

- ii. *The Order is more trade-restrictive than necessary and creates an unnecessary obstacle to trade under Article 2.2*

43. Even if one were to accept that some of the stated objectives of the Order are legitimate, the Order is more trade-restrictive than necessary to meet such objectives and creates an unnecessary obstacle to trade, contrary to Article 2.2. Many alternatives to the Order would be much less trade-restrictive and would not create such an obstacle.

44. The EC argues that it is legitimate and justified under the TBT to ensure that all shellfish do not appropriate the name of a well-known shellfish, just as it is legitimate to ensure that all fish eggs are not referred to as caviar.²⁵ Canada is not disputing that in some circumstances commercial distinctions made on the basis of species or *genera* may be legitimate. Canada objects to the imposition of arbitrary distinctions that have the effect of creating unnecessary obstacles to trade.

45. The EC's caviar example helps to illustrate Canada's position in this dispute. In the EC, it has been determined that Member States may restrict the use of the term "caviar" to sturgeon roe, and prohibit its use for other fish roe.²⁶ In its example the EC failed to mention that the sturgeon family comprises four different *genera* -- (beluga (*Huso*), sturgeons (*Acipenser*), shovel-nosed sturgeons (*Scaphirhynchus*) and false shovel-nosed sturgeons (*Pseudoscaphirhynchus*) -- and twenty-five different species located around the world. Regardless of country of origin or species or *genera*, sturgeon roe can be labelled as caviar.

46. In this case, France purports to require Canadian scallops to give up their "caviar" name and to adopt a name equivalent to the term "fish roe". Presumably, it would be unacceptable for France to require that certain *genera* or species of sturgeon roe could no longer be labelled as caviar, and it is equally unacceptable for France to require that *Placopecten magellanicus* can no longer be labelled "coquilles Saint-Jacques" or "noix de Saint Jacques".

47. As Canada stated in its first written and oral submissions, even if one accepts that the stated objectives of the Order are legitimate, the Order is more trade-restrictive than necessary to meet such objectives. There are many other alternatives that could be used that would be much less trade-restrictive than the Order. In fact, the approach in the labelling of caviar gives some guidance as to more acceptable methods of distinguishing between different species of the same product. For example, often the term "caviar" is supplemented by reference to an

²⁵ See paragraph 66 of the EC's first written submission.

²⁶ *Commission interpretative communication on the names under which foodstuffs are sold*, Official Journal of the European Communities, no. 91/C 270/02, 15.10.91.