

a. *The Order is a technical regulation subject to the TBT Agreement*

34. The EC has disputed the application of the TBT Agreement to the Order on the following grounds: first, that product characteristics determined by nature are not product characteristics within the definition of a technical regulation; second, that Canada's complaint relates to the scientific classification of scallops; and third, that "mere definition of terminology (rather than the obligation to use it) is not subject to the disciplines of the TBT Agreement." None of the three grounds are sustainable.

35. First, the EC's argument that product characteristics determined by nature are not product characteristics within the definition of a technical regulation and that regulations governing such product characteristics are not technical regulations is not supported by the definition of "technical regulations" set out in Annex I of the TBT Agreement.<sup>14</sup> No distinction is made in the text in the definition between product characteristics that are an inherent "natural" part of a product and other product characteristics. To read in such a distinction would be contrary to the plain language of the definition. Moreover, there is nothing in the negotiating history of the TBT Agreement to suggest that the Members intended to limit the scope of "product characteristics" in the definition of a technical regulation.<sup>15</sup> The EC's interpretation would so severely restrict the scope of the TBT Agreement as to render it inapplicable to a wide variety of regulatory measures that WTO Members intend to be covered.

36. Second, the EC's suggestion that Canada's complaint relates to the classification of scallops into different *genera* is incorrect.<sup>16</sup> Canada does not dispute that different species of scallops are classified in different *genera*, although it is important to remember, as Canada noted in its first oral submission, that the scientific classification of scallops is still a dynamic and evolving area.<sup>17</sup> Rather, this dispute is about France's arbitrary and discriminatory commercial re-classification of scallops by assignment to some scallops a trade name viewed with favour in the French market, while requiring other scallops to use a prejudicial and unfavourable trade name.

37. Third, the EC's assertion that "mere definition of terminology (rather than the obligation

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<sup>14</sup> See paragraph 51 of the EC's first written submission.

<sup>15</sup> *Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics*, WT/CTE/W/10 and G/TBT/W/11, dated August 29, 1995.

<sup>16</sup> See paragraph 52 of the EC's first written submission.

<sup>17</sup> See statement by Dr. T. Waller, *supra*, paragraph 9.