European Communities—Trade Description of Sardines
(WT/DS231)

RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL FROM THE THIRD PARTY SESSION

December 7, 2001

Factual Questions

1. (All third parties) What is (are) the name(s) of the species of the fish identified by Codex Stan 94 which you export to the European Communities and what is the labelling requirement for that (those) particular fish?

Response:

1. There are a number of sardine species that are harvested in the United States, but that are not exported to the European Communities because of the restrictive EC labeling requirements. They are, however, sold to many parts of the rest of the world. These species include *Clupea Harengus*; *Sardinops caeruleus*; *Sardinops Sagax*; *Harengula jaguana*; *Sardinella* and *Sardinella longiceps*. The United States has no regulations requiring the use of specific names for these fish species. There is, however, a general requirement that labels not be false or misleading. All of these fish either can be, or actually are, marketed in the United States under the name "sardines", among other names.

2. (For Canada only) You state that Clupea harengus harengus had, in 1990, been marketed as "sardines" for over forty years in the U.K.

(a) Was it called "sardine" without any qualification up to 1990?

(b) Has the Council Regulation 2136/89 ("EC regulation") at issue affected your exports of Clupea harengus harengus to the European Communities?

Reponse:

2. Not applicable

Questions Concerning Codex Stan 94

3. *(All third parties) A Decision was taken by the TBT Committee on principles for the development of international standards in respect of Articles 2, 5 and Annex 3 of the TBT Agreement. For your benefit, this document is G/TBT/9. The Decision sets out the principles and procedures that are to be observed when international standards are considered.*

(a) Do you consider the Codex Alimentarius Commission to be an international standardizing body for the purposes of the TBT Agreement?

(b) Do you consider Codex Stan 94 to be an international standard?

(c) Does the Codex Alimentarius Commission comply with these principles set out in the Decision, especially with the principle of consensus?

(d) What is (are) the official language(s) of the Codex Alimentarius Commission that adopted Codex Stan 94?

Response:

3. (a) and (b): The United States expects that standards adopted by the Codex Alimentarius Commission would be international standards for purposes of the TBT Agreement. First, Codex is an "international body" as defined in paragraph 4 of Annex 1 to the TBT Agreement, because it is a body "whose membership is open to the relevant bodies of at least all Members." Second, Codex engages in standardization, defined in the ISO/IEC Guide 2: 1991 as "[a]ctivity of establishing, with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context."[1]

4. We would note, however, that unlike the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement") the TBT Agreement does not define the term "international standard" in terms of the specific bodies establishing them, such as the Codex Alimentarius Commission. From the perspective of the United States, an assessment of a standard to determine if it is an "international standard" must be made on a case-by-case basis. Here, the United States believes that the Codex Stan 94 is an international standard for purposes of the TBT Agreement, and has seen no evidence in this dispute to the contrary.

5. (c) As an initial matter, the United States would note that the Decision of the TBT Committee is not a covered agreement for purposes of the DSU nor is it an authoritative interpretation of a WTO agreement. It does, however, articulate the principles and procedures which, in the view of the TBT Committee and the United States, should be followed in developing international standards. It is the understanding of the United States that the Codex Alimentarius Commission complies with the principles set forth in Annex 4 to G/TBT/9, including the principle of consensus. Indeed, it is the responsibility of each Member to ensure that it does so, through participation in its activities.

6. (d) The official languages of the Codex Alimentarius Commission that adopted Codex Stan 94 are English, French, and Spanish.

4. (All third parties) Paragraph 6.1.1(ii) of Codex Stan 94 states that the name of the species other than Sardina pilchardus Walbaum ("Sardina pilchardus") are to be:

> *"X Sardines" of a country, a geographical area, the species, or the common name of the species in accordance with the law and customs of*

[1] Italics omitted. Under Annex 1 to the TBT Agreement, the definitions of the terms in the ISO/IEC Guide apply to the TBT Agreement, except that the specific definitions in the TBT Agreement would govern instead (for example, the definition of "standard").

> *the country in which the product is sold and in a manner not to mislead the consumer."*

Do you construe 6.1.1(ii) of Codex Stan 94 to mean that countries can choose between "X Sardines" and the common name of the species or should that paragraph be construed to mean that the term "sardines" must always be used with the name of a country, a geographical area, the species or the common name?

Response:

7. In the view of the United States, the standard does not anticipate a country choosing between "X Sardines" and the common name of the species. Rather, under the standard, a country permits the named sardine species to be sold as "X Sardines", where X is a country, a geographic area, a species, or the common name of the species. In other words, under the standard, the product could be labeled, for example, "Peruvian sardines", "Pacific sardines", or "Atlantic herring sardines". The standard does not envision the "common name" as an alternative to "X sardines", only as an option for "X" in the name "X Sardines." This interpretation is clear in the English version of Codex, but is even more clear in the French version, which states that species other than *Sardina Pichardus* shall be called "'X Sardines', 'X' designating a country, a geographic area, a species, or the common name."[2]

5. (All third parties) Codex Stan 94 was adopted before the EC regulation came into effect although it was revised after the EC regulation was adopted. Can Codex Stan 94 be considered a relevant international standard?

Response:

8. Relevancy does not refer to the timing of the international standard, but only to its subject matter — *i.e.*, whether an international standard is apposite, pertinent or germane to the issue for which the technical regulation is required. The reference to "their completion is imminent" in Article 2.4 in relation to "relevant international standards" makes clear that the question of relevance is separate from the question of the date on which the international standard came into existence.

6. (All third parties) What do you see as the legal status of Codex standards under the TBT Agreement? Are Members required to bring their technical regulations into conformity with international standards where they exist? Please explain.

Response:

9. First, the evaluation of the status of a Codex standard for purposes of Article 2.4 of the TBT Agreement must be done on a case-by-case basis.

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[2] "Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce . . ."

10. Second, while the question assumes that the Member in question has a technical regulation on the subject matter of the international standard, we note that Members are not required under the TBT Agreement to maintain a technical regulation simply because there is an international standard.

11. Third, the TBT Agreement does not require that Members bring their technical regulations into "conformity" with international standards — those standards must be used "as a basis for" technical regulations, but only where those standards are relevant, not ineffective and not inappropriate.

Question Concerning Burden of Proof

> *7. (All third parties) In your view, what are the burden of proof requirements for the parties in respect of Article 2.4 and Article 2.2 of the TBT Agreement?*

Response:

12. As a general matter, as the Appellate Body has recognized in *Wool Shirts*,[3] *Beef Hormones*[4], and other reports, the complaining party has the burden of presenting evidence and arguments sufficient to make a *prima facie* demonstration of each claim that the measure at issue is inconsistent with a provision of a covered agreement.[5] This burden is not shifted to the responding party simply because the obligation identified is characterized as an "exception".[6] However, the responding party would have the burden with respect to an "affirmative defense" that a breach of an obligation is justified by a separate provision that would excuse the breach.[7]

13. With respect to Articles 2.2 and 2.4 of the TBT Agreement, the complaining party has the burden of presenting evidence and arguments with respect to the obligations in the relevant articles, that is:

> With respect to Article 2.4 of the TBT Agreement, (1) that an international standard exists (or its completion is imminent); (2) that the international standard is relevant; (3)

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[3] *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted May 23, 1997, p. 14.

[4] *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R and WT/DS48/AB/R, adopted February 13, 1998.

[5] *E.g.*, *Beef Hormones*, paras. 104 - 109.

[6] *Beef Hormones*, para. 104.

[7] *Beef Hormones*, para. 109.

that the international standard is not an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued by the responding party; and (4) that the responding party has not used the standard, or the relevant parts of it, as a basis for the party's technical regulation.

With respect to the second sentence of Article 2.2 of the TBT Agreement, that the technical regulation is more trade restrictive than necessary to fulfill the responding party's legitimate objectives, taking account of the risks non-fulfilment would create.

There is no "affirmative defense" involved in either of these provisions.

General Questions Concerning the TBT Agreement

8. (All third parties) What are the objectives of the TBT Agreement and are there differences between the objectives of the SPS Agreement and TBT Agreement? To what extent is there a parallel between the provisions of the two agreements that would be relevant for the purposes of interpreting the provisions of the TBT Agreement?

Response:

14. Neither question can be answered in the abstract, except to note with respect to the first question that the preambles of the agreements are useful in helping to understand the objectives, and to note with respect to the second question that each agreement is part of the context of the other agreement. Also with respect to the second question, to the extent there are textual similarities between two specific provisions in the two agreements, whether the text in one agreement is relevant to the interpretation of the text of the other agreement must be decided on a case-by-base basis, using the principles of treaty interpretation articulated in the Vienna Convention.

9. (All third parties) Article 1 of Annex 1 of the TBT Agreement defines the term "technical regulation". Can a labelling requirement per se be a technical regulation pursuant to the definition provided?

Response:

15. Yes. The definition of technical regulation makes clear that labeling requirements that are "mandatory" and "apply to a product, process or production method" constitute "technical regulations."[8]

[8] Those labeling requirements that are SPS measures would fall under the SPS Agreement, rather than the TBT Agreement, by virtue of Article 1.5 of the TBT Agreement.

Questions Concerning Article 2.4

10. (All third parties) What elements need to be established to demonstrate that a Member is in violation of its obligations under Article 2.4 of the TBT Agreement?

Response:

16. See response to question 7 above.

11. (All third parties) In your view, what does the term "shall use as a basis" mean?

Response:

17. The United States assumes that the Panel refers to Article 2.4's requirement that Members "shall use [relevant international standards] as a basis for" their technical regulations, subject to exceptions. As Canada notes in its submission (para. 22), the phrase "as a basis for" should be construed consistently with "based on," a phrase that the Appellate Body has had occasion to interpret. According to the Appellate Body, "[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."[9]

18. This does not mean that the technical regulation must "conform" to the terms of the relevant international standard. But it does mean that a Member's technical regulation must be founded upon or supported by the standard, insofar as the standard is, to quote the TBT Agreement, "relevant," not "ineffective" and not "inappropriate."

19. Further, with respect to this dispute, it is apparent that the EC regulation is not based on the international standard; the standard specifically provides for the label "X sardines", and the EC regulation specifically prohibits that label, with no plausible justification for contradicting the standard. Disputes may arise in the future that may require a precise interpretation of the phrase "use . . . as a basis for". This is not one of those disputes.

12. (All third parties) Is there an ongoing obligation under Article 2.4 of the TBT Agreement for WTO Members to reassess their technical regulations so as to use relevant international standards that are developed after the adoption of the technical regulation?

Response:

20. With regard to this dispute, we would note that (1) the international standard at issue, although revised in 1995, predates the EC technical regulation, and (2) the EC was under the same obligation with regard to international standards under the 1979 Agreement on Technical Barriers to Trade, Article 2.2.

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[9] *Beef Hormones*, para. 163.

Questions Concerning Article 2.2

13. (All third parties) With respect to Article 2.2 of the TBT Agreement, what are the elements that must be established for there to be a violation? In particular, please specify:

(a) What is the test for determining or what elements need to be considered to determine whether a technical regulation is "more trade-restrictive than necessary"?

(b) The European Communities claim that as one of the requirements to prove a violation of Article 2.2, the complaining party would have to demonstrate a "trade restrictive effect". Is this a separate requirement that must be proved to establish a violation under Article 2.2? Or can the second sentence of Article 2.2 be construed to presume that technical regulations have trade restrictive effects and that the question is therefore one of whether it is more trade-restrictive than necessary?

(c) Is "taking into account of the risks non-fulfilment would create" a separate and independent element that has to be established to find a violation of Article 2.2 of the TBT Agreement? If so, what elements are to be considered in such risk assessment?

Response:

21. (a) In this dispute, the United States believes that the Panel need not reach issues relating to Article 2.2 because the EC measure is inconsistent with Article 2.4. Under the circumstances, the Panel should, as requested by Peru, decline to make further findings on grounds of judicial economy.

22. Having said that, in order for a Member to show that a government's technical regulation is more trade-restrictive than necessary to fulfill a legitimate objective, it would need to show that there is another measure that is reasonably available, fulfills the regulating Member's legitimate objectives, and is significantly less restrictive to trade.

23. Accordingly, there should be a specific alternative measure that is reasonably available -- as a Member is not required to do what is unreasonable. Furthermore, the alternative measure must make a *significant* difference from a trade perspective. There should be no need to adopt an alternative measure if it makes only an insignificant difference in terms of trade, particularly since changes in technical regulations can themselves cause some disruption to trade. Finally, the alternative measure must fulfill the Member's legitimate objectives.

24. Here, there are clear alternatives which meet these requirements. In addition to simply removing the technical regulation, allowing other species to be marketed as "X sardines" would fulfill the EC's objectives of consumer protection, transparency and fair competition. There is ample evidence indicating that the EC measure, if anything, undermines the EC's objectives,

since European consumers have in fact come to know the Peruvian product as a form of sardine, and will likely be confused by the use of other names. Indeed, the use of a proper descriptor prior to the term "sardine," appears to be a very effective means of assuring transparency and protecting the consumer. In addition, the alternative is reasonably available, since there are no impediments to such a change, nor would there be any disruption to markets already accustomed to seeing the products at issue referred to as "sardines." Finally, the alternative would be significantly less trade restrictive, inasmuch as there is now a complete ban on the marketing of several species as "sardines," with or without qualifier.

25. (b) There is no requirement under Article 2.2 to demonstrate a trade restrictive effect as such; the only requirement is to show that a measure is more trade restrictive than necessary. By definition, to show that the measure is "more trade restrictive" than necessary would demonstrate that there is some trade restrictive element to the measure. Further, with respect to this dispute, there is no doubt that a measure prohibiting the use of the term "sardine" in connection with sardine products is trade restrictive.

26. (c) A complaining party has the burden of showing that a measure is more trade restrictive than necessary to achieve a legitimate objective, taking account of the risks non-fulfillment of the objective would create. The language is "taking into account;" it is not a separate or independent element that has to be established, but rather an element that is factored into the consideration of the obligation. Moreover, the Panel's reference to "risk assessment" in connection with the TBT Agreement creates confusion. "Risk assessment" is a term of art used in the SPS Agreement, and the obligation to base measures on such a risk assessment is a formal obligation that is specific to the SPS Agreement.

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RESPONSE OF THE UNITED STATES
TO QUESTIONS FROM THE EUROPEAN COMMUNITIES
FROM THE THIRD PARTY SESSION

December 7, 2001

1. The United States notes that the EC's questions are not relevant to the issue before the Panel – whether the EC's sardine regulation is inconsistent with the WTO provisions set forth in Peru's panel request. Having said that, the United States responds that it has no technical regulations concerning sardines and sardine-type products. With respect to the types of sardines landed in the United States, please see response to Panel question 1. As noted in response to the Panel's question, these products cannot be sold in Europe as sardine products because of the restrictive European technical regulation at issue in this proceeding.