

55. In Canada's view, a like product comparison cannot and should not be made in isolation. Rather, any comparison must be made against the backdrop of the purpose of the regulation in question. In this case, the Order addresses the naming of products for labelling and marketing to purchasers. Accordingly, the relevance of any criteria must be determined in the context of this purpose.

56. Therefore, the relevant "like product" criteria in this case are those that relate to the French scallops market such as end-use, physical characteristics and consumer preferences; indeed, the very nature of the Order *requires* that criteria such as physical characteristics and product end-use be fundamental elements of a like product analysis. This is in accordance with GATT practice, which has established the criteria that may be used in determining whether two products are like.<sup>30</sup> These criteria take the nature of the regulation fully into account.

57. The EC essentially argues that an arbitrary distinction made between products that are virtually indistinguishable, in a manner that is intended to protect domestic industry, can justify a finding that those products are not like. The EC argument turns the like products requirement on its head: each WTO Member would have the right to use the regulation of trade descriptions as a means of discriminating against imported products. Articles I and III do not prevent WTO Members from regulating commercial designations for products. Rather, WTO Members are precluded from using such regulation to discriminate against imported products; that is, to deny imports the opportunity to compete with like domestic and imported products on an equal basis.

*b. The Order accords less favourable treatment to Canadian scallops than that accorded to the like domestic product contrary to Article III:4*

*i. Article III:4 applies to the Order*

58. The EC argues that Article III:4 does not apply to labelling regulations governing trade names.<sup>31</sup> This view is contrary to the language in Article III:4 and to past GATT 1947 panel decisions.<sup>32</sup> Past GATT 1947 panels have interpreted Article III:4 broadly, and to adopt the EC

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<sup>30</sup> These criteria include the products' physical characteristics, end-use, tariff classification and treatment, and consumer tastes and preferences.

<sup>31</sup> See paragraph 86 of the EC's first written submission.

<sup>32</sup> This view also appears contrary to the generally accepted view WTO Members that "while GATT did not explicitly refer to questions of packaging and labelling, 'national treatment' accorded to imported goods under Article III of GATT, in particular under Article III:4, would apply to laws and regulations adopted by countries in the area of labelling." See WT/CTE/W/10