judicial economy with respect to its subsidiary claims, including its claim under Article 2.2 of the *TBT Agreement*. Peru submits, nonetheless, that the Panel's description of the EC Regulation as trade-restrictive is entirely accurate.

91. Peru recognizes that these statements are not necessary to the Panel's analysis under Article 2.4 of the *TBT Agreement* and, to the extent that the Panel's finding on that Article is confirmed, requests that the Appellate Body decline to address these statements or rule that they were not necessary or pertinent to the disposition of the issues before the Panel. If the Appellate Body does not confirm the finding that the EC Regulation is inconsistent with Article 2.4, Peru requests that the



Appellate Body complete the analysis with respect to Articles 2.2 and 2.1 of the *TBT Agreement* and, in so doing, that it consider the Panel's statements on the trade-restrictiveness of the EC Regulation.

9. Completing the Legal Analysis

92. Peru submits that, if the Appellate Body concludes that the EC Regulation is consistent with Article 2.4, it would be appropriate in such circumstances for the Appellate Body to complete the Panel's analysis and resolve the dispute by making findings on those provisions of Article 2 of the *TBT Agreement* on which the Panel did not make any findings. Peru explains that it asked the Panel to exercise judicial economy in accordance with the guidance given by the Appellate Body to panels to address only those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings. Peru then points to several cases where, after reversing a panel's finding, the Appellate Body completed the legal analysis of those claims where the panel had exercised judicial economy.

93. Peru states that it requested the Panel to include in the Panel Report all of the arguments and evidence submitted to it on the legal claims not addressed, so as to provide the Appellate Body with the factual basis to rule on those claims if this became necessary. Peru further asserts that the fundamental rationale of Articles 2.1, 2.2, and 2.4 of the *TBT Agreement* is the same, so that the facts required to rule on the consistency of a measure with Article 2.4 of the *TBT Agreement* include those required to rule on the consistency of that measure with Articles 2.1 and 2.2 of that Agreement.

94. Peru therefore requests that, if the Appellate Body concludes that the EC Regulation is consistent with Article 2.4, the Appellate Body complete the Panel's analysis and find that the EC Regulation is inconsistent with Article 2.2. If the Appellate Body concludes that the EC Regulation is consistent with Article 2.2, Peru requests the Appellate Body to complete the Panel's analysis and find that the EC Regulation is inconsistent with Article 2.1 of the *TBT Agreement*.

C. *Arguments of the Third Participants*

1. Canada

95. Canada agrees with the Panel's finding that the EC Regulation is a "technical regulation" for the purposes of the *TBT Agreement*. It submits that the Panel correctly applied the Appellate Body's reasoning in *EC – Asbestos*, by finding that the EC Regulation identifies a product, namely preserved sardines, lays down product characteristics in a negative form by prohibiting fish of species other than *Sardina pilchardus* to be marketed as preserved sardines, and is mandatory.

96. Canada further asserts that, pursuant to Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*, the European Communities had an obligation on 1 January 1995 to ensure the conformity of its existing technical regulations with its obligations under, *inter alia*, Article 2.4 of the *TBT Agreement*. Canada adds that the European Communities failed to comply with this obligation in respect of the EC Regulation.

97. Canada also claims that the Panel correctly found that Codex Stan 94 was not used "as a basis for" the EC Regulation. According to Canada, the EC Regulation is not "founded or built upon" or "supported by" Codex Stan 94, because the EC Regulation prohibits preserved sardines of species other than *Sardina pilchardus* from being marketed as "sardines", regardless of whether the term "sardine" is used in conjunction with the country, geographical area, species, or common name of the species.

98. Canada agrees with the Panel's finding that under Article 2.4 of the *TBT Agreement*, the burden rests with the European Communities, as the party asserting the affirmative of a particular claim or defence, to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" of the EC Regulation. It further notes that, even if this were not the case, Peru provided sufficient evidence and legal arguments to meet this burden.

99. According to Canada, the Panel made an "objective assessment of the matter before it". Canada submits that in order to establish that the Panel acted inconsistently with Article 11 of the DSU, the European Communities must do more than merely contend that the Panel should have reached different factual findings than those it reached.

100. Canada further submits that the Panel's interpretation of Codex Stan 94 is correct and that it was within the Panel's discretion to decline to consult the Codex Commission.

101. Canada disagrees with the Panel's comment that, under Article 2.5 of the *TBT Agreement*, a regulation that is not in accordance with "relevant international standards" creates an unnecessary obstacle to trade. Canada notes, however, that the Panel's comment played no part in its determination that the EC Regulation is inconsistent with Article 2.4 of the *TBT Agreement*.

102. Canada submits that, in the event that the Appellate Body finds the EC Regulation to be consistent with Article 2.4 of the *TBT Agreement*, the Appellate Body has an adequate basis to complete the legal analysis of the claims made by Peru under Articles 2.2 and 2.1 of the *TBT Agreement* and Article III:4 of the GATT 1994.

103. In referring to the *amicus curiae* briefs received in this appeal, Canada notes that there is a lack of clear agreement among WTO Members as to the role of *amicus curiae* briefs in dispute settlement. It also states that the DSU provides WTO Members with the legal right to make submissions in a dispute, but only if they reserve their third party rights at the outset of the dispute settlement process. Canada finally asserts that, in any event, the *amicus curiae* briefs should be rejected because they are not pertinent or useful.

2. Chile

104. Chile agrees with Peru's claim that the European Communities could not conditionally withdraw its Notice of Appeal of 25 June 2002 and replace it with a new Notice of Appeal.

105. Chile also agrees with the Panel's conclusion that the EC Regulation is a "technical regulation" for purposes of the *TBT Agreement*.

106. Chile states that the Panel was correct in concluding that Article 2.4 of the *TBT Agreement* applies to all technical regulations that existed prior to 1 January 1995. According to Chile, the commitment under the *TBT Agreement* not to restrict trade more than necessary is a permanent and continuous one.

107. Chile rejects the European Communities' contention that Article 2.4 applies only to the preparation and adoption of technical regulations. Chile states that Article 2 of the *TBT Agreement* is entitled "*Preparation, Adoption and Application of Technical Regulations by Central Government Bodies*". Given the title of Article 2, Chile argues that if Article 2.4 were limited to the preparation and adoption of technical regulations, its text would have indicated this explicitly or the provision would have been included in a different article.

108. Chile agrees with the Panel's conclusion that Codex Stan 94 is a "relevant international standard". Chile, nevertheless, disagrees with the Panel's interpretation of the Explanatory note to the definition of "standard" in Annex 1.2 to the *TBT Agreement*. According to Chile, the Explanatory note provides that international standards must be based on consensus, and this was confirmed 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, adopted by the WTO Committee on Technical Barriers to Trade.<sup>22</sup> Chile notes, however, that the European Communities has not provided any evidence to demonstrate that Codex Stan 94 was not approved by consensus.

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<sup>22</sup>G/TBT/9, Committee on Technical Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, 13 November 2000, Annex 4.

109. Chile submits that the Panel was correct in finding that Codex Stan 94 was not used "as a basis for" the EC Regulation. Chile explains that the EC Regulation monopolizes the term "sardines" for *Sardina pilchardus* in circumstances where Codex Stan 94 provides otherwise. Chile then asserts that, had the European Communities used Codex Stan 94 "as a basis", the European Communities would have had to incorporate all relevant parts of it, and not only section 6.1.1(i).

110. Chile asserts that the burden of proving that Codex Stan 94 is not "ineffective or inappropriate" rests with the European Communities, because it is impossible for the Panel or for the other Members to prove what are the true "legitimate objectives" pursued by the Member adopting a technical regulation. In Chile's view, the European Communities failed to meet this burden.

111. Chile requests, furthermore, that the Appellate Body reject the *amicus curiae* briefs received in this appeal. Chile argues that accepting *amicus curiae* briefs from WTO Members who have not notified the DSB of their interest as third parties would mean that those Members would be accorded more favourable treatment than those accorded passive observer status in an appeal.

### 3. Ecuador

112. Ecuador requests clarification of the issues raised by the European Communities' conditional withdrawal of the original Notice of Appeal and the submission of a second Notice of Appeal.

113. Ecuador submits that the EC Regulation is a "technical regulation" for purposes of the *TBT Agreement*. It agrees with the Panel's finding that Codex Stan 94 is a "relevant international standard" which must be used "as a basis for" the adoption and maintenance of the EC Regulation.

114. According to Ecuador, the Panel correctly found that Codex Stan 94 allows Members to provide a precise trade description for preserved sardines, thereby promoting market transparency, consumer protection, and fair competition. Ecuador further agrees with the Panel's finding that Peru presented sufficient evidence to prove that Codex Stan 94 is neither "ineffective" nor "inappropriate" to achieve the "legitimate objectives" pursued by the European Communities through the EC Regulation.

115. Finally, Ecuador objects to the acceptance and consideration of the *amicus curiae* briefs submitted in this appeal. According to Ecuador, this would accord Morocco more favourable treatment than Colombia who was accorded passive observer status in this appeal.

4. United States

116. According to the United States, the Panel correctly found, as a factual matter, that the EC Regulation lays down product characteristics that must be complied with in order for a product to be labelled and sold as preserved sardines, and that one of those mandatory product characteristics is that the fish must be of the species *Sardina pilchardus*. It further notes that the European Communities has not contested that the EC Regulation is a "technical regulation", but only that it is a "technical regulation" relating to *Sardinops sagax*.

117. The United States submits that, contrary to what the European Communities claims, there is no need to prove that the EC Regulation is an explicit "technical regulation" for *Sardinops sagax*. Although the EC Regulation mentions only *Sardina pilchardus* by name, the United States asserts that this does not mean that the EC Regulation cannot be challenged by another Member, especially when that Member is precluded from labelling its sardine species as "sardines" by that regulation.

118. The United States also rejects the European Communities' attempt to distinguish between labels and names, and states that the Panel correctly noted that both labelling and naming requirements are means of identifying a product.

119. The United States agrees with the Panel's conclusion that Article 2.4 applies to technical regulations that were in effect when the *TBT Agreement* came into force. The United States submits that the Appellate Body's reasoning in *EC – Hormones*<sup>23</sup> regarding the temporal application of the *SPS Agreement* is also relevant for interpreting Article 2.4 of the *TBT Agreement*.

120. The United States further asserts that the European Communities' allegation that Article 2.4 applies only to the drafting, drawing up or preparation of technical regulations is not supported by the text of that provision nor by its context. In this regard, the United States argues that this provision "follows fast" upon Article 2.3 of the *TBT Agreement*, which requires that technical regulations not be maintained if they are no longer necessary or if the objectives can be attained in a less trade-restrictive manner. This provides contextual support, according to the United States, to the conclusion that the phrase "where technical regulations are required" in Article 2.4 can refer to existing technical regulations that are being maintained because they are still required.

121. The United States submits that the Panel correctly found that Codex Stan 94 is a "relevant international standard". It further states that the Panel properly rejected the European Communities'

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<sup>23</sup>Appellate Body Report, *supra*, footnote 17.

allegations that the international standard at issue does not mean what it says, or is invalid because of drafting changes made in the course of developing the standard.

122. The United States disagrees, however, with the Panel's conclusion that international standards do not have to be based on consensus. According to the United States, this conclusion is contrary to the Explanatory note to the definition of "standard" in Annex 1.2 to the *TBT Agreement*, which states that international standards *are* based on consensus. It argues that the *TBT Agreement* does not impose any obligations on an international body or system with respect to the development of international standards. In the United States' view, the obligations set out in the *TBT Agreement* apply only to WTO Members and thus do not *cover* the international standards referred to in Article 2.4. The last phrase of the Explanatory note, referring to the application of the *TBT Agreement* to documents not adopted by consensus, would cover instead those standards adopted by Members even if not adopted by consensus.

123. The United States, therefore, urges the Appellate Body to modify this aspect of the Panel Report, but clarifies that this would not invalidate the Panel's conclusion that Codex Stan 94 is a "relevant international standard", given the Panel's finding that there was no evidence that Codex Stan 94 was not based on consensus.

124. The United States submits that the Panel was correct in finding that the European Communities is not using Codex Stan 94 "as a basis for" the EC Regulation. The United States asserts that the EC Regulation is directly contrary to the international standard because Codex Stan 94 provides that a number of sardine species can be marketed with the name "sardines", appropriately qualified, while the EC Regulation explicitly forbids such marketing.

125. The United States rejects the European Communities' allegation that the Panel effectively required conformity or compliance with the international standard. According to the United States, the Panel simply said that an international standard could not have been used as a basis for a technical regulation if the technical regulation directly contradicts the standard. The United States further states that the EC Regulation would not meet the European Communities' proposed definition for the term "as a basis", given that the only rational relationship between the EC Regulation and Codex Stan 94 is that they contradict each other.

126. The United States also asserts that the European Communities is incorrect to argue that it appropriately used relevant parts of Codex Stan 94 on the grounds that the EC Regulation is based on that part of the standard that permits Members to reserve the name "sardine", without a qualifier, for the species *Sardina pilchardus*. The United States argues that, given that the EC Regulation also

forbids the name "X sardines" for other sardine species, that part of Codex Stan 94 concerning "X sardines" is therefore plainly a relevant part of the standard.

127. The United States claims that the Panel correctly concluded that Codex Stan 94 is not an "ineffective or inappropriate" means for pursuing the European Communities' "legitimate objectives", identified as market transparency, consumer protection, and fair competition, because, *inter alia*, this international standard provides for conveying accurate information to the consumer concerning the content of the product. The United States also agrees with the Panel's finding that Peru met the burden of showing that Codex Stan 94 is not "ineffective or inappropriate".

128. The United States alleges, however, that the Panel erred in stating that Peru was not required to meet this burden—even though it found that Peru had done so. According to the United States, this reasoning is unnecessary to the Panel's finding and legally erroneous. In the United States' view, it is the complaining party, not the responding party, that has the burden of presenting evidence and arguments sufficient to make a *prima facie* demonstration of each claim that the measure is inconsistent with a provision of a covered agreement. This includes the demonstration under Article 2.4 of the *TBT Agreement* that the relevant international standards are not "ineffective or inappropriate". The United States argues, moreover, that this burden does not shift to the responding party because the obligation is characterized as an exception, or because the responding party asserts that the international standard is "ineffective or inappropriate", or because the responding party may have more information at its disposal concerning the "legitimate objectives."

129. The United States, therefore, requests the Appellate Body to modify the portion of the Panel's reasoning dealing with the allocation of the burden of proving that relevant international standards are an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" through the technical regulation.

130. The United States submits that the Appellate Body has the discretion to accept both *amicus curiae* briefs received in this appeal, but that it need not do so because they are not pertinent or useful.

## 5. Venezuela

131. Venezuela states that the Panel correctly found that the EC Regulation is a "technical regulation". It also agrees with the Panel's finding that Article 2.4 of the *TBT Agreement* applies to measures adopted before 1 January 1995, but which have not ceased to exist. According to

Venezuela, the Panel properly applied the principle set forth in Article 28 of the *Vienna Convention*<sup>24</sup>, as interpreted by the Appellate Body.

132. Venezuela agrees with the Panel's conclusion that Codex Stan 94 is a "relevant international standard" and contends that the EC Regulation does not take into account the standard established in Codex Stan 94.

133. Venezuela disagrees with the European Communities' assertion that Codex Stan 94, by authorizing use of the term "sardines" for products other than *Sardina pilchardus*, is "ineffective or inappropriate" to fulfil the "legitimate objectives" of consumer protection, market transparency, and fair competition. Venezuela also submits that Peru presented sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

### **III. Issues Raised in this Appeal**

134. This appeal raises the following issues:

- (a) whether the appeal is inadmissible as a result of the conditional withdrawal of the Notice of Appeal filed on 25 June 2002, and the filing of a new Notice of Appeal on 28 June 2002;
- (b) whether the *amicus curiae* briefs submitted by the Kingdom of Morocco and a private individual are admissible, and, if so, whether they assist us in this appeal;
- (c) whether the Panel erred by finding that Council Regulation (EEC) 2136/89 (the "EC Regulation") is a "technical regulation" within the meaning of Annex 1.1 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*");
- (d) whether the Panel erred by finding that Article 2.4 of the *TBT Agreement* applies to existing measures, such as the EC Regulation;
- (e) whether the Panel erred by finding that CODEX STAN 94–1981, Rev.1–1995 ("Codex Stan 94") is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*;

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<sup>24</sup>*Supra*, footnote 16.



- (f) whether the Panel erred by finding that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*;
- (g) whether the Panel correctly interpreted and applied the second part of Article 2.4 of the *TBT Agreement*, which allows Members not to use international standards "as a basis for" their technical regulations "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued";
- (h) whether the Panel properly discharged its duty under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") to make "an objective assessment of the facts of the case";
- (i) whether the Panel has made a determination that the EC Regulation is trade-restrictive, and, if so, whether the Panel erred in making such a determination; and
- (j) whether we should complete the analysis under Article 2.2 of the *TBT Agreement*, Article 2.1 of the *TBT Agreement*, or Article III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), in the event that we find that the EC Regulation is consistent with Article 2.4 of the *TBT Agreement*.

#### IV. Procedural Issues

##### A. *Admissibility of Appeal*

135. We begin with the question of the admissibility of the appeal. Peru submits that the Notice of Appeal of 25 June 2002 was withdrawn, that the withdrawal was subject to an "impermissible" condition of filing a new notice of appeal, and that the Notice of Appeal filed on 28 June 2002 is inadmissible because there is no right to appeal twice.<sup>25</sup> The European Communities responds that it did not appeal twice, that it withdrew the original Notice of Appeal in response to Peru's request for additional information on the grounds of appeal, and that Peru did not suffer any prejudice as a result of the timely filing of the new Notice of Appeal based on the same legal grounds as the original Notice.<sup>26</sup>

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<sup>25</sup>Peru's letter dated 2 July 2002.

<sup>26</sup>European Communities' response to questioning at the oral hearing.

136. We set out earlier in this Report<sup>27</sup> the sequence of events relevant to the filing by the European Communities of a Notice of Appeal on 25 June 2002, the withdrawal of that Notice three days later, and the filing of a replacement Notice of Appeal on 28 June 2002. Before commencing our analysis of the admissibility of the Notice of Appeal of 28 June 2002, we note first that Peru does not request that we rule in this Report on Peru's Request for a Preliminary Ruling, submitted on 27 June 2002, regarding the sufficiency of paragraphs (d), (f), (g), and (h) of the European Communities' Notice of Appeal dated 25 June 2002.<sup>28</sup> Peru states in its appellee's submission that "[t]he Division presumably considers the original Notice of Appeal to be withdrawn"<sup>29</sup>, and Peru does not address further the question of the insufficiency of the original Notice of Appeal. The European Communities submits that "the preliminary objections raised by Peru on the adequacy of the Notice of Appeal filed by the [European Communities] on 25 June 2002 is a matter that is now moot and settled."<sup>30</sup> In the light of these submissions, we need not, and, therefore, we do not decide the issues raised in the Request for a Preliminary Ruling filed by Peru regarding the sufficiency of the Notice of Appeal filed on 25 June 2002.

137. We turn to the claim by Peru that the European Communities was not entitled to attach a condition to its withdrawal of the Notice of Appeal filed on 25 June 2002. Rule 30(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*"), which governs the withdrawal of an appeal, provides:

At any time during an appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the DSB.

138. This rule accords to the appellant a broad right to withdraw an appeal at any time. This right appears, on its face, to be unfettered: an appellant is not subject to any deadline by which to withdraw its appeal; an appellant need not provide any reason for the withdrawal; and an appellant need not provide any notice thereof to other participants in an appeal. More significantly for this appeal, there is nothing in the Rule prohibiting the attachment of conditions to a withdrawal. Indeed, in two previous cases, notices of appeal were withdrawn subject to the condition that new notices would be

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<sup>27</sup>*Supra*, paras. 11 *ff.*

<sup>28</sup>WT/DS231/10, 27 June 2002.

<sup>29</sup>Peru's appellee's submission, para. 42.

<sup>30</sup>European Communities' appellant's submission, para. 235.

filed.<sup>31</sup> Nor is the right to withdraw an appeal expressly subject to the condition that no new notice be filed on the same matter after the withdrawal.

139. However, despite this permissive language, we emphasize that the *Working Procedures* must not be interpreted in a way that could undermine the effectiveness of the dispute settlement system, for they have been drawn up pursuant to the DSU and as a means of ensuring that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute.<sup>32</sup> As we have said:

The procedural rules of WTO dispute settlement are designed to promote ... the fair, prompt and effective resolution of trade disputes.<sup>33</sup>

140. This obligation to interpret the *Working Procedures* in a way that promotes the effective resolution of disputes is complemented by the obligation of Members, set out in Article 3.10 of the DSU, to "engage in [dispute settlement] procedures in good faith in an effort to resolve the dispute." Hence, the right to withdraw an appeal must be exercised subject to these limitations, which are applicable generally to the dispute settlement process.

141. Peru submits that nothing in Rule 30 of the *Working Procedures* permits the attachment of conditions to the withdrawal of a notice of appeal, and that, therefore, this appeal must be deemed to have been withdrawn irrespective of whether the conditions are met. We find no support in Rule 30 for Peru's position. While it is true that nothing in the text of Rule 30(1) explicitly permits an appellant to exercise its right subject to conditions, it is also true that nothing in the same text prohibits an appellant from doing so. As we have just explained, in our view, the right to withdraw a notice of appeal under Rule 30(1) is broad, subject only to the limitations we have described. Therefore, we see no reason to interpret Rule 30 as granting a right to withdraw an appeal only if that withdrawal is unconditional. Rather, the correct interpretation, in our view, is that Rule 30(1) permits conditional withdrawals, unless the condition imposed undermines the "fair, prompt and effective resolution of trade disputes", or unless the Member attaching the condition is not "engag[ing] in [dispute settlement] procedures in good faith in an effort to resolve the dispute." Therefore, it is necessary to examine any such conditions attached to withdrawals on a case-by-case basis to

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<sup>31</sup>We note that, in both previous cases, unlike in this case, the Divisions hearing those appeals and the appellees had prior knowledge of, and agreed with, the process. (Appellate Body Report, *US – FSC*, *supra*, footnote 20, para. 4; Appellate Body Report, *US – Line Pipe*, *supra*, footnote 19, para. 13) Peru distinguishes this case on that basis; however, the mere fact that there was both notice and agreement in those cases does not, on its own, mean that such notice and agreement are required.

<sup>32</sup>DSU, Article 3.7.

<sup>33</sup>Appellate Body Report, *US – FSC*, *supra*, footnote 20, para. 166.

determine whether, in fact, the particular condition in a particular case in any way obstructs the dispute settlement process, or in some way diminishes the rights of the appellee or other participants in the appeal.

142. With this in mind, we examine next whether, by withdrawing the Notice of Appeal of 25 June 2002 subject to the condition of filing a replacement notice of appeal, the European Communities has effectively undermined the "fair, prompt and effective resolution of trade disputes" or has not "engage[d] in [dispute settlement] procedures in good faith in an effort to resolve the dispute."

143. According to the European Communities, it withdrew the Notice of Appeal of 25 June 2002 after receiving Peru's Request for a Preliminary Ruling in order to "enlarge ... the description of the points" in paragraphs (d), (f), (g), and (h) of the original Notice and, thus, "clarify the points that Peru considered were not clear".<sup>34</sup> The European Communities maintains that the "replacement"<sup>35</sup> Notice contained "no new grounds of appeal, or modified ones."<sup>36</sup> Moreover, the European Communities contends that "Peru's rights of defense have not been harmed in any way by the replacement of the original Notice of Appeal with a new one and by the new Working Schedule".<sup>37</sup> The European Communities submits that it acted in a timely manner, "within the 60 days provided by the DSU [for adoption of panel reports]" and "well in advance of any substantial exchange between the parties".<sup>38</sup>

144. In our view, attaching the condition to the withdrawal was not unreasonable under the circumstances. The conditioning by the European Communities of its withdrawal of the Notice of Appeal of 25 June 2002 on the right to file a replacement Notice of Appeal arose as a response to the Request for a Preliminary Ruling filed by Peru. Although Peru contests the European Communities' contention that no prejudice was suffered by Peru—arguing that Peru was "forced to address a completely novel procedural issue and waste time on that issue that [Peru] could have used for better purposes"<sup>39</sup>—we are not persuaded that the European Communities' response in any way obstructed the process or diminished Peru's rights. Indeed, it may well have had the opposite effect. Although the European Communities states that it thought Peru's Request for a Preliminary Ruling "to be

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<sup>34</sup>European Communities' response to questioning at the oral hearing.

<sup>35</sup>European Communities' appellant's submission, para. 235.

<sup>36</sup>European Communities' response to questioning at the oral hearing.

<sup>37</sup>European Communities' appellant's submission, para. 235.

<sup>38</sup>European Communities' response to questioning at the oral hearing.

<sup>39</sup>Peru's response to questioning at the oral hearing.

without merit"<sup>40</sup>, the European Communities sought to remedy the difficulty perceived by Peru, and not to delay the proceedings further by contesting the allegations of insufficiency.

145. Moreover, the European Communities responded in a timely manner, providing the additional information in a replacement Notice of Appeal the day following receipt of Peru's objections to the Notice of Appeal of 25 June 2002, and only three days after filing the original Notice of Appeal. The replacement Notice was provided well before any submissions were filed. Thus, for the reasons explained, we find that the withdrawal of the original Notice on condition of filing a replacement Notice was appropriate and had the effect of conditionally withdrawing the original Notice.

146. In making this finding, we are mindful of Peru's argument that allowing the withdrawal of a notice of appeal subject to a unilaterally declared condition of the right to file a new notice of appeal, and the filing thereafter of a new notice of appeal, creates an "immense potential for abuse and disorder in appellate review proceedings."<sup>41</sup> Peru suggests a number of examples of possible abusive practices that could result—including the delaying of the adoption of a panel report by submitting a new notice of appeal each time a panel report is before the Dispute Settlement Body (the "DSB"), the amending of allegations of error in the light of arguments made by the appellee or of questions posed by the Division at the oral hearing, and the attempt to have a different division selected or a different date chosen for the oral hearing.<sup>42</sup> We agree with Peru that there may be situations where the withdrawal of an appeal on condition of refiling a new notice, and the filing thereafter of a new notice, could be abusive and disruptive. However, in such cases, we would have the right to reject the condition, and also to reject any filing of a new notice of appeal, on the grounds either that the Member seeking to file such a new notice would not be engaging in dispute settlement proceedings in good faith, or that Rule 30(1) of the *Working Procedures* must not be used to undermine the fair, prompt, and effective resolution of trade disputes. We agree with Peru that the rules must be interpreted so as to "ensure that appellate review proceedings do not become an arena for unfortunate litigation techniques that frustrate the objectives of the DSU, and that developing countries do not have the resources to deal with".<sup>43</sup> The case before us, however, presents none of these circumstances.

147. In addition, we believe there are circumstances that, although not constituting "abusive practices", would be in violation of the DSU, and would, thus, compel us to disallow the conditional withdrawal of a notice of appeal as well as the filing of a replacement notice. For example, if the

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<sup>40</sup>European Communities' letter to the Appellate Body dated 28 June 2002.

<sup>41</sup>Peru's appellee's submission, para. 45.

<sup>42</sup>*Ibid.*

<sup>43</sup>*Ibid.*, para. 51.

conditional withdrawal or the filing of a new notice were to take place after the 60-day deadline in Article 16.4 of the DSU for adoption of panel reports, this would effectively circumvent the requirement to file appeals within 60 days of circulation of panel reports. In such circumstances, we would reject the conditional withdrawal and the new notice of appeal.

148. We turn now to Peru's request that we declare the Notice of Appeal of 28 June 2002 inadmissible because neither the DSU nor the *Working Procedures* "accord[s] an appellant the right to appeal the same panel report twice on different grounds."<sup>44</sup> In our view, this argument by Peru is also misplaced, for we do not consider that the European Communities has in fact appealed "twice". The European Communities maintains that it "never intended to appeal twice", and also that it "considered that [the European Communities] only appealed once".<sup>45</sup> The European Communities contends as well that the replacement Notice contained "no new grounds of appeal, or modified ones."<sup>46</sup> Peru, for its part, states that the replacement Notice "reformulated the points to which Peru had objected"<sup>47</sup> and was based on "different allegations of error"<sup>48</sup>, but Peru does not point to any new or modified grounds of appeal.<sup>49</sup>

149. As we have explained, we are of the view that the conditional withdrawal of the Notice of Appeal of 25 June 2002 was appropriate and effective, and that, therefore, the filing of a replacement Notice on 28 June 2002 did not constitute a second appeal. Moreover, we agree with the European Communities that the replacement Notice of Appeal contains no additional grounds of appeal, and that it merely added information to the paragraphs in the initial Notice that Peru considered deficient.

150. Peru alleges that, in sanctioning the approach of the European Communities in this appeal, we would be creating a procedural right for which the DSU has not provided—a right that can only be added to the DSU through a formal amendment by the Members of the World Trade Organization (the "WTO"). We are, however, not creating a new procedural right; we are only upholding the right to withdraw an appeal. In addition, in admitting the replacement Notice of Appeal in this dispute, we are, as we were in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("US – Shrimp"), seeking to:

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<sup>44</sup>Peru's appellee's submission, para. 179.

<sup>45</sup>European Communities' response to questioning at the oral hearing.

<sup>46</sup>*Ibid.*

<sup>47</sup>Peru's appellee's submission, para. 38.

<sup>48</sup>*Ibid.*, para. 48.

<sup>49</sup>Peru stated that the first Notice was "vague as to the scope of the appeal" and therefore it did not know whether the new Notice covered the same grounds. (Peru's response to questioning at the oral hearing)

... give full meaning and effect to the right of appeal and to give a party which regards itself aggrieved by some legal finding or interpretation in a panel report a real and effective opportunity to demonstrate the error in such finding or interpretation.<sup>50</sup>

In that same Report, we added that "an appellee is, of course, always entitled to its full measure of due process."<sup>51</sup> In the circumstances of this case, we believe that Peru has been accorded the full measure of its due process rights, because the withdrawal of the original Notice and the filing of a replacement Notice were carried out in response to objections raised by Peru, the replacement Notice was filed in a timely manner and early in the process, and the replacement Notice contained no new or modified grounds of appeal. Also, Peru has not demonstrated that it suffered prejudice as a result. Moreover, Peru was given an adequate opportunity to address its concerns about the European Communities' actions during the course of the appeal.

151. In our view, the withdrawal of the original Notice of Appeal of 25 June 2002 and its replacement with the Notice of Appeal of 28 June 2002 was not an exercise of abusive litigation techniques by the European Communities, but rather was an appropriate response under the circumstances to Peru's objections regarding the original Notice of Appeal.

152. For all these reasons, we reject Peru's claims that the withdrawal of the Notice of Appeal of 25 June 2002 by the European Communities cannot be subject to a condition, and that the Notice of Appeal of 28 June 2002 by the European Communities is inadmissible.

#### B. *Amicus Curiae Briefs*

153. We turn next to the second procedural issue in this case, namely whether we may accept and consider the *amicus curiae* briefs that have been submitted to us. One brief was filed by a private individual, and the other by the Kingdom of Morocco ("Morocco"), a Member of the WTO that did not exercise its third party rights at the panel stage of these proceedings.

154. Peru objects to our acceptance and consideration of these unsolicited submissions. Peru argues that, although it "welcomes non-Member submissions where they are attached to the submission of a WTO Member engaged in dispute settlement proceedings, the DSU makes clear that only WTO Members can make independent submissions to panels and to the Appellate Body".<sup>52</sup> As for the brief submitted by Morocco, a WTO Member, Peru contends that accepting such a brief

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<sup>50</sup>Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 97.

<sup>51</sup>*Ibid.*

<sup>52</sup>Peru's letter dated 26 July 2002.

"would be to allow a WTO Member impermissibly to circumvent the DSU", which "establishes the conditions under which WTO Members can participate as third parties in dispute settlement proceedings."<sup>53</sup> On this basis, Peru requests us to reject both of these briefs.

155. The European Communities does not address this issue in its written submission. In response to our questioning at the oral hearing, however, the European Communities stated that the *amicus curiae* briefs are pertinent, and that we have the discretion to accept them. Among the third participants, Canada argues that there is a lack of clear agreement among WTO Members as to the role of *amicus curiae* briefs in dispute settlement, and contends that WTO Members have a legal right to participate in dispute settlement proceedings only if they reserve their third party rights at the outset of the dispute settlement process. Moreover, Canada asserts that both *amicus curiae* briefs should be rejected because they are not pertinent or useful. Chile and Ecuador also ask us to reject the *amicus curiae* briefs, alleging that the DSU does not permit participation by *amici*. The United States is of the view that we have the authority to accept both briefs, but believes we should not consider either of them because they are not pertinent or useful.

156. We recall that, in *US – Shrimp*<sup>54</sup>, we admitted three *amicus curiae* briefs that were attached as exhibits to the appellant's submission in that appeal. We concluded that those briefs formed part of the appellant's submission, and observed that it is for a participant in an appeal to determine for itself what to include in its submission.<sup>55</sup> We followed this approach in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*")<sup>56</sup>, and in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*").<sup>57</sup> In subsequent cases, *amicus curiae* briefs were submitted by private individuals or organizations separately from participants' submissions. We admitted those briefs as well.<sup>58</sup>

157. We have the authority to accept *amicus curiae* briefs. We enunciated this authority for the first time in our Report in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled*

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<sup>53</sup>Peru's letter dated 26 July 2002.

<sup>54</sup>Appellate Body Report, *supra*, footnote 50.

<sup>55</sup>*Ibid.*, para 91.

<sup>56</sup>Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted 5 April 2001.

<sup>57</sup>Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/AB/RW, adopted 21 November 2001.

<sup>58</sup>Appellate Body Report, *EC – Asbestos*, *supra*, footnote 15, Appellate Body Report, *Thailand – H-Beams*, *supra*, footnote 56, Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601.



*Lead and Bismuth Carbon Steel Products Originating in the United Kingdom ("US – Lead and Bismuth II")*), where we reasoned:

In considering this matter, we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit[s] acceptance or consideration of such briefs. ... [Article 17.9<sup>59</sup>] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.<sup>60</sup> (footnote omitted)

158. In that finding, we drew a distinction between, on the one hand, parties and third parties to a dispute, which have a *legal right* to participate in panel and Appellate Body proceedings, and, on the other hand, private individuals and organizations, which are not Members of the WTO, and which, therefore, do not have a *legal right* to participate in dispute settlement proceedings. We said there:

We wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages *participation* in panel or Appellate Body proceedings, as a matter of legal right, *only* by parties and third parties to a dispute. And, under the DSU, *only* Members of the WTO have a legal right to participate as parties or third parties in a particular dispute. ...

Individuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal *duty* to accept and consider *only* submissions from WTO Members which are parties or third parties in a particular dispute.<sup>61</sup> (original emphasis; underlining added; footnotes omitted)

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<sup>59</sup>Article 17.9 of the DSU provides as follows:

*Procedures for Appellate Review*

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

<sup>60</sup>Appellate Body Report, *supra*, footnote 58, para. 39.

<sup>61</sup>*Ibid.*, paras. 40–41.

159. We explained further in that appeal that participation by private individuals and organizations is dependent upon our permitting such participation if we find it useful to do so. We observed that:

... we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision.<sup>62</sup>

We have followed this same approach in a number of subsequent appeals.<sup>63</sup>

160. Peru conceded at the oral hearing that its "position is not exactly supported by the case law of the Appellate Body".<sup>64</sup> On this, Peru is correct. Accordingly, we believe that the objections of Peru with regard to the *amicus curiae* brief submitted by a private individual are unfounded. We find that we have the authority to accept the brief filed by a private individual, and to consider it. We also find that the brief submitted by a private individual does not assist us in this appeal.

161. We turn now to the issue of the *amicus curiae* brief filed by Morocco, which raises a novel issue, as this is the first time that a WTO Member has submitted such a brief in any WTO dispute settlement proceeding. The European Communities is of the view that we should not treat *amicus curiae* briefs submitted by private individuals differently from *amicus curiae* briefs submitted by WTO Members.<sup>65</sup> Peru objects to our accepting Morocco's brief, arguing that such acceptance would circumvent the rules in the DSU setting out the conditions under which WTO Members can participate as third parties in dispute settlement proceedings.<sup>66</sup> Peru refers specifically to Articles 10.2 and 17.4 of the DSU, which provide, respectively:

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<sup>62</sup>Appellate Body Report, *US – Lead and Bismuth II*, *supra*, footnote 58, para. 42.

<sup>63</sup>The issue of unsolicited *amicus curiae* briefs submitted to us by private individuals also arose in *EC – Asbestos*, *supra*, footnote 15; *Thailand – H-Beams*, *supra*, footnote 56; and *US – Shrimp (Article 21.5 – Malaysia)*, *supra*, footnote 57.

<sup>64</sup>Peru's response to questioning at the oral hearing.

<sup>65</sup>European Communities' response to questioning at the oral hearing.

<sup>66</sup>Peru's letter dated 26 July 2002.

*Article 10*

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

*Article 17*

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

Peru asserts that, because Morocco did not notify its interest to the DSB in accordance with these provisions, Morocco cannot be given an opportunity to be heard by us.

162. We do not agree. As we said earlier, we found in *US – Lead and Bismuth II* that "nothing in the DSU or the *Working Procedures* specifically provides that we may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal."<sup>67</sup> We also stated in that appeal that "neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs."<sup>68</sup> In so ruling, we did *not* distinguish between, on the one hand, submissions from WTO Members that are not participants or third participants in a particular appeal, and, on the other hand, submissions from *non*-WTO Members.

163. It is true that, unlike private individuals or organizations, WTO Members are given an explicit right, under Articles 10.2 and 17.4 of the DSU, to participate in dispute settlement proceedings as third parties. Thus, the question arises whether the existence of this explicit right, which is not accorded to non-Members, justifies treating WTO Members differently from non-WTO Members in the exercise of our authority to receive *amicus curiae* briefs. We do not believe that it does.

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<sup>67</sup>Appellate Body Report, *supra*, footnote 58, para. 39.

<sup>68</sup>*Ibid.*

164. We have been urged by the parties to this dispute not to treat Members less favourably than non-Members with regard to participation as *amicus curiae*.<sup>69</sup> We agree. We have not. And we will not. As we have already determined that we have the authority to receive an *amicus curiae* brief from a private individual or an organization, *a fortiori* we are entitled to accept such a brief from a WTO Member, provided there is no prohibition on doing so in the DSU. We find no such prohibition.

165. None of the participants in this appeal has pointed to any provision of the DSU that can be understood as prohibiting WTO Members from participating in panel or appellate proceedings as an *amicus curiae*. Nor has any participant in this appeal demonstrated how such participation would contravene the DSU. Peru states only that the DSU provides that participation as a third party is governed by Articles 10.2 and 17.4, and appears to draw from this a negative inference such that Members may participate pursuant to those rules, or not at all. We have examined Articles 10.2 and 17.4, and we do not share Peru's view. Just because those provisions stipulate when a Member may participate in a dispute settlement proceeding as a third party or third participant, does not, in our view, lead inevitably to the conclusion that participation by a Member as an *amicus curiae* is prohibited.

166. As we explained in *US – Lead and Bismuth II*, the DSU gives WTO Members that are participants and third participants a legal *right* to participate in appellate proceedings.<sup>70</sup> In particular, WTO Members that are third participants in an appeal have the *right* to make written and oral submissions. The corollary is that we have a *duty*, by virtue of the DSU, to accept and consider

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<sup>69</sup>European Communities' response to questioning at the oral hearing; Peru's response to questioning at the oral hearing.

Ecuador and Chile argued that if we were to accept and consider an *amicus curiae* brief submitted by a WTO Member that had not followed the procedures for participation as a third party or third participant, we would be according such Member greater rights than we would a WTO Member which had followed those procedures, but had not filed a written submission on appeal as specified in Rule 27(3) of our *Working Procedures*. According to Chile and Ecuador, the Member that had not filed a written submission on appeal would have an opportunity only to participate as a passive observer at the oral hearing, but would not be permitted to make its views known at that hearing. Chile and Ecuador argue that, by contrast, the Member which had filed an *amicus curiae* brief would have greater rights because its views would be before us. We do not agree. A Member that has participated as a third party at the panel stage has a right to file a written submission on appeal in accordance with Rule 24, and if it does so we would have a duty to consider it. If such Member chooses for its own reasons not to file a written submission on appeal, our practice is to permit such Member to attend the oral hearing. By contrast, a Member which files an *amicus curiae* brief is not guaranteed that we will accept or consider the brief, and the Member will not be entitled to attend the oral hearing in any capacity.

<sup>70</sup>Appellate Body Report, *supra*, footnote 58, para. 40. This is subject to meeting the requirements in Rule 27(3) of the *Working Procedures*, which provides that "[a]ny third participant who has filed a submission pursuant to Rule 24 may appear to make oral arguments or presentations at the oral hearing." However, we have on several occasions permitted third parties who have not filed a submission to attend the oral hearing as passive observers.

these submissions from WTO Members. By contrast, participation as *amici* in WTO appellate proceedings is not a legal *right*, and we have no duty to accept any *amicus curiae* brief. We may do so, however, based on our legal authority to regulate our own procedures as stipulated in Article 17.9 of the DSU. The fact that Morocco, as a sovereign State, has chosen not to exercise its *right* to participate in this dispute by availing itself of its third-party rights at the panel stage does not, in our opinion, undermine our *legal authority* under the DSU and our *Working Procedures* to accept and consider the *amicus curiae* brief submitted by Morocco.

167. Therefore, we find that we are entitled to accept the *amicus curiae* brief submitted by Morocco, and to consider it. We wish to emphasize, however, that, in accepting the brief filed by Morocco in this appeal, we are not suggesting that each time a Member files such a brief we are required to accept and consider it. To the contrary, acceptance of any *amicus curiae* brief is a matter of discretion, which we must exercise on a case-by-case basis. We recall our statement that:

The procedural rules of WTO dispute settlement are designed to promote ... the fair, prompt and effective resolution of trade disputes.<sup>71</sup>

Therefore, we could exercise our discretion to reject an *amicus curiae* brief if, by accepting it, this would interfere with the "fair, prompt and effective resolution of trade disputes." This could arise, for example, if a WTO Member were to seek to submit an *amicus curiae* brief at a very late stage in the appellate proceedings, with the result that accepting the brief would impose an undue burden on other participants.

168. Having concluded that we have the legal authority to accept the *amicus curiae* brief submitted by Morocco, we now consider whether Morocco's brief assists us in this appeal.

169. Morocco's *amicus curiae* brief provides mainly factual information. It refers to the scientific differences between *Sardina pilchardus* Walbaum ("*Sardina pilchardus*") and *Sardinops sagax* ("*Sardinops sagax*"), and it also provides economic information about the Moroccan fishing and canning industries. As Article 17.6 of the DSU limits an appeal to issues of law and legal interpretations developed by the panel, the factual information provided in Morocco's *amicus curiae* brief is not pertinent in this appeal. In addition, Morocco has alleged in its *amicus curiae* brief that the measure at issue in this appeal is consistent with relevant international standards, including those of the Codex Alimentarius Commission (the "Codex Commission"). Morocco does not elaborate on

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<sup>71</sup>Appellate Body Report, *US – FSC*, *supra*, footnote 20, para. 166. In that appeal, we were not referring in the quoted excerpt to the issue of *amicus curiae* briefs. The issue there related to the exercise of the right of appeal. We nevertheless believe that our views on how to interpret the *Working Procedures* are of general application and are thus pertinent to the *amicus curiae* issue as it arises in this case.

this allegation, and provides no support for this position. Therefore, this, too, fails to assist us in this appeal. However, some of the legal arguments put forward by Morocco relate to Article 2.1 of the *TBT Agreement* and to the GATT 1994. Therefore, we will consider whether these arguments are of assistance when we consider Article 2.1 and the GATT 1994 later in this Report.

170. In sum, with the exception of the arguments relating to Article 2.1 of the *TBT Agreement* and the GATT 1994, to which we will return later, we find that Morocco's *amicus curiae* brief does not assist us in this appeal.

## V. The Characterization of the EC Regulation as a "Technical Regulation"

171. We now turn to whether the Panel erred by finding that the EC Regulation is a "technical regulation" for purposes of Article 2.4 of the *TBT Agreement*. We recall that we have described the measure at issue—the EC Regulation—earlier in this Report.<sup>72</sup>

172. The Panel found that:

... the EC Regulation is a technical regulation as it lays down product characteristics for preserved sardines and makes compliance with the provisions contained therein mandatory.<sup>73</sup>

173. The European Communities does not contest that the EC Regulation is a "technical regulation" *per se*.<sup>74</sup> Instead, on appeal, the European Communities reiterates two arguments that the Panel rejected. First, the European Communities argues that the product coverage of the EC Regulation is limited to preserved *Sardina pilchardus*. The European Communities contends that the EC Regulation does not regulate preserved fish made from *Sardinops sagax* or from any other species, and that, accordingly, *Sardinops sagax* is not an *identifiable* product under the EC Regulation.<sup>75</sup> The European Communities concludes that, in the light of our ruling in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos")<sup>76</sup> that a "technical regulation" must apply to *identifiable* products, the EC Regulation is not a "technical regulation" for *Sardinops sagax*.<sup>77</sup>

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<sup>72</sup>*Supra*, paras. 2–3.

<sup>73</sup>Panel Report, para. 7.35.

<sup>74</sup>European Communities' appellant's submission, paras. 21 and 23; European Communities' statement at the oral hearing.

<sup>75</sup>European Communities' response to questioning at the oral hearing.

<sup>76</sup>Appellate Body Report, *supra*, footnote 15.

<sup>77</sup>European Communities' appellant's submission, para. 49.

174. Second, the European Communities contends that a "naming" rule is distinct from a labelling requirement. The European Communities argues that, "[t]he requirement to state a certain name on the label ... involves not only a labelling requirement but also a substantive naming rule, which is not subject to the TBT Agreement."<sup>78</sup> Thus, according to the European Communities, even if it were determined that the EC Regulation relates to *Sardinops sagax*, the "naming" rule set out in Article 2 of the EC Regulation—the provision challenged by Peru—is not a product characteristic.<sup>79</sup> On this basis, the European Communities argues that Article 2 of the EC Regulation—which the European Communities contends sets out a "naming" rule and not a labelling requirement—does not meet the definition of the term "technical regulation" provided in the *TBT Agreement*.<sup>80</sup>

175. As we explained in *EC – Asbestos*, whether a measure is a "technical regulation" is a threshold issue because the outcome of this issue determines whether the *TBT Agreement* is applicable.<sup>81</sup> If the measure before us is not a "technical regulation", then it does not fall within the scope of the *TBT Agreement*.<sup>82</sup> The term "technical regulation" is defined in Annex 1.1 to the *TBT Agreement* as follows:

1. *Technical Regulation*

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.

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<sup>78</sup>European Communities' statement at the oral hearing.

<sup>79</sup>Article 2 of the EC Regulation reads as follows:

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

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
- they must be prepared exclusively from fish of the species "*Sardina pilchardus* Walbaum";
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
- they must be sterilized by appropriate treatment.

<sup>80</sup>European Communities' statement at the oral hearing.

<sup>81</sup>Appellate Body Report, *supra*, footnote 15, para. 59.

<sup>82</sup>The *TBT Agreement* covers also "standards" and "conformity assessment procedures". However, none of the participants has alleged that the measure at issue in this dispute is either a "standard" or a "conformity assessment procedure".

176. We interpreted this definition in *EC – Asbestos*.<sup>83</sup> In doing so, we set out *three criteria* that a document must meet to fall within the definition of "technical regulation" in the *TBT Agreement*. *First*, the document must apply to an identifiable product or group of products. The *identifiable* product or group of products need not, however, be expressly *identified* in the document. *Second*, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory. As we stressed in *EC – Asbestos*, these three criteria are derived from the wording of the definition in Annex 1.1. At the oral hearing, both participants confirmed that they agree with these criteria for determining whether a document is a "technical regulation" under the *TBT Agreement*.<sup>84</sup>

177. The European Communities concedes that the EC Regulation is a "technical regulation" *per se*.<sup>85</sup> All the same, the European Communities argues that the EC Regulation is *not* a "technical regulation" for the purposes of this dispute because—in relation to *Sardinops sagax*—it does not fulfil two of the criteria that a document must meet to be considered a "technical regulation" under the *TBT Agreement*.<sup>86</sup> The European Communities' assertion that the EC Regulation does not regulate preserved *Sardinops sagax* relates to the first criterion, which requires that a document apply to *identifiable* products. The European Communities' argument distinguishing "naming" from labelling requirements relates to the second criterion, which requires that a document lay down *product characteristics*. We will consider each of these arguments in turn.

178. We begin with the European Communities' contention that the EC Regulation is a "technical regulation" only for preserved *Sardina pilchardus*, and that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation.

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<sup>83</sup>Appellate Body Report, *supra*, footnote 15, paras. 66–70.

<sup>84</sup>European Communities' response to questioning at the oral hearing; Peru's response to questioning at the oral hearing.

<sup>85</sup>European Communities' response to questioning at the oral hearing.

<sup>86</sup>*Ibid.*



179. The Panel rejected this argument because, in the Panel's view, it:

... disregards the notion that a document may prescribe or impose product characteristics in either a positive or negative form — that is, by inclusion or by exclusion.<sup>87</sup> (footnote omitted)

The Panel then concluded that:

... by requiring the use of only the species *Sardina pilchardus* as preserved sardines, *the EC Regulation in effect lays down product characteristics in a negative form*, that is, by excluding other species, such as *Sardinops sagax*, from being "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. *It is for this reason that we do not accept the European Communities' argument that the EC Regulation is not a technical regulation for preserved Sardinops sagax.* This argument would be persuasive only if technical regulations were to lay down product characteristics in a positive form.<sup>88</sup> (emphasis added)

This excerpt from the Panel Report suggests that the Panel examined the European Communities' argument on this issue in the light of the *second* criterion, which requires that a document lay down product characteristics.<sup>89</sup> In our view, the European Communities' argument, as presented on appeal, relates rather to the *first* criterion: the European Communities is claiming that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation.<sup>90</sup>

180. In *EC – Asbestos*, we made the following observations about the requirement that a document apply to identifiable products:

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<sup>87</sup>Panel Report, para. 7.44.

<sup>88</sup>*Ibid.*, para. 7.45.

<sup>89</sup>Before examining this argument, the Panel had concluded that the EC Regulation applies to an identifiable product because it *identifies* preserved sardines. (*Ibid.*, para. 7.26)

<sup>90</sup>European Communities' appellant's submission, paras. 43–47.

A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, "of the *products to be covered*" by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named, identified or specified* in the regulation. (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the "characteristic" that is the subject of regulation.<sup>91</sup> (original emphasis; footnote omitted)

Thus, a product does not necessarily have to be mentioned *explicitly* in a document for that product to be an *identifiable* product. *Identifiable* does not mean expressly identified.

181. The European Communities argues that the Panel erred in failing to acknowledge that the EC Regulation uses the term "preserved sardines" to mean—exclusively—preserved *Sardina pilchardus*.<sup>92</sup> The European Communities is of the view that preserved *Sardina pilchardus* and preserved *Sardinops sagax* are not like products. The European Communities reasons that preserved *Sardinops sagax* can neither be an identified nor an identifiable product under the EC Regulation.<sup>93</sup>

182. In our view, the Panel correctly found that the EC Regulation is applicable to an identified product, and that the identified product is "preserved sardines". This is abundantly clear from a plain reading of the EC Regulation itself. The EC Regulation is entitled "Council Regulation (EEC) 2136/89 of 21 June 1989 Laying Down Common Marketing Standards for *Preserved Sardines*". (emphasis added) Article 1, which sets forth the scope of the EC Regulation, states that "[t]his Regulation defines the standards governing the marketing of *preserved sardines* in the Community." (emphasis added) Article 2 states that "[o]nly products meeting the following requirements may be marketed as *preserved sardines*". (emphasis added)

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<sup>91</sup>Appellate Body Report, *supra*, footnote 15, para 70.

<sup>92</sup>European Communities' appellant's submission, para. 38.

<sup>93</sup>*Ibid.*, para. 49.

183. This alone, however, does not dispose of the European Communities' argument, as the European Communities reproaches the Panel for failing to acknowledge that the EC Regulation uses the term "preserved sardines" to mean—exclusively—preserved *Sardina pilchardus*. We observe that the EC Regulation does not expressly identify *Sardinops sagax*. However, this does not necessarily mean that *Sardinops sagax* is not an *identifiable* product. As we stated in *EC – Asbestos*, a product need not be expressly identified in the document for it to be *identifiable*.<sup>94</sup>

184. Even if we were to accept, for the sake of argument, the European Communities' contention that the term "preserved sardines" in the EC Regulation refers exclusively to preserved *Sardina pilchardus*, the EC Regulation would still be applicable to a range of *identifiable* products beyond *Sardina pilchardus*. This is because preserved products made, for example, of *Sardinops sagax* are, by virtue of the EC Regulation, *prohibited* from being identified and marketed under an appellation including the term "sardines".

185. As we explained in *EC – Asbestos*, the requirement that a "technical regulation" be applicable to *identifiable* products relates to aspects of compliance and enforcement, because it would be impossible to comply with or enforce a "technical regulation" without knowing to what the regulation applied.<sup>95</sup> As the Panel record shows, the EC Regulation has been enforced against preserved fish products imported into Germany containing *Sardinops sagax*.<sup>96</sup> This confirms that the EC Regulation is applicable to preserved *Sardinops sagax*, and demonstrates that preserved *Sardinops sagax* is an *identifiable product* for purposes of the EC Regulation. Indeed, the European Communities admits that the EC Regulation is applicable to *Sardinops sagax*, when it states in its appellant's submission that "[t]he only legal consequence of the [EC] Regulation for preserved *Sardinops sagax* is that they may not be called 'preserved sardines'." <sup>97</sup>

186. Therefore, we reject the contention of the European Communities that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation.

187. Next, we examine whether the EC Regulation meets the second criterion of a "technical regulation", which is that it must be a document that lays down product characteristics. According to the European Communities, Article 2 of the EC Regulation does not lay down product characteristics;

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<sup>94</sup>Appellate Body Report, *EC – Asbestos*, *supra*, footnote 15, para. 70.

<sup>95</sup>*Ibid.*

<sup>96</sup>Letter from German importer submitted as Exhibit PERU-13 by Peru to the Panel. Reference to this is also found in Peru's first submission to the Panel, paras. 5–7; Peru's second submission to the Panel, para. 12; Peru's appellee's submission, para. 60; and Peru's response to questioning at the oral hearing.

<sup>97</sup>European Communities' appellant's submission, para 43.

rather, it sets out a "naming" rule. The European Communities argues that, although the definition of "technical regulation" in the *TBT Agreement* covers labelling requirements, it does not extend to "naming" rules. Therefore, the European Communities asserts that Article 2 of the EC Regulation is not a "technical regulation".<sup>98</sup>

188. The Panel rejected this assertion for two reasons. First, the Panel stated:

... even if it were determined that the EC Regulation does not contain a labelling requirement, it cannot detract from our conclusion that the EC Regulation constitutes a technical regulation because that conclusion is based on our finding that it lays down certain product characteristics we have already identified. A finding to the effect that the EC Regulation does not contain a related product characteristic in the form of a labelling requirement does not negate the existence of other product characteristics set out in the EC Regulation.<sup>99</sup>

The Panel continued:

Second, we fail to see the basis on which a distinction can be drawn between a requirement to "name" and a requirement to "label" a product for the purposes of the TBT Agreement. ... Based on the ordinary meaning, we consider that labelling and naming requirements are essentially "means of identification" of a product and as such, they come within the scope of the definition of "technical regulation".

In any event, the distinction which we have been asked to draw between "naming" and "labelling" requirements is not supported by the text and structure of the EC Regulation.<sup>100</sup> (footnotes omitted)

189. In *EC – Asbestos*, we examined what it means to lay down product characteristics, and concluded that:

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<sup>98</sup>European Communities' statement at the oral hearing.

<sup>99</sup>Panel Report, para. 7.39.

<sup>100</sup>*Ibid.*, paras. 7.40–7.41.

The heart of the definition of a "technical regulation" is that a "document" must "lay down" – that is, set forth, stipulate or provide – "product *characteristics*". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".<sup>101</sup> (original emphasis; underlining added)

Accordingly, product characteristics include not only "features and qualities intrinsic to the product", but also those that are related to it, such as "means of identification".

190. We do not find it necessary, in this case, to decide whether the definition of "technical regulation" in the *TBT Agreement* makes a distinction between "naming" and labelling. This question is irrelevant to the issue before us. As we stated earlier, the EC Regulation expressly identifies a product, namely "preserved sardines". Further, Article 2 of the EC Regulation provides that, to be marketed as "preserved sardines", products must be prepared exclusively from fish of the species *Sardina pilchardus*. We are of the view that this requirement—to be prepared exclusively from fish of the species *Sardina pilchardus*—is a product characteristic "intrinsic to" preserved sardines that is laid down by the EC Regulation.<sup>102</sup> Thus, we agree with the Panel's finding in this regard that:

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<sup>101</sup> Appellate Body Report, *supra*, footnote 15, para. 67.

<sup>102</sup> We observe that Article 2 of the EC Regulation lays down another intrinsic product characteristic in requiring that only products "sterilized by appropriate treatment" may be marketed as preserved sardines.

... one product characteristic required by Article 2 of the EC Regulation is that preserved sardines must be prepared exclusively from fish of the species *Sardina pilchardus*. This product characteristic must be met for the product to be "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. We consider that the requirement to use exclusively *Sardina pilchardus* is a product characteristic as it objectively defines features and qualities of preserved sardines for the purposes of their "market[ing] as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation.<sup>103</sup>

191. In any event, as we said in *EC – Asbestos*, a "means of identification" is a product characteristic.<sup>104</sup> A name clearly identifies a product; indeed, the European Communities concedes that a name is a "means of identification".<sup>105</sup> As the following excerpt from the Panel Report illustrates, the European Communities itself underscored the important role that a "name" plays as a "means of identification" when it argued before the Panel that one of the objectives pursued by the European Communities through the EC Regulation is to provide precise information to avoid misleading the consumer:

The European Communities argues that the provisions of its Regulation laying down minimum quality standards, harmonizing the ways in which the product may be presented and regulating the indications to be contained on the label, all serve to facilitate comparisons between competing products. It further submits that some of these objectives are pursued by the Regulation at issue in conjunction with EC Directive 2000/13. The European Communities argues that this is particularly true of the name; *accurate and precise names allow products to be compared with their true equivalents rather than with substitutes and imitations whereas inaccurate and imprecise names reduce transparency, cause confusion, mislead the consumer, allow products to benefit from the reputation of other different products, give rise to unfair competition and reduce the quality and variety of products available in trade and ultimately for the consumer.*<sup>106</sup> (emphasis added)

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<sup>103</sup>Panel Report, para. 7.27.

<sup>104</sup>Appellate Body Report, *supra*, footnote 15, para. 67.

<sup>105</sup>European Communities' response to questioning at the oral hearing. The European Communities argues that the distinction between a labelling requirement and a "naming" rule is similar to the difference between, on the one hand, requirements relating to markings indicating the origin of a product, and, on the other hand, rules used to determine the origin of a product. We are not persuaded by this analogy. A "naming" rule bears no similarity to a rule of origin. A name is a clear means of identifying a product. Furthermore, as the facts of this case illustrate, affixing a name to the label of a product is a highly practical way of identifying a product when goods are marketed. Indeed, Codex Stan 94 includes the provisions relating to the name of the product—that is, section 6.1—within the section dealing with labelling generally.

<sup>106</sup>Panel Report, para. 4.71.

192. Before concluding on this second criterion and proceeding to the third criterion in the definition of "technical regulation", we observe that, although the European Communities argued before the Panel that Article 2 of the EC Regulation could not be analyzed in isolation, on appeal, the European Communities asks us to focus our attention exclusively on whether Article 2, taken by itself, lays down product characteristics.<sup>107</sup> As the Panel correctly points out, in *EC – Asbestos*, we stated that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole".<sup>108</sup> With this in mind, we observe that the Panel analyzed other articles of the EC Regulation and found that those, too, lay down product characteristics.<sup>109</sup>

193. For all these reasons, we agree with the Panel's conclusion that the EC Regulation lays down product characteristics.

194. The third and final criterion that a document must fulfil to meet the definition of "technical regulation" in the *TBT Agreement* is that compliance must be mandatory. The European Communities does not contest that compliance with the EC Regulation is mandatory.<sup>110</sup> We also find that it is mandatory.<sup>111</sup>

195. We, therefore, uphold the Panel's finding, in paragraph 7.35 of the Panel Report, that the EC Regulation is a "technical regulation" for purposes of the *TBT Agreement*, because it meets the three criteria we set out in *EC – Asbestos* as necessary to satisfy the definition of a "technical regulation" under the *TBT Agreement*.

## **VI. The Temporal Scope of Application of Article 2.4 of the *TBT Agreement***

196. We turn now to the European Communities' claim that Article 2.4 of the *TBT Agreement* does not apply to pre-existing technical regulations because it deals only with the *preparation* and *adoption* of technical regulations and not with their continued application. On this issue, we begin by recalling that the EC Regulation and Codex Stan 94 came into effect before the entry into force of the *TBT Agreement* on 1 January 1995.

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<sup>107</sup>Panel Report, para. 7.31.

<sup>108</sup>Appellate Body Report, *supra*, footnote 15, para. 64.

<sup>109</sup>The Panel referred to Articles 3–7 of the EC Regulation. (Panel Report, para. 7.28)

<sup>110</sup>European Communities' response to questioning at the oral hearing.

<sup>111</sup>Article 9 of the EC Regulation states in relevant part that "[t]his Regulation shall be binding in its entirety and directly applicable in all Member States."

197. The Panel found that:

...the EC Regulation is a "situation or measure that did not cease to exist" and the TBT Agreement does not reveal a contrary intention to limit the temporal application of the TBT Agreement to measures adopted after 1 January 1995.

Therefore, Article 2.4 of the TBT Agreement applies to measures that were adopted before 1 January 1995 but which have not ceased to exist.<sup>112</sup>

198. The Panel also rejected "the European Communities' argument that Article 2.4 [of the *TBT Agreement*] does not apply to existing technical regulations."<sup>113</sup>

199. The European Communities appeals this finding. The European Communities "does not argue that the *TBT Agreement* does not apply to technical regulations enacted before 1995".<sup>114</sup> Instead, the European Communities contends that Article 2.4 of that Agreement does not impose an ongoing obligation on Members to reassess their existing technical regulations in the light of the adoption of new international standards, or the revision of existing ones.<sup>115</sup>

200. We recall that Article 28 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")<sup>116</sup> provides that treaties generally do not apply retroactively. Article 28 provides:

*Non-retroactivity of treaties*

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 to exist before the date of the entry into force of the treaty* with respect to that party. (emphasis added)

As we have said in previous disputes<sup>117</sup>, the interpretation principle codified in Article 28 is relevant to the interpretation of the covered agreements.

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<sup>112</sup>Panel Report, paras. 7.59–7.60.

<sup>113</sup>*Ibid.*, para. 7.83. The Panel addressed this argument in the context of its analysis of whether Codex Stan 94 is a relevant international standard.

<sup>114</sup>European Communities' statement at the oral hearing.

<sup>115</sup>*Ibid.*

<sup>116</sup>*Supra*, footnote 16.

<sup>117</sup>Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, at 179–180; Appellate Body Report, *Canada – Term of Patent Protection*, WT/DS170/AB/R, adopted 12 October 2000, paras. 71–72; Appellate Body Report, *EC – Hormones*, *supra*, footnote 17, para. 128.



201. In the European Communities' view, both the text and the context of Article 2.4 make plain that the scope of application of Article 2.4 is limited to the *preparation* and *adoption* of technical regulations, and not to their *maintenance*.<sup>118</sup> The European Communities does not contest that the EC Regulation—which is currently in force—is an act that has not "ceased to exist". However, according to the European Communities, the *preparation* and *adoption* of the EC Regulation are both "acts that ceased to exist"—in the sense that they were completed—before the date of the entry into force of the *TBT Agreement*. Therefore, the European Communities contends that, consistent with Article 28 of the *Vienna Convention*<sup>119</sup>, Article 2.4 of the *TBT Agreement* is not applicable to the EC Regulation.<sup>120</sup>

202. The text of Article 2.4 of the *TBT Agreement* provides as follows:

#### TECHNICAL REGULATIONS AND STANDARDS

##### *Article 2*

##### *Preparation, Adoption and Application of Technical Regulations by Central Government Bodies*

With respect to their central government bodies:

...

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

203. According to the European Communities, it is evident from the text of Article 2.4 that the temporal scope of the provision is limited to the two stages of *preparation* and *adoption* of technical regulations, and that the continued existence thereafter of these regulations is not governed by that provision. The European Communities finds support for this contention in what the European Communities sees as the time-limited nature of the terms "where technical regulations are required",

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<sup>118</sup>European Communities' appellant's submission, paras. 66–83.

<sup>119</sup>*Supra*, footnote 16.

<sup>120</sup>European Communities' appellant's submission, para. 63; European Communities' response to questioning at the oral hearing.

"exist", "imminent", "use", and "as a basis for" in the text of Article 2.4, and also in the absence in the text of that provision of the words "maintain" or "apply".<sup>121</sup>

204. The Panel took a contrary view, and concluded that a textual reading does not support the European Communities' assertion because:

Article 2.4 of the TBT Agreement starts with the language "where technical regulations are required". We construe this expression to cover technical regulations that are already in existence as it is entirely possible that a technical regulation that is already in existence can continue to be required. ... Moreover, we note that the first part of the sentence of Article 2.4 is in the present tense ("exist") and not in the past tense — "[w]here technical regulations are required and relevant international standards *exist or their completion is imminent*", Members are obliged to use such international standards as a basis. This supports the view that Members have to use relevant international standards that currently exist or whose completion is imminent with respect to the technical regulations that are already in existence. We do not consider that the word "imminent", the ordinary meaning of which is "likely to happen without delay", is intended to limit the scope of the coverage of technical regulations to those that have yet to be adopted. Rather, the use of the word "imminent" means that Members cannot disregard a relevant international standard whose completion is imminent with respect to their existing technical regulations.<sup>122</sup> (original emphasis; footnote omitted)

205. We concur with the Panel's view that the text of Article 2.4 of the *TBT Agreement* does not support the European Communities' contention. We fail to see how the terms "where technical regulations are required", "exist", "imminent", "use", and "as a basis for" give any indication that Article 2.4 applies only to the two stages of *preparation* and *adoption* of technical regulations. To the contrary, as the Panel noted, the use of the present tense suggests a continuing obligation for existing measures, and not one limited to regulations prepared and adopted after the *TBT Agreement* entered into force. The European Communities reads Article 2.4 as if it said "where technical regulations are in preparation or are to be adopted", which is clearly not the case. The obligation refers to technical regulations generally and without limitations.

206. The European Communities' claim is also at odds with our reasoning in *EC Measures Concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*")<sup>123</sup>, which, as the Panel correctly

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<sup>121</sup>European Communities' appellant's submission, paras. 66–67; European Communities' response to questioning at the oral hearing.

<sup>122</sup>Panel Report, para. 7.74.

<sup>123</sup>Appellate Body Report, *supra*, footnote 17.

pointed out, is relevant to the issue before us. In *EC – Hormones*, we addressed the temporal scope of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), and stated:

We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement does not contain any provision limiting the temporal application of the SPS Agreement*, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, *it cannot be assumed that central provisions of the SPS Agreement, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter*. 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>124</sup> (emphasis added; footnote omitted)

207. Like the sanitary measure in *EC – Hormones*, the EC Regulation is currently in force. The European Communities has conceded that the EC Regulation is an act or fact that has not "ceased to exist".<sup>125</sup> Accordingly, following our reasoning in *EC – Hormones*, Article 2.4 of the *TBT Agreement* applies to existing measures unless that provision "reveals a contrary intention".<sup>126</sup> As we have said, we see nothing in Article 2.4 which would suggest that the provision does not apply to existing measures.

208. Furthermore, like Articles 5.1 and 5.5 of the *SPS Agreement*, Article 2.4 is a "central provision" of the *TBT Agreement*, and it cannot just be assumed that such a central provision does not apply to existing measures. Again, following our reasoning in *EC – Hormones*, we must conclude that, if the negotiators had wanted to exempt the very large group of existing technical regulations from the disciplines of a provision as important as Article 2.4 of the *TBT Agreement*, they would have said so explicitly.<sup>127</sup> No such explicit exemption is found in the terms "where technical regulations are required", "exist", "imminent", "use", or "as a basis for".

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<sup>124</sup>Appellate Body Report, *supra*, footnote 17, para. 128.

<sup>125</sup>European Communities' response to questioning at the oral hearing.

<sup>126</sup>Appellate Body Report, *supra*, footnote 17, para. 128.

<sup>127</sup>*Ibid.*

209. The European Communities' argument that our ruling in *EC – Hormones* is not relevant to Article 2.4 of the *TBT Agreement* is not persuasive. The European Communities contends that we based our ruling in *EC – Hormones* on the wording of Articles 2.2, 2.3, 3.3, and 5.6 of the *SPS Agreement*, and that all these provisions include the word "maintain".<sup>128</sup> The European Communities argues that the word "maintain" implies that a provision applies to measures already prepared and adopted. The European Communities then notes that Article 2.4 of the *TBT Agreement* does not include the word "maintain".<sup>129</sup> It is true that, in *EC – Hormones*, we referred to Articles 2.2, 2.3, 3.3, and 5.6 of the *SPS Agreement*. But we did so as relevant context.<sup>130</sup> Our analysis there focused on the meaning of Articles 5.1 and 5.5 of the *SPS Agreement*, which, like Article 2.4 of the *TBT Agreement*, do *not* include the word "maintain".<sup>131</sup> As we have explained, we found in that appeal that Articles 5.1 and 5.5 of the *SPS Agreement* apply to existing measures, despite the absence of the word "maintain". Thus, this argument by the European Communities fails on its own logic.

210. Having considered the European Communities' arguments based on the text of Article 2.4, we turn to examine the arguments of the European Communities that are based on the context of that provision. The European Communities argues that Article 2.5 of the *TBT Agreement* demonstrates that, when a provision is intended to cover the *application* of technical regulations, the provision says so explicitly. The European Communities finds similar contextual support in Article 12.4 of the *TBT Agreement*, which uses the word "adopt", and in paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards, included as Annex 3 to the *TBT Agreement*, which uses the word "develops".<sup>132</sup>

211. In discussing what it considered the relevant context of Article 2.4, the Panel looked first to Article 2.5 of the *TBT Agreement*:

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<sup>128</sup>European Communities' appellant's submission, paras. 62–63; European Communities' response to questioning at the oral hearing. We note that although the European Communities referred to Article 2.3, this provision does not include the word "maintain".

<sup>129</sup>*Ibid.*; European Communities' response to questioning at the oral hearing.

<sup>130</sup>Appellate Body Report, *supra*, footnote 17, para. 128.

<sup>131</sup>*Ibid.*

<sup>132</sup>European Communities' appellant's submission, paras. 75–78; European Communities' statement at the oral hearing. We note that, although the European Communities referred, in its statement at the oral hearing, to paragraph B of the Code of Good Practice for the Preparation, Adoption and Application of Standards as including the word "develops", this word is found in paragraph F.

There is contextual support for the interpretation that Article 2.4 applies to technical regulations that are already in existence. The context provided by Article 2.5, which explicitly refers to Article 2.4, speaks of "preparing, adopting or *applying*" a technical regulation and is not limited to, as the European Communities claims, to preparing and adopting. A technical regulation can only be applied if it is already in existence. The first sentence imposes an obligation on a Member "preparing, adopting or applying" a technical regulation that may have a significant effect on trade of other Members to provide the justification for that technical regulation. The second sentence of Article 2.5 states that whenever a technical regulation is "prepared, adopted or *applied*" for one of the legitimate objectives explicitly set out in Article 2.2 and is in accordance with relevant international standards, it is to be rebuttably presumed not to create an unnecessary obstacle to trade. The use of the term "apply", in our view, confirms that the requirement contained in Article 2.4 is applicable to existing technical regulations.<sup>133</sup> (original emphasis)

The Panel also looked to Article 2.6 of the *TBT Agreement*:

Article 2.6 provides another contextual support. It states that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either "*adopted*, or expect to adopt technical regulations." Those Members that have in place a technical regulation for a certain product are expected to participate in the development of a relevant international standard. Article 2.6 would be redundant and it would be contrary to the principle of effectiveness, which is a corollary of the general rule of interpretation in the Vienna Convention, if a Member is to participate in the development of a relevant international standard and then claim that such standard need not be used as a basis for its technical regulation on the ground that it was already in existence before the standard was adopted. Such reasoning would allow Members to avoid using international standards as a basis for their technical regulations simply by enacting preemptive measures and thereby undermine the object and purpose of developing international standards.<sup>134</sup> (original emphasis)

212. We agree with the Panel's analysis. Thus, we find no support for the European Communities' claim in the context of Article 2.4 of the *TBT Agreement*. Rather than supporting the European Communities' argument, Articles 2.5 and 2.6 of the *TBT Agreement* provide support for the argument advanced by Peru that Article 2.4 of the *TBT Agreement* regulates measures adopted before the date of the entry into force of the *TBT Agreement*. We note also that there is additional contextual support in the title of Article 2, which reads "Preparation, Adoption and *Application* of Technical Regulations by Central Government Bodies". (emphasis added) This express reference to

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<sup>133</sup>Panel Report, para. 7.75.

<sup>134</sup>*Ibid.*, para. 7.76.

the *application* of technical regulations in the title of Article 2 runs counter to an interpretation of Article 2.4 that would limit its scope to the preparation and adoption of technical regulations.

213. Moreover, as general context for all the covered agreements, Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* is of great significance. Article XVI:4 reads:

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

This provision establishes a clear obligation for all WTO Members to ensure the conformity of their existing laws, regulations, and administrative procedures with the obligations in the covered agreements.

214. In our view, the European Communities' reading of Article 2.4 also flies in the face of the object and purpose of the *TBT Agreement*. In several of its provisions, the *TBT Agreement* recognizes the important role that international standards play in promoting harmonization and facilitating trade. For example, Article 2.5 of the *TBT Agreement* establishes a rebuttable presumption that technical regulations that are in accordance with relevant international standards do not create unnecessary obstacles to trade. Article 2.6, for its part, encourages Members to participate in international standardizing bodies with a view to harmonizing technical regulations on as wide a basis as possible.

215. The significant role of international standards is also underscored in the Preamble to the *TBT Agreement*. The third recital of the Preamble recognizes the important contribution that international standards can make by improving the efficiency of production and facilitating the conduct of international trade. The eighth recital recognizes the role that international standardization can have in the transfer of technology to developing countries. In our view, excluding existing technical regulations from the obligations set out in Article 2.4 would undermine the important role of international standards in furthering these objectives of the *TBT Agreement*. Indeed, it would go precisely in the opposite direction.

216. For all these reasons, we uphold the Panel's finding, in paragraph 7.60 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to measures that were adopted before 1 January 1995 but which have not ceased to exist, such as the EC Regulation. We also uphold the Panel's finding, in paragraph 7.83 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to existing technical regulations, including the EC Regulation.

## VII. The Characterization of Codex Stan 94 as a "Relevant International Standard"

217. We proceed to the European Communities' claim that the Panel erred in finding that Codex Stan 94 is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*.

218. The Panel found that "Codex Stan 94 is a relevant international standard".<sup>135</sup> The European Communities challenges this finding for two reasons. The European Communities asserts, first, that only standards adopted by international bodies by consensus are "relevant international standards" under Article 2.4 of the *TBT Agreement*.<sup>136</sup> The European Communities argues that the Panel assumed "that Codex Stan 94 ... was adopted by consensus ... without undertaking positive steps to verify the accuracy of the conflicting statements made in this respect by the parties".<sup>137</sup> Second, the European Communities asserts that, even if Codex Stan 94 were considered an international standard, it is not a "*relevant* international standard" because its product coverage is different from that of the EC Regulation. The European Communities contends that the EC Regulation covers only preserved sardines, while Codex Stan 94 covers that product as well as "sardine-type" products.<sup>138</sup> We will address each of these arguments in turn.

### A. *The European Communities' Argument that Consensus is Required*

219. The European Communities argues that only standards that have been adopted by an international body by consensus can be *relevant* for purposes of Article 2.4. The European Communities contends that the Panel did not verify that Codex Stan 94 was not adopted by consensus, and that, therefore, it cannot be a "relevant international standard".<sup>139</sup>

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<sup>135</sup>Panel Report, para. 7.70.

<sup>136</sup>European Communities' appellant's submission, para. 123.

<sup>137</sup>*Ibid.*, para. 134.

<sup>138</sup>This argument is based on the European Communities' interpretation of Codex Stan 94, which differs from that of the Panel. The European Communities explains that when Codex Stan 94 was in draft form, and particularly when it was at Step 7 of the elaboration procedures of the Codex Commission, it provided three naming options: (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus*); (ii) "X Sardines", where "X" is the name of a country, a geographic area, or the species; and (iii) the common name of the species. The European Communities claims that the first two options—"Sardines" and "X Sardines"—apply to sardine products, while the third option—the common name of the species—was envisaged as a separate option for "*sardine-type products*". Given that only editorial changes are allowed between Steps 7 and 8 of the elaboration procedures, when the second and third options were merged, the European Communities alleges that the draft standard at Step 7 should guide the interpretation of Codex Stan 94, even though the text approved at Step 8 includes the common name of the species in the same subsection as "X Sardines". (European Communities' appellant's submission, paras. 135–148; European Communities' response to questioning at the oral hearing) The Panel's interpretation of Codex Stan 94 focuses on its final version. The Panel is of the view that the "common name of the species" is part of the "X Sardines" option. (See *infra*, paras. 235–239)

<sup>139</sup>European Communities' response to questioning at the oral hearing.

220. However, in our view, the European Communities' contention is essentially related to whether Codex Stan 94 meets the definition of a "standard" in Annex 1.2 of the *TBT Agreement*. The term "standard", is defined in Annex 1.2 as follows:

2. *Standard*

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

*Explanatory note*

The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. *Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.* (emphasis added)

221. The European Communities does not contest that the Codex Commission is an international standardization body, and that it is a "recognized body" for purposes of the definition of a "standard" in Annex 1.2.<sup>140</sup> The issue before us, rather, is one of *approval*. The definition of a "standard" refers to documents *approved* by a recognized body. Whether approval takes place by consensus, or by other methods, is not addressed in the definition, but it is addressed in the last two sentences of the Explanatory note.

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<sup>140</sup>European Communities' response to questioning at the oral hearing.



222. The Panel interpreted the last two sentences of the Explanatory note as follows:

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

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<sup>86</sup> The record does not demonstrate that Codex Stan 94 was not adopted by consensus. In any event, we consider that this issue would have no bearing on our determination in light of the explanatory note of paragraph 2 of Annex 1 of the TBT Agreement which states that the TBT Agreement covers "documents that are not based on consensus".<sup>141</sup>

We agree with the Panel's interpretation. In our view, the text of the Explanatory note supports the conclusion that consensus is not required for standards adopted by the international standardizing community. The last sentence of the Explanatory note refers to "documents". The term "document" is also used in the singular in the first sentence of the definition of a "standard". We believe that "document(s)" must be interpreted as having the same meaning in both the definition and the Explanatory note. The European Communities agrees.<sup>142</sup> Interpreted in this way, the term "documents" in the last sentence of the Explanatory note must refer to standards *in general*, and not only to those adopted by entities *other than* international bodies, as the European Communities claims.

223. Moreover, the text of the last sentence of the Explanatory note, referring to documents not based on consensus, gives no indication whatsoever that it is departing from the subject of the immediately preceding sentence, which deals with standards adopted by international bodies. Indeed, the use of the word "also" in the last sentence suggests that the same subject is being addressed—namely standards prepared by the international standardization community. Hence, the logical assumption is that the last phrase is simply continuing in the same vein, and refers to standards adopted by international bodies, including those not adopted by consensus.

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<sup>141</sup>Panel Report, para. 7.90 and footnote 86 thereto.

<sup>142</sup>European Communities' response to questioning at the oral hearing. The United States agreed. (United States' response to questioning at the oral hearing)

224. The Panel's interpretation, moreover, gives effect to the chapeau of Annex 1 to the *TBT Agreement*, which provides:

The terms presented in the sixth edition of the ISO/IEC Guide 2:1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide ...

For the purpose of this Agreement, *however*, the following definitions shall apply ... (emphasis added)

Thus, according to the chapeau, the terms defined in Annex 1 apply for the purposes of the *TBT Agreement* only if their definitions *depart* from those in the ISO/IEC Guide 2:1991 (the "ISO/IEC Guide").<sup>143</sup> This is underscored by the word "however". The definition of a "standard" in Annex 1 to the *TBT Agreement* departs from that provided in the ISO/IEC Guide precisely in respect of whether consensus is expressly required.

225. The term "standard" is defined in the ISO/IEC Guide as follows:

Document, established by *consensus* and approved by a recognized *body*, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context.<sup>144</sup>  
(original emphasis)

Thus, the definition of a "standard" in the ISO/IEC Guide expressly includes a consensus requirement. Therefore, the logical conclusion, in our view, is that the *omission* of a consensus requirement in the definition of a "standard" in Annex 1.2 of the *TBT Agreement* was a deliberate choice on the part of the drafters of the *TBT Agreement*, and that the last two phrases of the Explanatory note were included to give effect to this choice. Had the negotiators considered consensus to be necessary to satisfy the definition of "standard", we believe they would have said so explicitly in the definition itself, as is the case in the ISO/IEC Guide. Indeed, there would, in our view, have been no point in the negotiators adding the last sentence of the Explanatory note.

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<sup>143</sup>ISO/IEC Guide (6<sup>th</sup> edition, 1991), submitted as Exhibit EC-1 to the European Communities' appellant's submission.

<sup>144</sup>*Ibid.*, subclause 3.2.

226. Furthermore, we observe that the Panel found that, in any event, the European Communities did *not* prove that Codex Stan 94 was *not* adopted by consensus. Instead, the Panel found that, "[t]he record does not demonstrate that Codex Stan 94 was not adopted by consensus".<sup>145</sup>

227. Therefore, we uphold the Panel's conclusion, in paragraph 7.90 of the Panel Report, that the definition of a "standard" in Annex 1.2 to the *TBT Agreement* does not require approval by consensus for standards adopted by a "recognized body" of the international standardization community. We emphasize, however, that this conclusion is relevant only for purposes of the *TBT Agreement*. It is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the *TBT Agreement* does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe an international standardization body should not require consensus for the adoption of its standards. That is not for us to decide.

B. *The European Communities' Argument on the Product Coverage of Codex Stan 94*

228. We turn now to examine the European Communities' argument that Codex Stan 94 is not a "*relevant* international standard" because its product coverage is different from that of the EC Regulation.

229. In analyzing the merits of this argument, the Panel first noted that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent".<sup>146</sup> The Panel reasoned that, to be a "relevant international standard", Codex Stan 94 would have to bear upon, relate to, or be pertinent to the EC Regulation.<sup>147</sup> The Panel then conducted the following analysis:

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<sup>145</sup>Panel Report, footnote 86 to para. 7.90. The report of the meeting of the Codex Commission where Codex Stan 94 was adopted, which Peru submitted to the Panel, makes no mention of votes being cast before its approval. (Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission (ALINORM 78/41), submitted as Exhibit Peru-14 by Peru to the Panel) We note that, at the oral hearing, the European Communities and Peru agreed that the Panel's conclusion that the record does not demonstrate that Codex Stan 94 was not adopted by consensus is a factual finding, which is beyond the purview of appellate review.

<sup>146</sup>Panel Report, para. 7.68, quoting *Webster's New World Dictionary* (William Collins & World Publishing Co., Inc. 1976), p. 1199.

<sup>147</sup>*Ibid.*

The title of Codex Stan 94 is "Codex Standard for Canned Sardines and Sardine-type Products" and the EC Regulation lays down common marketing standards for preserved sardines. The European Communities indicated in its response that the term "canned sardines" and "preserved sardines" are essentially identical. *Therefore, it is apparent that both the EC Regulation and Codex Stan 94 deal with the same product, namely preserved sardines.* The scope of Codex Stan 94 covers various species of fish, including *Sardina pilchardus* which the EC Regulation covers, and includes, *inter alia*, provisions on presentation (Article 2.3), packing medium (Article 3.2), labelling, including a requirement that the packing medium is to form part of the name of the food (Article 6), determination of net weight (Article 7.3), foreign matter (Article 8.1) and odour and flavour (Article 8.2). The EC Regulation contains these corresponding provisions set out in Codex Stan 94, including the section on labelling requirement.<sup>148</sup> (emphasis added; footnote omitted)

230. We do not disagree with the Panel's interpretation of the ordinary meaning of the term "relevant". Nor does the European Communities.<sup>149</sup> Instead, the European Communities argues that, although the EC Regulation deals *only* with preserved sardines—understood to mean exclusively preserved *Sardina pilchardus*—Codex Stan 94 *also covers* other preserved fish that are "sardine-type".<sup>150</sup>

231. We are not persuaded by this argument. First, even if we accepted that the EC Regulation relates only to preserved *Sardina pilchardus*, which we do not, the fact remains that section 6.1.1(i) of Codex Stan 94 also relates to preserved *Sardina pilchardus*. Therefore, Codex Stan 94 can be said to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved *Sardina pilchardus*.

232. Second, we have already concluded that, although the EC Regulation expressly mentions only *Sardina pilchardus*, it has legal consequences for other fish species that could be sold as preserved sardines, including preserved *Sardinops sagax*.<sup>151</sup> Codex Stan 94 covers 20 fish species in addition to *Sardina pilchardus*.<sup>152</sup> These other species also are legally affected by the exclusion in the EC Regulation. Therefore, we conclude that Codex Stan 94 bears upon, relates to, or is pertinent to the EC Regulation.

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<sup>148</sup>Panel Report, para. 7.69.

<sup>149</sup>European Communities' response to questioning at the oral hearing.

<sup>150</sup>*Ibid.*

<sup>151</sup>See *supra*, paras. 184–185.

<sup>152</sup>The fish species covered by Codex Stan 94 are listed in section 2.1.1 thereto. (*Supra*, footnote 4) See also, *supra*, para. 5.

233. For all these reasons, we uphold the Panel's finding, in paragraph 7.70 of the Panel Report, that Codex Stan 94 is a "relevant international standard" for purposes of Article 2.4 of the *TBT Agreement*.

### VIII. Whether Codex Stan 94 Was Used "As a Basis For" the EC Regulation

234. We turn now to whether Codex Stan 94 has been used "as a basis for" the EC Regulation. It will be recalled that Article 2.4 of the *TBT Agreement* requires Members to use relevant international standards "as a basis for" their technical regulations under certain circumstances. The Panel found that "the relevant international standard, i.e., Codex Stan 94, was not used as a basis for the EC Regulation".<sup>153</sup> The European Communities appeals this finding.

235. The starting point of the Panel's analysis was the interpretation of section 6.1.1(ii) of Codex Stan 94, which reads as follows:

The name of the product shall be:

...

(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.

236. Two interpretations of section 6.1.1(ii) of Codex Stan 94 were submitted to the Panel. The European Communities argued that the phrase "the common name of the species in accordance with the law and custom of the country in which the product is sold", found in section 6.1.1(ii) of Codex Stan 94, is intended as a self-standing option for "naming", independent of the formula "X sardines", and that, under this section, "each country has the option of choosing between 'X sardines' and the common name of the species".<sup>154</sup>

237. For its part, Peru contended that, under section 6.1.1(ii), the species other than *Sardina pilchardus* to which Codex Stan 94 refers may be marketed as "X sardines" where "X" is one of the four following alternatives: (1) a country; (2) a geographic area; (3) the species; or (4) the common name of the species.<sup>155</sup> Thus, in Peru's view, "the common name of the species" is not a stand-alone option for naming, but rather is one of the qualifiers for naming sardines that are not *Sardina*

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<sup>153</sup>Panel Report, para. 7.112.

<sup>154</sup>*Ibid.*, para. 7.101. See also, *supra*, footnote 138, explaining why the European Communities interprets this as a stand-alone option.

<sup>155</sup>Panel Report, para. 4.43.

*pilchardus*. Further, Peru argued that prohibiting the marketing in the European Communities of *Sardinops sagax* imported from Peru as, for example, "Peruvian sardines" would run counter to the first of the four options in section 6.1.1(ii).

238. The Panel was of the view that a textual reading of section 6.1.1(ii) favoured the interpretation advocated by Peru, adding that:

We consider that paragraph 6.1.1(ii) of Codex Stan 94 contains four alternatives and each alternative envisages the use of the term "sardines" combined with the name of a country, name of a geographic area, name of the species or the common name of the species in accordance with the law and custom of the country in which the product is sold.<sup>156</sup>

239. We agree with Peru and with the Panel that section 6.1.1(ii) permits the marketing of non-*Sardina pilchardus* as "sardines" with one of four qualifiers. The French version of section 6.1.1(ii) supports this approach. It provides:

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

The French language is one official language of the Codex Commission. The French and English versions are equally authentic. The French version is drafted in a manner that puts all four qualifiers on an equal footing. In the French version, there is no comma after the word "espèce". The use of the term "'X' désignant" to introduce the enumeration in section 6.1.1(ii) of Codex Stan 94 makes clear that the common name of the species is *one* of the qualifiers that may be attached to the term "sardines" when marketing preserved sardines.<sup>157</sup>

240. With this understanding of this international standard in mind, we turn to the requirement that relevant international standards must be used "as a basis for" technical regulations. We note that the Panel interpreted the word "basis" to mean "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".<sup>158</sup> In applying this interpretation of "basis" to the measure in this dispute, the Panel contrasted its interpretation of section 6.1.1(ii) of Codex Stan 94 as setting forth "four alternatives for labelling species other than *Sardina pilchardus*" that all "require

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<sup>156</sup>Panel Report, para. 7.103.

<sup>157</sup>Our interpretation is also consistent with the English print version of section 6.1.1(ii) of Codex Stan 94. See *supra*, footnote 5.

<sup>158</sup>Panel Report, para. 7.110, quoting *Webster's New World Dictionary*, *supra*, footnote 146, p. 117.

the use of the term 'sardines' with a qualification"<sup>159</sup>, with the fact that, under the EC Regulation, "species such as *Sardinops sagax* cannot be called 'sardines' even when ... combined with the name of a country, name of a geographic area, name of the species or the common name in accordance with the law and custom of the country in which the product is sold."<sup>160</sup> In the light of this contrast, the Panel concluded that Codex Stan 94 was *not* used "as a basis for" the EC Regulation.

241. On appeal, the European Communities contends that the Panel erred in finding that Codex Stan 94 was not used "as a basis for" the EC Regulation. The European Communities submits that the EC Regulation is "based on" Codex Stan 94 "because it used as a basis paragraph 6.1.1(i) of the Codex standard", and because this paragraph reserves the term "sardines" exclusively for *Sardina pilchardus*.<sup>161</sup> According to the European Communities, the term "'as a basis' should involve a consideration of the texts as a whole, examining the basic structure of the domestic measure and deciding whether the international standard has been used in its preparation and adoption."<sup>162</sup> The European Communities adds that, in order to determine whether a relevant international standard, or a part of it, is used "as a basis for" a technical regulation, the criterion to apply is not, as the Panel suggested, whether the standard is the principal constituent or the fundamental principle of the technical regulation, but, rather, whether there is a "rational relationship" between the standard and the technical regulation on the substantive aspects of the standard in question.<sup>163</sup>

242. The question before us, therefore, is the proper meaning to be attributed to the words "as a basis for" in Article 2.4 of the *TBT Agreement*. In *EC – Hormones*, we addressed a similar issue, namely, the meaning of "based on" as used in Article 3.1 of the *SPS Agreement*, which provides:

#### *Harmonization*

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall *base their sanitary or phytosanitary measures on international standards, guidelines or recommendations*, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3. (emphasis added)

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<sup>159</sup>Panel Report, para. 7.111.

<sup>160</sup>*Ibid.*, para. 7.112.

<sup>161</sup>European Communities' appellant's submission, para. 150.

<sup>162</sup>*Ibid.*, para. 155.

<sup>163</sup>*Ibid.*

In *EC – Hormones*, we stated that "based on" does not mean the same thing as "conform to".<sup>164</sup> In that appeal, we articulated the ordinary meaning of the term "based on", as used in Article 3.1 of the *SPS Agreement* in the following terms:

A thing is commonly said to be "based on" another thing when the former "stands" or is "founded" or "built" upon or "is supported by" the latter.<sup>150</sup>

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<sup>150</sup> L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 187.<sup>165</sup>

The Panel here referred to this conclusion in its analysis of Article 2.4 of the *TBT Agreement*. In our view, the Panel did so correctly, because our approach in *EC – Hormones* is also relevant for the interpretation of Article 2.4 of the *TBT Agreement*.<sup>166</sup>

243. In addition, as we stated earlier, the Panel here used the following definition to establish the ordinary meaning of the term "basis":

The word "basis" means "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".<sup>90</sup>

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<sup>90</sup> [*Webster's New World Dictionary*, (William Collins & World Publishing Co., Inc., 1976)], p. 117.<sup>167</sup>

Informed by our ruling in *EC – Hormones*, and relying on this meaning of the term "basis", the Panel concluded that an international standard is used "as a basis for" a technical regulation when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation.<sup>168</sup>

244. We agree with the Panel's approach. In relying on the ordinary meaning of the term "basis", the Panel rightly followed an approach similar to ours in determining the ordinary meaning of "based on" in *EC – Hormones*.<sup>169</sup> In addition to the definition of "basis" in *Webster's New World Dictionary* that was used by the Panel, we note, as well, the similar definitions for "basis" that are set

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<sup>164</sup> Appellate Body Report, *supra*, footnote 17, para. 166.

<sup>165</sup> *Ibid.*, para. 163 and footnote 150 thereto.

<sup>166</sup> Panel Report, para. 7.110.

<sup>167</sup> *Ibid.* and footnote 90 thereto.

<sup>168</sup> *Ibid.*, para. 7.110.

<sup>169</sup> In the present case, we do not consider it necessary to decide whether the term "as a basis", in the context of Article 2.4 of the *TBT Agreement*, has the same meaning as the term "based on", in the context of Article 3.1 of the *SPS Agreement*.



out in the *The New Shorter Oxford English Dictionary*, and also provide guidance as to the ordinary meaning of the term:

3 [t]he main constituent. ... 5 [a] thing on which anything is constructed and by which its constitution or operation is determined; a determining principle; a set of underlying or agreed principles.<sup>170</sup>

245. From these various definitions, we would highlight the similar terms "principal constituent", "fundamental principle", "main constituent", and "determining principle"—all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is "the basis for" the other.

246. The European Communities, however, seems to suggest the need for something different. The European Communities maintains that a "rational relationship" between an international standard and a technical regulation is sufficient to conclude that the former is used "as a basis for" the latter.<sup>171</sup> According to the European Communities, an examination based on the criterion of the existence of a "rational relationship" focuses on "the qualitative aspect of the substantive relationship that should exist between the relevant international standard and the technical regulation".<sup>172</sup> In response to questioning at the oral hearing, the European Communities added that a "rational relationship" exists when the technical regulation is informed in its overall scope by the international standard.

247. Yet, we see nothing in the text of Article 2.4 to support the European Communities' view, nor has the European Communities pointed to any such support. Moreover, the European Communities does not offer any arguments relating to the context or the object and purpose of that provision that would support its argument that the existence of a "rational relationship" is the appropriate criterion for determining whether something has been used "as a basis for" something else.

248. We see no need here to define in general the nature of the relationship that must exist for an international standard to serve "as a basis for" a technical regulation. Here we need only examine this measure to determine if it fulfils this obligation. In our view, it can certainly be said—at a minimum—that something cannot be considered a "basis" for something else if the two are *contradictory*. Therefore, under Article 2.4, if the technical regulation and the international standard *contradict* each other, it cannot properly be concluded that the international standard has been used "as a basis for" the technical regulation.

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<sup>170</sup>*The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 188.

<sup>171</sup>European Communities' appellant's submission, para. 155.

<sup>172</sup>*Ibid.*

249. Thus, we need only determine here whether there is a *contradiction* between Codex Stan 94 and the EC Regulation. If there is, we are justified in concluding our analysis with that determination, as the only appropriate conclusion from such a determination would be that the Codex Stan 94 has not been used "as a basis for" the EC Regulation.

250. In making this determination, we note at the outset that Article 2.4 of the *TBT Agreement* provides that "Members shall use [relevant international standards], *or the relevant parts of them*, as a basis for their technical regulations". (emphasis added) In our view, the phrase "*relevant parts of them*" defines the appropriate focus of an analysis to determine whether a relevant international standard has been used "as a basis for" a technical regulation. In other words, the examination must be limited to those parts of the relevant international standards that relate to the subject-matter of the challenged prescriptions or requirements. In addition, the examination must be broad enough to address *all* of those relevant parts; the regulating Member is not permitted to select only *some* of the "relevant parts" of an international standard. If a "part" is "relevant", then it must be one of the elements which is "a basis for" the technical regulation.

251. This dispute concerns the WTO-consistency of the requirement set out in Article 2 of the EC Regulation that only products prepared exclusively from the species *Sardina pilchardus* may be marketed in the European Communities as preserved sardines. Consequently, the "relevant parts" of Codex Stan 94 are those elements of Codex Stan 94 that bear upon or relate to the marketing of preserved fish products under the name "sardines". The term "relevant parts of them", as used in Article 2.4, implies two things for the case before us. First, the determination whether Codex Stan 94 has been used "as a basis for" the EC Regulation must stem from an analysis that is limited to those "parts" of Codex Stan 94 relating to the use of the term "sardines" for the identification and marketing of preserved fish products. Those parts include not only sections 6.1.1(i) and 6.1.1(ii), but also section 2.1.1 of Codex Stan 94, which sets out the various species that may be given the names contemplated in sections 6.1.1(i) and 6.1.1(ii). Second, this analysis must address *all* of those relevant provisions of Codex Stan 94, and must not ignore any one of them.

252. In response to our questioning at the oral hearing, the European Communities expressed the view that, in order to determine whether Codex Stan 94 has been used "as a basis for" the EC Regulation, the whole of the standard and the whole of the EC Regulation should be compared. We disagree. We do so because there are several parts of Codex Stan 94 that are not relevant to the use of the term "sardines" for the identification and marketing of preserved fish products. We see no reason why this examination under Article 2.4 of the *TBT Agreement* should extend beyond Article 2 of the EC Regulation, which is the only provision of the EC Regulation whose WTO-consistency has

been challenged by Peru in this dispute. There is simply no purpose served in examining other provisions of the EC Regulation that are irrelevant to this dispute.<sup>173</sup>

253. As we have said, the European Communities contends that Codex Stan 94 was used "as a basis for" the EC Regulation "because it used as a basis paragraph 6.1.1(i) of the Codex standard"<sup>174</sup>, which stipulates that only *Sardina pilchardus* may have the name "sardines", and that our examination as to whether Codex Stan 94 has been used "as a basis for" the EC Regulation must be limited to section 6.1.1(i).<sup>175</sup> This contention stems from the European Communities' proposition that the scope of the EC Regulation and that of Codex Stan 94 are different: the European Communities considers that the EC Regulation lays down prescriptions and technical requirements for *Sardina pilchardus* only, whereas Codex Stan 94 has a broader scope, as it also addresses other species, namely "sardine-type" products. In the view of the European Communities, section 6.1.1(ii) is not a "relevant part" of Codex Stan 94 for our determination of whether that standard has been used "as a basis for" the EC Regulation, because section 6.1.1(ii) concerns species other than *Sardina pilchardus*, a subject-matter the EC Regulation does not address.

254. We are not persuaded by this line of reasoning. Article 2 of the EC Regulation governs the use of the term "sardines" for the identification and marketing of preserved fish products. Section 6.1.1(ii) of Codex Stan 94 also relates to this same subject. Therefore, section 6.1.1(ii) is a "relevant part" of Codex Stan 94 for the purpose of determining whether Codex Stan 94 was used "as a basis for" the EC Regulation. As we stated earlier, the analysis must address *all* of the parts of Codex Stan 94 that relate to the use of the term "sardines" for the identification and the marketing of preserved fish products, and not only to selected parts. Moreover, the European Communities' argument that the EC Regulation does not relate to species other than *Sardina pilchardus* is simply untenable. It is tantamount to saying that a regulation stipulating 16 years as the age at which one may obtain a driver's licence, does not relate to persons that are under 16 years of age. Consequently, contrary to what the European Communities suggests, the "as a basis for" analysis cannot be restricted to section 6.1.1(i) of Codex Stan 94; it must, in addition, also encompass both section 6.1.1(ii), and section 2.1.1 of Codex Stan 94.

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<sup>173</sup>The other provisions of the EC Regulation deal with product presentation (trimming of head, gills, etc.; with or without bones or skin; as fillets or trunks), covering media (such as olive oil or natural juice), arrangement in containers, colour, odour, flavour, ratio between weight of sardines after sterilization and net weight, compliance measures and date of entry into force.

<sup>174</sup>European Communities' appellant's submission, para. 150.

<sup>175</sup>European Communities' response to questioning at the oral hearing.

255. In the light of all this, we ask now whether there is a *contradiction* between the EC Regulation and Codex Stan 94 in the use of the term "sardines" for the identification and marketing of preserved fish products.

256. We accept the European Communities' contention that the EC Regulation contains the prescription set out in section 6.1.1(i) of Codex Stan 94. However, as we have just explained, the analysis must go beyond section 6.1.1(i); it must extend also to sections 6.1.1(ii) and 2.1.1 of Codex Stan 94. And, a comparison between, on the one hand, sections 6.1.1(ii) and 2.1.1 of Codex Stan 94 and, on the other hand, Article 2 of the EC Regulation, leads to the inevitable conclusion that a contradiction exists between these provisions.

257. The effect of Article 2 of the EC Regulation is to prohibit preserved fish products prepared from the 20 species of fish other than *Sardina pilchardus* to which Codex Stan 94 refers—including *Sardinops sagax*—from being identified and marketed under the appellation "sardines", even with one of the four qualifiers set out in the standard. Codex Stan 94, by contrast, permits the use of the term "sardines" with any one of four qualifiers for the identification and marketing of preserved fish products prepared from 20 species of fish other than *Sardina pilchardus*. Thus, the EC Regulation and Codex Stan 94 are manifestly contradictory. To us, the existence of this contradiction confirms that Codex Stan 94 was not used "as a basis for" the EC Regulation.

258. We, therefore, uphold the finding of the Panel, in paragraph 7.112 of the Panel Report, that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*.

## **IX. The Question of the "Ineffectiveness or Inappropriateness" of Codex Stan 94**

259. We turn now to the second part of Article 2.4 of the *TBT Agreement*, which provides that Members need not use international standards as a basis for their technical regulations "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued".

260. In interpreting this part of Article 2.4, the Panel, first, addressed the question of the burden of proof, and made the following finding:

... the burden of proof rests with the European Communities, as the party "assert[ing] the affirmative of a particular claim or defence", to demonstrate that the international standard is an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the EC Regulation.<sup>176</sup> (footnote omitted)

261. Regarding the substance of the phrase "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued", the Panel began by examining the meaning of the terms "ineffective" and "inappropriate". The Panel said:

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

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

<sup>92</sup> *Ibid.*, p. 103.<sup>177</sup> (original emphasis)

262. Second, the Panel addressed the meaning of the phrase "legitimate objectives pursued". The Panel stated that the "'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2", which provides an illustrative, open list of objectives considered "legitimate".<sup>178</sup> Also, the Panel indicated that Article 2.4 of the *TBT Agreement* requires an examination and a determination whether the objectives of the measure at issue are "legitimate".<sup>179</sup>

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<sup>176</sup> Panel Report, para 7.50. See also, Panel Report, paras. 7.52 and 7.114.

<sup>177</sup> *Ibid.*, para. 7.116 and footnotes 91–92 thereto.

<sup>178</sup> *Ibid.*, para. 7.118.

<sup>179</sup> *Ibid.*, para. 7.122.

263. The Panel took note of the three "objectives" of the EC Regulation identified by the European Communities, namely market transparency, consumer protection, and fair competition.<sup>180</sup> The Panel also noted Peru's acknowledgement that those "objectives" are "legitimate", and the Panel saw "no reason to disagree with the parties' assessment in this respect."<sup>181</sup> During questioning at the oral hearing, Peru confirmed that it does see these three objectives pursued by the European Communities as "legitimate" within the meaning of Article 2.4.

264. The Panel then examined whether Codex Stan 94 is "ineffective" or "inappropriate" for the fulfilment of the three objectives pursued by the European Communities through the EC Regulation in the light of the definitions that the Panel articulated for those two terms. The Panel noted that the three objectives were founded on the factual premise that consumers in the European Communities associate "sardines" exclusively with *Sardina pilchardus*. The Panel was of the view that, if this factual premise is valid, it must be concluded that Codex Stan 94 is "ineffective or inappropriate" to meet the "legitimate objectives" of market transparency, consumer protection, and fair competition. In other words, if European Communities consumers associate the term "sardines" exclusively with *Sardina pilchardus*, a product identified as "sardines" would have to be made exclusively of *Sardina pilchardus* so as not to mislead those consumers.<sup>182</sup> However, after reviewing the evidence adduced by the parties, the Panel stated that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus* and that the use of 'X sardines' would therefore not enable the European consumer to distinguish preserved *Sardina pilchardus* from preserved *Sardinops sagax*."<sup>183</sup> The Panel also found that, by establishing a precise labelling requirement "in a manner not to mislead the consumer"<sup>184</sup>, "Codex Stan 94 allows Members to provide [a] precise trade description of preserved sardines which promotes market transparency so as to protect consumers and promote fair competition."<sup>185</sup> On this basis, the Panel concluded that Codex Stan 94 is *not* "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

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<sup>180</sup>Panel Report, para. 7.123.

<sup>181</sup>*Ibid.*, para. 7.122.

<sup>182</sup>*Ibid.*, para. 7.123.

<sup>183</sup>*Ibid.*, para. 7.137.

<sup>184</sup>Codex Stan 94, *supra*, footnote 4, section 6.1.1(ii).

<sup>185</sup>Panel Report, para. 7.133.

265. Although the Panel had assigned the burden of proof under Article 2.4 to the European Communities—so that it was for the European Communities to prove that Codex Stan 94 was "ineffective or inappropriate" to meet the European Communities' "legitimate objectives"—the Panel stated that Peru had, in any event, adduced sufficient evidence and legal arguments to allow the Panel to reach the conclusion that the standard was not "ineffective or inappropriate".<sup>186</sup>

266. The European Communities appeals the Panel's assignment of the burden of proof under Article 2.4 of the *TBT Agreement*. The European Communities disputes the Panel's conclusion that the burden rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" of the EC Regulation. The European Communities maintains that the burden of proof rests rather with Peru, as Peru is the party claiming that the measure at issue is inconsistent with WTO obligations.

267. The European Communities also appeals the finding of the Panel that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. In particular, the European Communities argues that the Panel erred in founding its analysis on the factual premise that consumers in the European Communities associate "sardines" exclusively with *Sardina pilchardus*.<sup>187</sup> Furthermore, the European Communities contends that the Panel erred in concluding that the term "sardines", either by itself or when combined with the name of a country or geographic area, is a common name for *Sardinops sagax* in the European Communities. The European Communities also objects to the decision by the Panel to take this conclusion into account in its assessment of whether consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*.

268. In considering these claims of the European Communities, we will address, first, the question of the burden of proof, and, next, the substantive content of the second part of Article 2.4 of the *TBT Agreement*.

A. *The Burden of Proof*

269. Before the Panel, the European Communities asserted that Codex Stan 94 is "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. The Panel was of the view that the European Communities was thus asserting the affirmative of a particular claim or defence, and, therefore, that the burden of proof rests with the European Communities to demonstrate that

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<sup>186</sup>Panel Report, para. 7.138.

<sup>187</sup>European Communities' appellant's submission, paras. 176–179.

claim.<sup>188</sup> The Panel justified its position as follows: first, it reasoned that the complainant is not in a position to "spell out" the "legitimate objectives" pursued by a Member through a technical regulation; and, second, it reasoned "that the assessment of whether a relevant international standard is 'inappropriate' ... may extend to considerations which are proper to the Member adopting or applying a technical regulation."<sup>189</sup>

270. We recall that, in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, we said the following about the burden of proof:

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

In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.<sup>190</sup> (footnote omitted)

271. In *EC – Hormones*, we stated that characterizing a treaty provision as an "exception" does not, by itself, place the burden of proof on the respondent Member.<sup>191</sup> That case concerned, among other issues, the allocation of the burden of proof under Articles 3.1 and 3.3 of the *SPS Agreement*. Those Articles read as follows:

### *Article 3*

#### *Harmonization*

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

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<sup>188</sup>Panel Report, para. 7.50.

<sup>189</sup>*Ibid.*, para. 7.51.

<sup>190</sup>Appellate Body Report, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, at 335.

<sup>191</sup>Appellate Body Report, *supra*, footnote 17, para. 104.



3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement. (footnote omitted)

272. In *EC – Hormones*, the panel assigned the burden of showing that the measure there was justified under Article 3.3 to the respondent, reasoning that Article 3.3 provides an exception to the general obligation contained in Article 3.1. The panel there was of the view that it was the *defending* party that was asserting the *affirmative* of that particular defence. We reversed the panel's finding.<sup>192</sup> In particular, we stated:

The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an "exception". In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.<sup>193</sup> (original emphasis)

273. The Panel in this case acknowledged our finding in *EC – Hormones*, but concluded that it "does not have a direct bearing" on the question of the allocation of the burden of proof under the second part of Article 2.4 of the *TBT Agreement*.<sup>194</sup> The relevant statement in the Panel Report—found in a footnote—reads as follows:

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<sup>192</sup>Appellate Body Report, *supra*, footnote 17, para. 109.

<sup>193</sup>*Ibid.*, para. 104.

<sup>194</sup>Panel Report, footnote 70 to para. 7.50.

We are cognizant of the Appellate Body's finding in *EC – Hormones* that, in reference to Articles 3.1 and 3.3 of the SPS Agreement, the latter provision, which allows Members to establish their own level of sanitary protection, does not constitute an exception to the general obligation of Article 3.1, and that the burden of the complaining party to establish a *prima facie* case of inconsistency "is not avoided by simply describing that provision as an 'exception'". *However, we consider that the Appellate Body's finding in EC – Hormones does not have a direct bearing on the matter before us.*<sup>195</sup> (emphasis added)

274. We disagree with the Panel's conclusion that our ruling on the issue of the burden of proof has no "direct bearing" on this case. The Panel provides no explanation for this conclusion and, indeed, could not have provided any plausible explanation. For there are strong conceptual similarities between, on the one hand, Article 2.4 of the *TBT Agreement* and, on the other hand, Articles 3.1 and 3.3 of the *SPS Agreement*, and our reasoning in *EC – Hormones* is equally apposite for this case. The heart of Article 3.1 of the *SPS Agreement* is a requirement that Members base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations. Likewise, the heart of Article 2.4 of the *TBT Agreement* is a requirement that Members use international standards as a basis for their technical regulations. Neither of these requirements in these two agreements is absolute. Articles 3.1 and 3.3 of the *SPS Agreement* permit a Member to depart from an international standard if the Member seeks a level of protection higher than would be achieved by the international standard, the level of protection pursued is based on a proper risk assessment, and the international standard is not sufficient to achieve the level of protection pursued. Thus, under the *SPS Agreement*, departing from an international standard is permitted in circumstances where the international standard is ineffective to achieve the objective of the measure at issue. Likewise, under Article 2.4 of the *TBT Agreement*, a Member may depart from a relevant international standard when it would be an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by that Member through the technical regulation.

275. Given the conceptual similarities between, on the one hand, Articles 3.1 and 3.3 of the *SPS Agreement* and, on the other hand, Article 2.4 of the *TBT Agreement*, we see no reason why the Panel should not have relied on the principle we articulated in *EC – Hormones* to determine the allocation of the burden of proof under Article 2.4 of the *TBT Agreement*. In *EC – Hormones*, we found that a "general rule-exception" relationship between Articles 3.1 and 3.3 of the *SPS Agreement* does not exist, with the consequence that the complainant had to establish a case of inconsistency with

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<sup>195</sup>Panel Report, footnote 70 to para. 7.50.

both Articles 3.1 and 3.3.<sup>196</sup> We reached this conclusion as a consequence of our finding there that "Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement".<sup>197</sup> Similarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. Accordingly, as with Articles 3.1 and 3.3 of the *SPS Agreement*, there is no "general rule-exception" relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru—as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities—to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used "as a basis for" the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

276. The *TBT Agreement* acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objectives. That said, part of the reason why the Panel concluded that the burden of proof under Article 2.4 is on the respondent is because, in the Panel's view, the complainant cannot "spell out" the "legitimate objectives" of the technical regulation. In addition, the Panel reasoned that the assessment of the appropriateness of a relevant international standard involves considerations which are properly the province of the Member adopting or applying a technical regulation.<sup>198</sup>

277. In our opinion, these two concerns are not justified. The *TBT Agreement* affords a complainant adequate opportunities to obtain information about the objectives of technical regulations or the specific considerations that may be relevant to the assessment of their appropriateness. A complainant may obtain relevant information about a technical regulation from a respondent under Article 2.5 of the *TBT Agreement*, which establishes a *compulsory* mechanism requiring the supplying of information by the regulating Member. This Article provides in relevant part:<sup>199</sup>

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

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<sup>196</sup>Appellate Body Report, *supra*, footnote 17, para. 104.

<sup>197</sup>*Ibid.*

<sup>198</sup>Panel Report, para. 7.51.

<sup>199</sup>We note that a similar provision to Article 2.5 is found in the *SPS Agreement*. Article 5.8 thereof requires a Member to provide an explanation of the reasons for its sanitary or phytosanitary measure.

278. Peru expresses doubts about the usefulness and efficacy of this obligation in the *TBT Agreement*. Peru argues that a Member may not respond fully or adequately to a request for information under Article 2.5, and that, therefore, it is inappropriate to rely on this obligation to support assigning the burden of proof under Article 2.4 to the complainant.<sup>200</sup> We are not persuaded by this argument. We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the *Vienna Convention*.<sup>201</sup> And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member.

279. Another source of information for the complainant is the "enquiry point" that must be established by the respondent under the *TBT Agreement*. Article 10.1 of the *TBT Agreement*, in relevant part, provides as follows:<sup>202</sup>

10.1 Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:

10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;

280. Indeed, the dispute settlement process itself also provides opportunities for the complainant to obtain the necessary information to build a case. Information can be exchanged during the consultation phase, and additional information may well become available during the panel phase itself. On previous occasions, we have stated that the arguments of a party "are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties"<sup>203</sup>, and that "[t]here is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining

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<sup>200</sup>Peru's response to questioning at the oral hearing.

<sup>201</sup>Appellate Body Report, *US – Shrimp*, *supra*, footnote 50, para. 158; Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281, para.74.

<sup>202</sup>Article 3 of Annex B to the *SPS Agreement* also requires the establishment of an "enquiry point".

<sup>203</sup>Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("EC – Bananas III"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 141. See also, Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 88; and Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea – Dairy"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 139.

party's first written submission to the panel." <sup>204</sup> Thus, it would not be necessary for the complainant to have all the necessary information about the technical regulation before commencing an action under the DSU. A complainant could collect information before and during the early stages of the panel proceedings and, on the basis of that information, develop arguments relating to the objectives or to the appropriateness that may be put forward during subsequent phases of the proceedings.

281. The degree of difficulty in substantiating a claim or a defence may vary according to the facts of the case and the provision at issue. For example, on the one hand, it may be relatively straightforward for a complainant to show that a particular measure has a text that establishes an explicit and formal discrimination between like products and is, therefore, inconsistent with the national treatment obligation in Article III of the GATT 1994. On the other hand, it may be more difficult for a complainant to substantiate a claim of a violation of Article III of the GATT 1994 if the discrimination does not flow from the letter of the legal text of the measure, but rather is a result of the administrative practice of the domestic authorities of the respondent in applying that measure. But, in both of those situations, the complainant must prove its claim. There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.

282. We, therefore, reverse the finding of the Panel, in paragraph 7.52 of the Panel Report, that, under the second part of Article 2.4 of the *TBT Agreement*, the burden rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation. Accordingly, we find that Peru bears the burden of demonstrating that Codex Stan 94 is an effective and appropriate means to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

283. We turn now to consider whether Peru effectively discharged its burden of proof under the second part of Article 2.4 of the *TBT Agreement*.

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<sup>204</sup> Appellate Body Report, *EC – Bananas III*, *supra*, footnote 203, para. 145.

B. *Whether Codex Stan 94 is an Effective and Appropriate Means to Fulfil the "Legitimate Objectives" Pursued by the European Communities Through the EC Regulation*

284. We recall that the second part of Article 2.4 of the *TBT Agreement* reads as follows:

... except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued ...

Before ruling on whether Peru met its burden of proof in this case, we must address, successively, the interpretation and the application of the second part of Article 2.4.

1. The Interpretation of the Second Part of Article 2.4

285. The interpretation of the second part of Article 2.4 raises two questions: first, the meaning of the term "ineffective or inappropriate means"; and, second, the meaning of the term "legitimate objectives". As to the first question, we noted earlier the Panel's view that the term "ineffective or inappropriate means" refers to two questions—the question of the *effectiveness* of the measure and the question of the *appropriateness* of the measure—and that these two questions, although closely related, are different in nature.<sup>205</sup> The Panel pointed out that the term "ineffective" "refers to something which is not 'having the function of accomplishing', 'having a result', or 'brought to bear', whereas [the term] 'inappropriate' refers to something which is not 'specially suitable', 'proper', or 'fitting' ".<sup>206</sup> The Panel also stated that:

Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. ... The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.<sup>207</sup> (original emphasis)

We agree with the Panel's interpretation.

286. As to the second question, we are of the view that the Panel was also correct in concluding that "the 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2", which refers also to "legitimate objectives", and includes a description of what the nature

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<sup>205</sup>See *supra*, para. 261.

<sup>206</sup>Panel Report, para. 7.116.

<sup>207</sup>*Ibid.*

of some such objectives can be.<sup>208</sup> Two implications flow from the Panel's interpretation. First, the term "legitimate objectives" in Article 2.4, as the Panel concluded, must cover the objectives explicitly mentioned in Article 2.2, namely: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment." Second, given the use of the term "*inter alia*" in Article 2.2, the objectives covered by the term "legitimate objectives" in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2. Furthermore, we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure.<sup>209</sup>

## 2. The Application of the Second Part of Article 2.4

287. With respect to the application of the second part of Article 2.4, we begin by recalling that Peru has the burden of establishing that Codex Stan 94 is an effective *and* appropriate means for the fulfilment of the "legitimate objectives" pursued by the European Communities through the EC Regulation. Those "legitimate objectives" are market transparency, consumer protection, and fair competition. To satisfy this burden of proof, Peru must, at least, have established a *prima facie* case of this claim. If Peru has succeeded in doing so, then a presumption will have been raised which the European Communities must have rebutted in order to succeed in its defence. If Peru has established a *prima facie* case, and if the European Communities has failed to rebut Peru's case effectively, then Peru will have discharged its burden of proof under Article 2.4. In such an event, Codex Stan 94 must, consistent with the European Communities' obligation under the *TBT Agreement*, be used "as a basis for" any European Communities regulation on the marketing of preserved sardines, because Codex Stan 94 will have been shown to be both effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities. Further, in such an event, as we have already determined that Codex Stan 94 was not used "as a basis for" the EC Regulation, we would then have to find as a consequence that the European Communities has acted inconsistently with Article 2.4 of the *TBT Agreement*.

288. This being so, our task is to assess whether Peru discharged its burden of showing that Codex Stan 94 is appropriate and effective to fulfil these same three "legitimate objectives". In the light of our reasoning thus far, Codex Stan 94 would be *effective* if it had the capacity to accomplish all three of these objectives, and it would be *appropriate* if it were suitable for the fulfilment of all three of these objectives.

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<sup>208</sup>Panel Report, para. 7.118.

<sup>209</sup>*Ibid.*, para. 7.122.

289. We share the Panel's view that the terms "ineffective" and "inappropriate" have different meanings, and that it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective.<sup>210</sup> This is why Peru has the burden of showing that Codex Stan 94 is both *effective* and *appropriate*. We note, however, that, in this case, a consideration of the *appropriateness* of Codex Stan 94 and a consideration of the *effectiveness* of Codex Stan 94 are interrelated—as a consequence of the nature of the objectives of the EC Regulation. The capacity of a measure to accomplish the stated objectives—its *effectiveness*—and the suitability of a measure for the fulfilment of the stated objectives—its *appropriateness*—are *both* decisively influenced by the perceptions and expectations of consumers in the European Communities relating to preserved sardine products.<sup>211</sup>

290. We note that the Panel concluded that "Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation."<sup>212</sup> We have examined the analysis which led the Panel to this conclusion. We note, in particular, that the Panel made the factual finding that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus*".<sup>213</sup> We also note that the Panel gave consideration to the contentions of Peru that, under Codex Stan 94, fish from the species *Sardinops sagax* bear a denomination that is distinct from that of *Sardina pilchardus*<sup>214</sup>, and that "the very purpose of the labelling regulations set out in Codex Stan 94 for sardines of species other than *Sardina pilchardus* is to ensure market transparency".<sup>215</sup> We agree with the analysis made by the Panel. Accordingly, we see no reason to interfere with the Panel's finding that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 meets the legal requirements of effectiveness and appropriateness set out in Article 2.4 of the *TBT Agreement*.

291. We, therefore, uphold the finding of the Panel, in paragraph 7.138 of the Panel Report, that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. Our finding

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<sup>210</sup>Panel Report, para. 7.116.

<sup>211</sup>We note that the Panel observed "that the European Communities has used the terms 'ineffective' and 'inappropriate' interchangeably throughout its oral and written statements." (*Ibid.*, footnote 93 to para. 7.117)

<sup>212</sup>*Ibid.*, para. 7.138.

<sup>213</sup>*Ibid.*, para. 7.137. In response to questioning at the oral hearing, the European Communities and Peru agreed that this statement of the Panel was a factual finding.

<sup>214</sup>*Ibid.*, para. 4.88.

<sup>215</sup>*Ibid.*, para. 4.86.



on this issue is, however, subject to our examination of whether the Panel acted consistently with Article 11 of the DSU. We turn to that issue now.

## **X. The Objectivity of the Assessment of Certain Facts by the Panel**

292. We next consider whether the Panel properly discharged its duty under Article 11 of the DSU to make an "objective assessment" of certain "facts of the case" before it. We recall that Article 11 reads as follows:

### *Function of Panels*

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including *an objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. (emphasis added)

293. The European Communities contends that, in four specific instances, the Panel failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts of the case. First, the European Communities submits that the Panel's treatment of the dictionary definitions of the term "sardines" amounts to a contravention of Article 11 of the DSU.<sup>216</sup> Second, the European Communities sees a violation of Article 11 of the DSU in the way the Panel handled a letter from the United Kingdom Consumers' Association and in the Panel's rejection of letters from other European consumers' associations submitted by the European Communities at the interim review stage.<sup>217</sup> Third, the European Communities submits that the Panel disregarded evidence in the form of tins, supermarket receipts, and labels relating to various preserved fish and thus violated Article 11 of the DSU.<sup>218</sup> Fourth, the European Communities finds a violation of Article 11 of the DSU in the decision of the Panel not to ask the Codex Commission "about the meaning, status and even validity of ... Codex Stan 94".<sup>219</sup>

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<sup>216</sup>European Communities' appellant's submission, paras. 216–219.

<sup>217</sup>*Ibid.*, paras. 220–223.

<sup>218</sup>*Ibid.*, paras. 224–226.

<sup>219</sup>*Ibid.*, para. 227.

294. All four points were raised by the European Communities in the interim review and addressed by the Panel at that stage of the Panel proceedings. On the use of the dictionary definitions of the term "sardines", the Panel stated:

[W]e are of the view that the use of the dictionaries referred to by both parties is *an* appropriate means to examine whether the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name that refers to species other than *Sardina pilchardus*, especially in light of the fact that the *Multilingual Illustrated Dictionary of Aquatic Animals and Plants* was published in cooperation with the European Commission and member States of the European Communities for the purposes of, *inter alia*, improving market transparency. We note that the electronic publication, *Fish Base*, was also produced with the support of the European Commission. In making our finding, not only did we consider carefully dictionaries referred to by both parties but also considered other evidence such as the regulations of several member States of the European Communities, statements made by the Consumers' Association and the trade description used by Canadian exporters of *Clupea harengus harengus* to the Netherlands and the United Kingdom. In our weighing and balancing of the totality of evidence before us, including the examination of the *Oxford Dictionary* referred to by Peru and Canada as well as the *Grand Dictionnaire Encyclopédique Larousse* and *Diccionario de la lengua espanola* referred to by the European Communities, we were persuaded, on balance, that the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name in the European Communities and that the consumers in the European Communities do not associate the term "sardines" exclusively with *Sardina pilchardus*.<sup>220</sup> (original emphasis; footnotes omitted)

295. On the letter from the United Kingdom Consumers' Association, the Panel replied:

We are ... mindful that we are not "required to accord to factual evidence of the parties the same meaning and weight as do the parties".<sup>40</sup> We did consider the Consumers' Association letter in determining whether the European consumers associate the term "sardines" exclusively with *Sardina pilchardus* but, as stated above, this was not the sole basis on which we made the determination as other evidence was considered in the overall weighing and balancing process. We therefore do not agree with the European Communities' argument that our approach was partial.

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<sup>40</sup> Appellate Body Report, *Australia – Measures Affecting the Importation of Salmon* ("Australia – Salmon"), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, para. 267.<sup>221</sup>

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<sup>220</sup> Panel Report, para. 6.12.

<sup>221</sup> *Ibid.*, para. 6.15 and footnote 40 thereto.

296. With respect to the letters from other European consumers' associations submitted by the European Communities at the interim review stage, the Panel made the following statement:

The European Communities submitted additional evidence, i.e., letters it had received lately from other European consumers' associations on the same issue. In a letter dated 11 April 2002, Peru requested that the new evidence submitted by the European Communities not be considered. In this regard, Peru referred to Article 12 of the Panel's Working Procedures which did not provide for the submission of new evidence at this stage of the Panel proceedings. Article 12 of the Panel's Working Procedures reads as follows: "Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, answers to questions or comments on answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate". We are obliged to point out that Peru submitted the letter from Consumers' Association as a part of its rebuttal submission. In light of this, it is our view that the European Communities should have submitted the evidence at the second substantive meeting or at least not later than at the time it submitted answers to the questions posed by the Panel. Further, the European Communities did not request an extension of time-period to rebut the letter from Consumers' Association. Nor did the European Communities demonstrate the requisite "good cause" which must be shown by the party submitting the new evidence. We do not consider that the interim review stage is the appropriate time to introduce new evidence. Therefore, we decline to consider the new evidence submitted by the European Communities.<sup>222</sup>

297. Regarding the third point—the evidence regarding tins, supermarket receipts, and labels—the Panel stated:

[T]he European Communities claimed that in paragraph 7.132 we "completely ignor[ed] the evidence submitted by the European Communities on the range and diversity of preserved fish products that the European consumers could find in any European supermarket and that responds to their expectations that each fish be called by and marketed under its own name". Again, we did not ignore any evidence and we took note of the fact that there is diverse range of fish products that are available in European supermarkets. However, we were not persuaded that the existence of diverse preserved fish products in the European market suggested that the European consumers associate the term "sardines" exclusively with *Sardina pilchardus*. We therefore reject the European Communities' argument that we "completely ignored" the evidence it submitted.<sup>223</sup>

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<sup>222</sup>Panel Report, para. 6.16.

<sup>223</sup>*Ibid.*, para. 6.18.

298. Finally, the Panel commented on its decision not to seek information from the Codex Commission:

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

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

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

<sup>34</sup> *United States — Import Prohibition of Certain Shrimp and Shrimp Products* ("US — Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, para. 104.<sup>224</sup> (original emphasis and underlining)

299. The first three points raised by the European Communities relate to the task—which we have discussed earlier—of evaluating evidence adduced in connection with the Panel's inquiry into whether consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*. As we have stated in several previous appeals, panels enjoy a discretion as the trier of

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<sup>224</sup> Panel Report, para. 6.8 and footnotes 32–34 thereto.

facts<sup>225</sup>; they enjoy "a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence."<sup>226</sup> We have also said that we will not "interfere lightly" with the Panel's appreciation of the evidence: we will not intervene solely because we might have reached a different factual finding from the one the panel reached; we will intervene only if we are "satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence".<sup>227</sup>

300. In particular, we stated, in *EC – Hormones*, that:

Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.<sup>228</sup>

Furthermore, in *Australia – Measures Affecting Importation of Salmon*, we indicated that:

Panels ... are not required to accord to factual evidence of the parties the same meaning and weight as do the parties.<sup>229</sup>

Moreover, in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, we ruled that:

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<sup>225</sup> Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:1, 3, paras. 161–162; Appellate Body Report, *EC – Hormones*, *supra*, footnote 17, para. 132; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("US – Wheat Gluten"), WT/DS166/AB/R, adopted 19 January 2001, para. 151. See also, Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031, paras. 131–136; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DRS 1998:VIII, 3327, paras. 262–267; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277, paras. 140–142; Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763, paras. 149 and 151; and Appellate Body Report, *Korea – Dairy*, *supra*, footnote 203, paras. 137–138.

<sup>226</sup> Appellate Body Report, *EC – Asbestos*, *supra*, footnote 15, para. 161.

<sup>227</sup> Appellate Body Report, *US – Wheat Gluten*, *supra*, footnote 225, para. 151.

<sup>228</sup> Appellate Body Report, *supra*, footnote 17, para. 132.

<sup>229</sup> Appellate Body Report, *supra*, footnote 225, para. 267.

... under Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof. ... The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.<sup>230</sup>

In the light of the comments made by the Panel at the interim review stage, we have no reason to believe, nor has the European Communities been able to persuade us, that the Panel did not examine and consider all the evidence properly put before it, or that the Panel did not evaluate the relevance and probative value of each piece of evidence. In particular, the Panel manifestly did not ignore the evidence in the form of tins, supermarket receipts, and labels relating to various preserved fish submitted by the European Communities, for it addressed that evidence specifically in paragraph 6.18 of the Panel Report. In addition, the Panel specifically stated that its factual finding that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus*"<sup>231</sup> was the result of an "overall weighing and balancing process"<sup>232</sup> bearing upon a plurality of pieces of evidence. On the other points raised by the European Communities, we reiterate: the Panel enjoyed a margin of discretion, as the trier of facts, to assess the value of each piece of evidence and the weight to be ascribed to them. In our view, the Panel did not exceed the bounds of this discretion by giving some weight to dictionary definitions, and to an extract of a letter from a United Kingdom Consumers' Association.<sup>233</sup>

301. We also reject the European Communities' contention relating to the letters it submitted at the interim review stage. The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during

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<sup>230</sup> Appellate Body Report, *supra*, footnote 203, para. 137.

<sup>231</sup> Panel Report, para. 7.137.

<sup>232</sup> *Ibid.*, para. 6.15.

<sup>233</sup> The extract of the letter from a United Kingdom Consumers' Association cited in the Panel Report is the following:

[A] wide array of sardines were made available to European consumers for many decades prior to the imposition of this restrictive Regulation.

(*Ibid.*, para. 7.132, referring to Exhibit Peru-16, submitted by Peru to the Panel, p. 8)

that stage of the proceedings, to submit comments on the draft report issued by the panel<sup>234</sup>, and to make requests "for the panel to review precise aspects of the interim report".<sup>235</sup> At that time, the panel process is all but completed; it is only—in the words of Article 15—"precise aspects" of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence. Therefore, we are of the view that the Panel acted properly in refusing to take into account the new evidence during the interim review, and did not thereby act inconsistently with Article 11 of the DSU.

302. We also reject the European Communities' claim regarding the fourth instance of supposed impropriety, which relates to the decision of the Panel not to seek information from the Codex Commission. Article 13.2 of the DSU provides that "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter." This provision is clearly phrased in a manner that attributes discretion to panels, and we have interpreted it in this vein. Our statements in *EC – Hormones, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("*Argentina – Textiles and Apparel*")<sup>236</sup>, and *US – Shrimp*, all support the conclusion that, under Article 13.2 of the DSU, panels enjoy discretion as to *whether or not* to seek information from external sources.<sup>237</sup> In this case, the Panel evidently concluded that it did not need to request information from the Codex Commission, and conducted itself accordingly.

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<sup>234</sup>Article 15.1 of the DSU provides:

Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

<sup>235</sup>Article 15.2 of the DSU provides:

Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, *a party may submit a written request for the panel to review precise aspects of the interim report* prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members. (emphasis added)

<sup>236</sup>Appellate Body Report, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003.

<sup>237</sup>In *EC – Hormones*, we stated that Article 13 of the DSU "enable[s] panels to seek information and advice as they deem appropriate in a particular case". (Appellate Body Report, *supra*, footnote 17, para. 147) In *Argentina – Textiles and Apparel*, we stated that, pursuant to Article 13.2 of the DSU, "just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all". (Appellate Body Report, *supra*, footnote 236, para. 84) In *US – Shrimp*, we considered that "a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case". (Appellate Body Report, *supra*, footnote 50, para. 104) (original emphasis)

We believe that, in doing so, the Panel acted within the limits of Article 13.2 of the DSU. A contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the due exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU.

303. In the light of this, we reject the claim of the European Communities that the Panel did not conduct "an objective assessment of the facts of the case", as required by Article 11 of the DSU.

## **XI. The References in the Panel Report to Trade-Restrictiveness**

304. We now turn to the issue whether the Panel made a determination that the EC Regulation is trade-restrictive, and, if so, whether the Panel erred in making such a determination, as contended by the European Communities.

305. The Panel stated:

The European Communities acknowledged that it is the Regulation which in certain member States "created" the consumer expectations which it now considers require the maintenance of that same Regulation. Thus, through regulatory intervention, the European Communities consciously would have "created" consumer expectations which now are claimed to affect the competitive conditions of imports. *If we were to accept that a WTO Member can "create" consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations, we would be endorsing the permissibility of "self-justifying" regulatory trade barriers.* Indeed, the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of the governmentally created consumer expectations. Mindful of this concern, we will proceed to examine whether the evidence and legal arguments before us demonstrate that consumers in most member States of the European Communities have always associated the common name "sardines" exclusively with *Sardina pilchardus* and that the use of "sardines" in conjunction with "Pacific", "Peruvian" or "*Sardinops sagax*" would therefore not enable European consumers to distinguish between products made from *Sardinops sagax* and *Sardina pilchardus*.<sup>238</sup> (emphasis added)

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<sup>238</sup>Panel Report, para. 7.127.



At the interim review in the Panel proceedings, the European Communities asked the Panel to delete the term "trade-restrictive" in the sixth line of paragraph 7.127 of the Panel Report.<sup>239</sup>

306. The Panel dismissed this request in the following terms:

The European Communities argued that the question of whether the measure at issue was trade-restrictive was an issue on which we had exercised judicial economy and therefore should "refrain from gratuitously qualifying the EC measure as 'trade-restrictive'". We used the expression "trade-restrictive" as part of the legal reasoning to state that if Members can create consumer expectations and then justify the trade restrictive measure, we would be endorsing the permissibility of self-justifying regulatory trade barriers. Therefore, we were justified in using the term "trade-restrictive". Moreover, in our examination of the EC Regulation, we were of the view that the EC Regulation was more trade-restrictive than the relevant international standard, i.e., Codex Stan 94. Our characterization of the EC Regulation as such is based on the fact that the EC Regulation prohibited the use of the term "sardines" for species other than *Sardina pilchardus* whereas Codex Stan 94 would permit the use of the term "sardines" in a qualified manner for species other than *Sardina pilchardus*.<sup>35</sup>

<sup>35</sup> In addition, we took note of the context provided by Article 2.5 of the TBT Agreement which states that if a technical regulation is in accordance with relevant international standards, "it shall be rebuttably presumed not to create an unnecessary obstacle to international trade." Because the EC Regulation was not in accordance with Codex Stan 94, we considered that it created an "unnecessary obstacle to trade", which, in our view, can be construed to mean more trade-restrictive than necessary.<sup>240</sup>

307. On appeal, the European Communities contends that—in paragraphs 7.127 and 6.11, as well as in footnote 35, of the Panel Report—the Panel characterized the EC Regulation as trade-restrictive. The European Communities considers "the findings of the Panel (if such they are) in paragraphs [7.127] and 6.11 of the Panel Report to the effect that the Regulation is 'trade restrictive' or 'more trade restrictive than the relevant international standard' should be reversed or considered moot and without legal effect."<sup>241</sup>

308. In our view, the argument of the European Communities is flawed regarding paragraph 7.127. We do not agree that the Panel characterized the EC Regulation as trade-restrictive in paragraph 7.127 of the Panel Report. In that paragraph, the Panel stated:

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<sup>239</sup>Panel Report, para. 6.11.

<sup>240</sup>*Ibid.* and footnote 35 thereto.

<sup>241</sup>European Communities' appellant's submission, para. 234.

*If we were to accept that a WTO Member can "create" consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations, we would be endorsing the permissibility of "self-justifying" regulatory trade barriers. (emphasis added)*

This statement by the Panel is made *in abstracto*; the Panel is not making a definitive finding here about the EC Regulation. Moreover, this statement is relevant only for the purposes of Article 2.4 of the *TBT Agreement*, as it was part of the Panel's examination whether consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*. We are, therefore, of the view that, in paragraph 7.127 of the Panel Report, the Panel did not make a determination that the EC Regulation itself is trade-restrictive *per se* as that term is used in Article 2.2 of the *TBT Agreement*. Accordingly, we reject the claim of the European Communities insofar as it relates to paragraph 7.127 of the Panel Report.

309. The Panel's statements in paragraph 6.11 and in footnote 35 of the Panel Report, however, are of a different nature. The relevant excerpt is as follows:

Moreover, in our examination of the EC Regulation, we were of the view that *the EC Regulation was more trade-restrictive than the relevant international standard, i.e., Codex Stan 94*. Our characterization of the EC Regulation as such is based on the fact that the EC Regulation prohibited the use of the term "sardines" for species other than *Sardina pilchardus* whereas Codex Stan 94 would permit the use of the term "sardines" in a qualified manner for species other than *Sardina pilchardus*.<sup>35</sup>

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

In this paragraph, the Panel stated that the "the EC Regulation was more trade-restrictive than the relevant international standard, i.e., Codex Stan 94." Also, in footnote 35, the Panel stated that the EC Regulation "created an 'unnecessary obstacle to trade', which, in [its] view, can be construed to mean more trade-restrictive than necessary." These two statements do contain determinations of the trade-restrictive nature of the EC Regulation.

310. The only provision of the WTO Treaty on which the Panel made a ruling was Article 2.4 of the *TBT Agreement*. We agree with the European Communities that the question whether the

EC Regulation is trade-restrictive is not relevant for the purposes of making a finding under Article 2.4. The Panel exercised judicial economy with respect to other claims where the trade-restrictive character of the EC Regulation might have been relevant.<sup>242</sup> As a consequence, the Panel should have refrained from making the statements quoted from paragraph 6.11 and footnote 35 of the Panel Report.<sup>243</sup>

311. The question whether the EC Regulation is trade-restrictive in nature could have been relevant to a legal analysis under Article 2.2 of the *TBT Agreement*. For this reason, the Panel's statements in paragraph 6.11 and in footnote 35 of the Panel Report on the trade-restrictive character of the EC Regulation, *to the extent that they could relate to the legal analysis under Article 2.2 of the TBT Agreement*, constitute legal interpretations within the meaning of Article 17.6 of the DSU. Because the Panel had determined *not* to make legal findings under Article 2.2, we declare the two statements in paragraph 6.11 and in footnote 35 of the Panel Report on the trade-restrictive character of the EC Regulation moot and without legal effect.

## **XII. Completing the Legal Analysis**

312. Peru submits that, if we conclude that the EC Regulation is consistent with Article 2.4, it would be appropriate for us to complete the Panel's analysis and resolve the dispute by making findings on those provisions of Article 2 of the *TBT Agreement* on which the Panel did not make any

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<sup>242</sup>The claims where such a finding would have been relevant related to Article 2.2 of the *TBT Agreement*.

<sup>243</sup>This approach is along the lines of that which we followed in *United States – Import Measures on Certain Products from the European Communities*:

Having found that the 3 March Measure is the measure at issue in this dispute, and that the 19 April action is outside its terms of reference, the Panel should have limited its reasoning to issues that were relevant and pertinent to the 3 March Measure. By making statements on an issue that is only relevant to the 19 April action, the Panel failed to follow the logic of, and thus acted inconsistently with, its own finding on the measure at issue in this dispute. The Panel, therefore, erroneously made statements that relate to a measure which it had *itself* previously determined to be outside its terms of reference.

For these reasons, we conclude that the Panel erred by making the statements in paragraphs 6.121 to 6.126 of the Panel Report on the mandate of arbitrators appointed under Article 22.6 of the DSU. Therefore, these statements by the Panel have no legal effect. (original emphasis; underlining added)

(Appellate Body Report, WT/DS165/AB/R, adopted 10 January 2001, paras. 89–90)

In that case, the irrelevance of the statements of the panel resulted from the limits of the terms of reference, rather than from judicial economy. Nevertheless, our views to the effect that a panel should limit its reasoning to relevant and pertinent issues, and that irrelevant statements may have no legal effect, are also pertinent to the case before us.

findings, namely Articles 2.2 and 2.1 of the *TBT Agreement*.<sup>244</sup> Although Peru made a claim before the Panel under Article III:4 of the GATT 1994, Peru does not ask us to complete the analysis by addressing that provision. The European Communities objects to the completion of the analysis, expressing the view that there are not sufficient undisputed facts in the record to do so.<sup>245</sup>

313. Because we have found that the EC Regulation is *not* consistent with Article 2.4 of the *TBT Agreement*, the conditions to Peru's request have not been met, and, therefore, we do not think it is necessary for us to make a finding under Articles 2.2 and 2.1 of the *TBT Agreement* in order to resolve this dispute. Equally, we do not think it is necessary to make a finding under Article III:4 of the GATT 1994 in order to resolve this dispute. Therefore, we decline to make findings on Articles 2.2 and 2.1 of the *TBT Agreement*, or on Article III:4 of the GATT 1994.

314. We indicated earlier in this Report that we would return to the question whether Morocco's *amicus curiae* brief assists us in this appeal when considering the issue of completing the legal analysis under Article 2.1 of the *TBT Agreement* and the GATT 1994.<sup>246</sup> In the light of our decision not to complete the analysis by making findings on these provisions, we find that the legal arguments submitted by Morocco in its *amicus curiae* brief on Article 2.1 of the *TBT Agreement* and on the GATT 1994 do not assist us in this appeal.

### **XIII. Findings and Conclusions**

315. For the reasons set out in this Report, the Appellate Body:

- (a) finds that the condition attached to the withdrawal of the Notice of Appeal of 25 June 2002 is permissible, and that the appeal of the European Communities, commenced by the Notice of Appeal of 28 June 2002, is admissible;
- (b) finds that the *amicus curiae* briefs submitted in this appeal are admissible but their contents do not assist us in deciding this appeal;
- (c) upholds the Panel's finding, in paragraph 7.35 of the Panel Report, that the EC Regulation is a "technical regulation" under the *TBT Agreement*;

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<sup>244</sup>Peru's appellee's submission, para. 181.

<sup>245</sup>European Communities' response to questioning at the oral hearing.

<sup>246</sup>*Supra*, paras. 169–170.

- (d) upholds the Panel's findings, in paragraph 7.60 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to measures that were adopted before 1 January 1995 but which have not "ceased to exist", and, in paragraph 7.83 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to existing technical regulations, including the EC Regulation;
- (e) upholds the Panel's finding, in paragraph 7.70 of the Panel Report, that Codex Stan 94 is a "relevant international standard" under Article 2.4 of the *TBT Agreement*;
- (f) upholds the Panel's finding, in paragraph 7.112 of the Panel Report, that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*;
- (g) reverses the Panel's finding, in paragraph 7.52 of the Panel Report, that, under the second part of Article 2.4 of the *TBT Agreement*, the burden of proof rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by the European Communities through the EC Regulation, and finds, instead, that the burden of proof rests with Peru to demonstrate that Codex Stan 94 is an effective and appropriate means to fulfil those "legitimate objectives", and, upholds the Panel's finding, in paragraph 7.138 of the Panel Report, that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation;
- (h) rejects the claim of the European Communities that the Panel did not conduct "an objective assessment of the facts of the case", as required by Article 11 of the DSU;
- (i) rejects the claim of the European Communities that the Panel made a determination, in paragraph 7.127 of the Panel Report, that the EC Regulation is trade-restrictive, and, declares moot and without legal effect the two statements, in paragraph 6.11 and in footnote 35 of the Panel Report, on the trade-restrictive character of the EC Regulation; and
- (j) finds it unnecessary to complete the analysis under Article 2.2 of the *TBT Agreement*, Article 2.1 of the *TBT Agreement*, or Article III:4 of the GATT 1994.

Therefore, the Appellate Body *upholds* the Panel's finding, in paragraph 8.1 of the Panel Report, that the EC Regulation is inconsistent with Article 2.4 of the *TBT Agreement*.

316. The Appellate Body *recommends* that the DSB request the European Communities to bring the EC Regulation, as found in this Report and in the Panel Report, as modified by this Report, to be inconsistent with Article 2.4 of the *TBT Agreement*, into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 12th day of September 2002 by:

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James Bacchus  
Presiding Member

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Georges Abi-Saab  
Member

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Luiz Olavo Baptista  
Member