

CA1
EA495
95E71
ENG
DOCS

CA1 EA495 95E71 ENG DOCS
European Communities - trade
description of scallops 43275151

.b2729830(E)

EUROPEAN COMMUNITIES - TRADE DESCRIPTION OF SCALLOPS

Public Version of the First Submission of Canada

43-275-151

NON - CIRCULATING I.
CONSULTER SUR PLACE

RETOURNER A LA BIBLIOTHEQUE DU MINISTRE
RETURN TO DEPARTMENTAL LIBRARY
FEB 5 1996
Dept. of External Affairs
Min. des Affaires extérieures

**PUBLIC VERSION OF THE FIRST SUBMISSION OF CANADA
TO THE WTO DISPUTE SETTLEMENT PANEL ON
EUROPEAN COMMUNITIES - TRADE DESCRIPTION OF SCALLOPS**

TABLE OF CONTENTS

SUMMARY OF THE CANADIAN SUBMISSION

I. BACKGROUND

II. FACTUAL ASPECTS

- A. Trade Items Affected
- B. The French Order and Subsequent Amendments
- C. Market Conditions
 - 1. The French scallop market
 - 2. Market differentiation between "coquilles Saint-Jacques" and "pétoncles"

III. ARGUMENT

- A. The TBT Agreement
 - 1. The Order is a technical regulation
 - 2. The Order is inconsistent with Article 2.2
 - a. Objectives of the Order
 - b. The Order is more trade-restrictive than necessary to meet the stated objectives
 - i. There is no rational connection between the Order and the stated objectives

ii. The Order is more trade restrictive than necessary

c. The Order creates an unnecessary obstacle to trade

3. The Order is inconsistent with Article 2.1

B. The GATT

1. The Order is inconsistent with GATT Article III:4

2. The Order is inconsistent with GATT Article I:1

C. The Order Nullifies or Impairs Benefits Accruing to Canada under, and Impedes the Attainment of the Objectives of, the WTO Agreement, the GATT and the TBT Agreement

IV. EFFECTS OF THE ORDER ON CANADA

V. CONCLUSIONS AND SUGGESTED RECOMMENDATIONS

SUMMARY OF THE CANADIAN SUBMISSION

French Order NOR MERP9300051A (the "Order") entered into force on March 28, 1993. The Order requires certain shucked and frozen scallops to be labelled and marketed as "pétoncles", and provides that other shucked and frozen scallops may be labelled and marketed as "coquilles Saint-Jacques".

In France, "pétoncles" is a term associated with inferior quality scallops. "Coquilles Saint-Jacques" is a term associated with premium quality scallops that are preferred by consumers and command a higher price than "pétoncles".

Under the Order, Canadian exports of shucked and frozen scallops to France are required to be labelled "pétoncles".¹ The Order was modified in December 1993 and again in October 1994, but the amendments ultimately did not result in a change to the labelling requirement. Domestic French scallops, which are like products to Canadian scallops, may be labelled "coquilles Saint-Jacques". Similarly, shucked and frozen scallops imported from other countries that are like products to the Canadian scallops may be labelled "coquilles Saint-Jacques". The discriminatory labelling requirement places Canadian scallops at a competitive disadvantage in respect of like scallops harvested domestically in France and imported into France from other countries.

The Order is inconsistent with the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). More specifically, it is inconsistent with Article 2 of the WTO Agreement on Technical Barriers to Trade (the "TBT Agreement"), is inconsistent with Articles III and I of the General Agreement on Tariffs and Trade 1994 (the "GATT"), and nullifies or impairs benefits accruing to Canada under, and impairs the attainment of the objectives of, the WTO Agreement, the GATT and the TBT Agreement.

Article 2.2 of the TBT Agreement requires Members to ensure that technical regulations do not have the purpose or effect of creating unnecessary obstacles to trade. Such an obstacle is created if a technical regulation does not have a legitimate objective, or if it is more trade-restrictive than necessary to fulfil a legitimate objective. France has advanced six separate objectives of the Order. However, even if those stated objectives are found to be legitimate, the imposition of the Order would not result in those objectives being met. Thus, the Order is more trade-restrictive than necessary, contrary to Article 2.2.

¹ The Order was amended by Order NOR ECOC9300090A (dated December 29, 1993) and Order NOR ECOC9400066A (dated October 3, 1994).

Article 2.1 of the TBT Agreement requires Members to ensure that imported products are accorded treatment no less favourable than that accorded to like domestic products and like products imported from other countries. The Order requires Canadian scallops to be labelled with a term that is perceived to apply to an inferior quality product, and permits the like domestic product and like products imported from other countries to be labelled with a term denoting a superior quality product. This places Canadian scallops at a competitive disadvantage in the French market in respect of the like domestic French product and like products imported from other countries, contrary to Article 2.1.

The Order is a discriminatory regulation inconsistent with Article III:4 of the GATT. Permitting domestic French scallops to use the term "coquilles Saint-Jacques", while like Canadian scallops are required to use the less favourable term "pétoncles", discriminates against Canadian scallops by placing Canadian scallops at a competitive disadvantage in the French market. Canadian scallops are thus accorded less favourable treatment than that granted to the like domestic French product, contrary to Article III:4.

Moreover, the Order is inconsistent with Article I:1 of the GATT as scallops imported from other countries may use the term "coquilles Saint-Jacques", while the like Canadian scallops are required to use the less favourable term "pétoncles". Permitting such scallops imported into France from countries other than Canada to reap the benefit of being labelled with a commercially favourable term constitutes the accordance of an advantage to those imports. As France has failed to accord that same commercial advantage to the like Canadian scallops, the imported scallops receive an advantage, favour, privilege or immunity not accorded to the like product imported into France from Canada, contrary to Article I:1.

The Order has had an adverse effect on imports of Canadian scallops into France. Prior to the Order, the volume of Canadian scallop exports to France and the Canadian share of the French scallop market had been increasing. After the implementation of the Order the demand for Canadian scallops decreased significantly. The labelling requirement resulted in a significant reduction in the volume of Canadian exports to France and in Canada's share of the French market. As a result of the Order, Canadian scallops are at a competitive disadvantage in respect of the like domestic French product and like products imported from other countries.

The Order nullifies or impairs benefits accruing to Canada under, and impairs the attainment of the objectives of, the WTO Agreement, the GATT and the TBT Agreement.

I. BACKGROUND

1. In Canada's view the Order is inconsistent with the WTO Agreement.
2. When the Order entered into force on March 28, 1993, Canada was concerned that the labelling requirement was inconsistent with the GATT 1947. Canada promptly advised France of its concerns, noting that the Order would have an unnecessary and unjustifiable adverse effect on imports of Canadian scallops into France.
3. Following unsuccessful attempts to resolve the issue bilaterally, Canada requested GATT 1947 Article XXII:1 consultations with the European Community (the "EC") on August 16, 1993. The consultations were held on September 20, 1993. The EC defended the Order on the grounds that, in the EC's view, the Order did not discriminate between countries, it corresponded to "correct" linguistic usage, and was intended to provide consumers with accurate information.
4. Canada continued to seek a bilateral resolution of the matter with France after the 1993 consultations. French amendments to the Order in December 1993 and October 1994 ultimately exacerbated rather than resolved the matter. When it became clear that the matter could not be resolved bilaterally, Canada requested consultations with the EC by letter dated May 19, 1995, pursuant to GATT Article XXII:1, Article 14.1 of the TBT Agreement and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"). The consultations concerning the Order were held on June 19, 1995.²
5. On July 19, 1995 the Dispute Settlement Body (the "DSB") agreed to establish a panel on the matter.
6. As determined by the DSB on July 19, 1995, the terms of reference for the Panel are:

"To examine, in the light of the relevant provisions in the Marrakesh Agreement establishing the World Trade Organization, including the General Agreement on Tariffs and Trade 1994 and the Agreement on Technical Barriers to Trade, the matter referred to the Dispute Settlement Body by Canada in document WT/DS7/7 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."³

² The following WTO Members joined the consultations: Chile, Iceland, Japan and Peru.

³ Minutes of the Meeting of the DSB on July 19, 1995. WT/DSB/M/6 (August 28, 1995).

II. FACTUAL ASPECTS

A. Trade Items Affected

7. The Order governs commercial terms to be used in the labelling of shucked scallops when preserved, semi-preserved or frozen.

8. The items affected by the Order are classified under tariff item 0307.29 (scallops, including queen scallops, of the genera *Pecten*, *Chlamys* or *Placopecten*) of Chapter Three of the Harmonized Tariff System.⁴ The EC Schedule subdivides the 0307.29 tariff line to the eight digit level: item 0307.29.10 (coquilles St. Jacques (*Pecten maximus*) frozen), and 0307.29.90 (Other).⁵ Canada exports frozen shucked scallops of the species *Placopecten magellanicus* to France. It is Canada's understanding, based on French import statistics, that Canadian scallops have been imported into France under both tariff lines.

9. As background, all living organisms are classified scientifically according to long-established international convention. Such classification is not static as new discoveries result in constant changes to the taxonomic classification of many organisms, particularly at the species level. All scallops are of the Kingdom Animalia, of the Phylum Mollusca, of the Class Bivalvia, of the Order Ostreoid, and of the Family Pectinidae. The Family classification is subdivided into genus and species. There are two species of scallops particularly relevant to this matter: Canadian *Placopecten magellanicus* (of the genus *Placopecten*) and *Pecten maximus* (of the genus *Pecten*). The fact that *Placopecten magellanicus* and *Pecten maximus* are different species is irrelevant in respect of distinguishing between scallops for commercial designation purposes.⁶

⁴ The EC has bound tariffs for all scallops at 8%.

⁵ It is of note that the Order cannot be based on tariff classification as under the EC tariff schedule, only frozen *Pecten maximus* is classified under tariff item 0307.29.10 as "coquilles St. Jacques". All other frozen scallops, including *Pectens* (other than *Pecten maximus*) permitted under the Order to be labelled "coquilles Saint-Jacques", are classified under tariff item 0307.29.90 as "other".

⁶ A technical analysis of different species of scallops including *Placopecten magellanicus* and *Pecten maximus* concluded that there is no pattern of physical or compositional characteristics such as size, weight, colour, texture or moisture content that would justify differentiating between *Placopecten magellanicus* and *Pecten maximus* for commercial labelling purposes.

B. The French Order and Subsequent Amendments

10. The Order entered into force on March 28, 1993.⁷ Article 1 of the Order provides that when preserved, semi-preserved or frozen, the scallops listed in the Annex to the Order may be marketed using only the names listed in the Annex. The Annex lists the various species of scallops, their scientific names, and the names under which they may be marketed in France. The Annex provides that only scallops of the genus *Pecten* may be labelled as "coquilles Saint-Jacques" and that all other genus and species of scallops, including *Placopecten magellanicus* from Canada, must be labelled as "pétoncles".

11. Article 3 of the Order permitted the depletion of existing packaging and labelling stocks up to 31 December, 1993.

12. On December 29, 1993, France modified the Order to permit non-*Pecten* scallops subject to Article 1 of the that Order to use the term "Saint-Jacques" in the label until December 31, 1995, provided that this term was followed by either the scientific name or the term "pétoncles" in brackets. Canada welcomed the modification and pressed for it to be made permanent.

13. On October 3, 1994, France further modified the Order to require that Canadian *Placopecten magellanicus* be labelled either "pétoncles" or "pétoncles (Saint-Jacques)" until December 31, 1995. After that date, the Order would come into effect, and scallops not of the genus *Pecten*, including Canadian *Placopecten magellanicus*, would be required to be labelled "pétoncles".

C. Market Conditions**1. *The French scallop market***

14. Canada exports frozen scallops primarily of the species *Placopecten magellanicus*. Canada is the largest exporter of this species in the world. Canadian scallops imported into France are sold in both the wholesale and retail markets, including sales for direct consumption, and for use in the food service industry including restaurants, and by food product manufacturers.

15. France's domestic scallops industry harvests scallops primarily of the species *Pecten*

⁷ Prior to the introduction of the Order, labelling of scallops was not governed by a French regulation. However, French labelling guidelines for scallops (provided to the Canadian Embassy in Paris by the French Government) expressly permitted Canadian scallops to use the term "noix de Saint-Jacques".

maximus. The remainder of that market comprises imports of a variety of species of scallops from other countries, including Canada.

16. Annual French scallop import statistics on a country by country basis, for the years 1989 - 1994, show that the Canadian share of the French market was over 11% in 1991 and 1992. However, by 1994 that share had fallen to 8%, and is expected to fall further in 1995. Monthly French import figures to May 1995 indicate that there has already been a sharp drop in the volume of Canadian exports to France, with volumes that are less than 50% of the lowest level over the past five years for those same months.

2. Market differentiation between "*coquilles Saint-Jacques*" and "*pétoncles*"

17. Canadian *Placopecten magellanicus* scallops have been sold in the French market as "noix de coquilles Saint-Jacques" or "noix de Saint-Jacques" for over forty years. According to Canadian exporters and French importers, French consumers have traditionally considered the distinction between the labelling terms "Saint-Jacques" and "pétoncles" to be based on, and to reflect, the quality of the scallop in terms of size, colour and texture of the scallop.⁸

18. "Pétoncles" are perceived by French consumers to be an inferior product to "coquilles Saint-Jacques"; the consumers differentiate between the label "coquilles Saint-Jacques" ("noix de Saint-Jacques") and "pétoncles" in making purchasing decisions regarding scallops and scallop products. A significant proportion of retail buyers would choose scallops and scallop products labelled "coquilles Saint-Jacques" over those labelled "pétoncles" even if the "coquilles Saint-Jacques" were more expensive, and would choose scallops and scallop products labelled "noix de Saint-Jacques du Canada" over those labelled "pétoncles du Canada".⁹

19. The technical analysis compared the physical and chemical characteristics of frozen scallops available on the retail market in France to determine whether there was a scientific basis for the commercial distinction under the Order. The analysis concluded that there are no qualitative differences between *Placopecten magellanicus* and *Pecten maximus* relevant to consumers in terms of size, weight, colour, texture and moisture content. Thus, using the commercial distinction between the terms "coquilles Saint-Jacques" and "pétoncles" to

⁸ The results of a survey of French consumers commissioned by Canada support this view.

⁹ The Consumer Research Report supports this view and confirmed the experience of Canadian exporters that French consumers differentiate between the labels, that they believe the term "coquilles Saint-Jacques" denotes a premium product in terms of size and quality, and that one factor they take into consideration in determining the value of a scallop is the label of the scallop (i.e. they are prepared to pay a higher price for scallops labelled "coquilles Saint-Jacques").

distinguish between *Placopecten magellanicus* and *Pecten maximus* does not have a scientific basis.

20. A review of scallop labelling practices and requirements in other countries, including EC member states, did not reveal a pattern of labelling making a similar commercial distinction between different genus and species of scallops.

III. ARGUMENT

21. The Order is inconsistent with Article 2 of the TBT Agreement, and Articles III and I of the GATT.

A. The TBT Agreement

22. The Order is a technical regulation that is subject to the TBT Agreement. The Order is inconsistent with Article 2 of the TBT Agreement. It creates an unnecessary obstacle to international trade, contrary to Article 2.2, and it accords less favourable treatment to Canadian scallops than that accorded to the like domestic French scallops and like scallops imported into France from other countries, contrary to Article 2.1.

1. *The Order is a technical regulation*

23. The TBT Agreement applies to technical regulations as they relate to products. A measure constitutes a "technical regulation" under the TBT Agreement if it is a document which lays down mandatory terminology or labelling requirements in respect of a product.¹⁰

24. The Order is set out in document NOR MERP9300051A, as amended by documents NOR ECOC9300190A, and NOR ECOC9400066A. The Order imposes terminology and labelling

¹⁰ The term "technical regulation" is defined in Annex I of the TBT Agreement as a:

[D]ocument 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.

requirements in respect of a product - frozen scallops.¹¹ The requirements are mandatory.¹² Thus, the Order meets the elements of a technical regulation as defined in the TBT Agreement.

25. France's notification of the two Orders amending the original March 1993 Order to the Committee on Technical Barriers to Trade (the "TBT Committee") pursuant to Article 2.5.2 of the 1979 Agreement on Technical Barriers to Trade (the "1979 TBT Code") confirms this fact.¹³

2. *The Order is inconsistent with Article 2.2*

26. Article 2.2 obliges WTO Members to ensure that technical regulations are not prepared, adopted or applied with the objective or effect of creating unnecessary obstacles to international trade.¹⁴ To this end, Article 2.2 provides that technical regulations must not be more trade-

¹¹ Article 1 of the Order provides that frozen scallops set out in the schedule to the Order must be labelled and marketed in accordance with the schedule.

¹² Article 1 provides that the scallops set out in the schedule to the Order "shall", when frozen, be labelled in accordance with the terms set out in that schedule.

¹³ Article 2.5.2 of the 1979 TBT Code provides:

2.5 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation or standard is not substantially the same as the technical content of relevant international standards, and if the technical regulation or standard may have a significant effect on trade of other Parties, Parties shall:

2.5.2 notify other Parties through the GATT secretariat of the products to be covered by technical regulations together with a brief indication of the objective and rationale of proposed technical regulations

¹⁴ Article 2.2 provides:

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety; animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

restrictive than necessary to meet a legitimate objective. To determine whether a measure is inconsistent with Article 2.2 a panel must therefore:

- a. determine whether the objective of a measure is one that falls within the range of legitimate objectives set out in Article 2.2; and
- b. be satisfied that the measure is not more trade-restrictive than necessary, that is, be satisfied that:
 - i. the measure is rationally connected to and can fulfil the legitimate objective; and
 - ii. any adverse impact of the measure on the conditions of competition in the domestic market is appropriate and proportionate to the legitimate objective.

a. Objectives of the Order

27. The preamble to the Order outlines the objectives of the Order to be: to protect consumers, to regulate trade descriptions, to prevent fraud, to ensure fairness in commercial transactions and to protect the French language.

28. Prior to the consultations, Canada requested that the EC (France) elaborate further on the objectives outlined in the Order. The EC's written response to Canada's questions raised in the June 19, 1995, consultations, provided the following description of the Order's objective:

From the recitals of the order itself, it can be seen that the order had a number of purposes, namely to protect consumers, to regulate trade descriptions, to prevent fraud, to ensure fairness in commercial transactions and to protect the French language.¹⁵

29. Canada recognizes that, in general, objectives such as consumer protection, prevention of fraud and deceptive practices, ensuring fairness in commercial transactions and the protection of language fall within the scope of legitimate objectives contemplated under Article 2.2 of the TBT Agreement.

30. However, at least one of the stated objectives in this case, the regulation of trade descriptions, clearly cannot constitute a legitimate objective. The illustrative list of legitimate

¹⁵ This answer responded to the first question of Canada: "[W]hy did the French Government introduce Order NOR MERP9300051A of March 22, 1993?"

objectives set out in Article 2.2 is intended to ensure that society in general, and humans, animals and plant life are protected from serious harm. That the objectives in Article 2.2 are directed to serious harm is evident from the fact that Article 2.2 requires a panel to take into account the risks that would arise from non-fulfilment of a legitimate objective. Regulating trade descriptions is not an objective that, if unfulfilled, would pose a risk of the sort contemplated by Article 2.2.

31. Moreover, the regulation of trade descriptions cannot constitute a policy objective. Such regulation is simply the **means** of **fulfilling** policy objectives. For example, the regulation of trade descriptions might be one method of achieving an objective of consumer protection, but the regulatory measure itself is not a policy objective. Therefore, the regulation of trade descriptions cannot constitute a policy objective generally, or a legitimate objective in these particular circumstances.

b. The Order is more trade-restrictive than necessary to meet the stated objectives

32. However laudable some of the purported objectives of the French Order, the measures implemented to advance those objectives must also satisfy the requirements of Article 2.2.

33. The second step in the Article 2.2 analysis requires the panel to determine whether the measures in question are more trade-restrictive than necessary. Such a determination has two elements: first, the Panel must determine whether the *nature* of the restrictions imposed is such as to advance the stated objectives, that is, whether the impugned measures have a rational connection to the stated objectives and are capable of fulfilling those objectives. Second, the Panel has to determine whether the *extent* of the restrictions imposed on international trade by the impugned measures is more than that necessary to fulfil those objectives.

(i) There is no rational connection between the Order and the stated objectives

34. The analysis under this part of the test is straight-forward: will the stated objectives be fulfilled if the Order is implemented? This forms an integral part of an analysis under Article 2.2; otherwise, all technical regulations could be justified on the basis of a tenuous or non-existent connection to a legitimate objective.

35. The Order is a commercial labelling requirement aimed at purchasers of scallops. Scallops are purchased on the basis of their composition, texture, size, and colour. The Order, however, artificially creates a commercial distinction between scallops that is not based on any

commercial or market considerations.¹⁶ The classification required by the Order is, in fact, based on highly technical and specialised biological characteristics of the scallops that are completely irrelevant to commercial purchasers and end-users alike. Since the Order is not based on any information relevant to the French consumer of scallops, it is *ipso facto* not connected to any of the purportedly consumer- or market-based objectives advanced by EC (France).

36. One stated objective of the Order is to provide better information to the consumer. The labelling requirement does not, however, distinguish between *Placopecten magellanicus* and *Pecten* on the basis of any factors relevant to the consumer; indeed, the Order is based on a criterion, genus, that consumers do not take into account. Therefore, and particularly given that some *Pecten* permitted to be labelled "coquilles Saint-Jacques" are smaller than *Placopecten magellanicus*, the Order is likely to create confusion in the French scallops market.¹⁷

37. A second stated objective is the protection of consumers. The regulation of labelling practices for consumer protection purposes typically aims to ensure that consumers receive accurate information about product characteristics such as quantity, size, quality, end-use, ingredients, origin, and manufacturer or producer. The objective of consumer protection labelling regulations is to ensure that consumers are not misled as to the quality or quantity of the product they are purchasing, or that consumers are able to make informed decisions to protect themselves from health risks such as food allergies. Neither France nor the EC have provided information as to how the Order will protect French consumers, or from what harm French consumers need to be protected. Because the distinction is irrelevant to consumers, the Order is not rationally connected to and cannot fulfil the objective of consumer protection and is therefore not necessary.

38. A third stated objective is to prevent fraud or deceptive practices. Since, for commercial purposes, *Placopecten magellanicus* and the French *Pecten maximus* are indistinguishable,¹⁸ labelling *Placopecten magellanicus* "coquilles Saint-Jacques" does not perpetrate a fraud on the consumer or importer of scallops. In any event, neither France nor the EC have provided any information regarding consumer or importer complaints about the former labelling system. Thus, there is no evidence that the Order is necessary to prevent fraud and there is nothing to suggest that it could fulfil such an objective.

¹⁶ The technical analysis did not reveal any pattern of differences between *Placopecten magellanicus* and *Pecten* that would justify the distinction being made by the Order.

¹⁷ For example, *Pecten alba* are significantly smaller than *Pecten maximus* and *Placopecten magellanicus*.

¹⁸ In fact, a French Government official stated in 1991 that all pectinides could be described as "coquilles Saint-Jacques" because once shucked and processed, the products could not be distinguished from each other.

39. A fourth stated objective is to ensure fairness in commercial transactions. Canada has serious reservations about the scope of "fairness in commercial transactions" as a legitimate objective for the purposes of Article 2.2 and the potential number of measures that could be justified by reference to such an objective. In any event, in the circumstances of this case, Canada recognizes that an objective of fairness in commercial transactions could fall within the range of legitimate objectives in Article 2.2 if it were directed to ensuring that products that compete directly with one another are traded under the same conditions of competition. That is, a product should not be given a competitive advantage that is denied to a directly competitive product; a product should not be required to conform with a measure that places it at a competitive disadvantage in respect of a directly competitive product. The Order is, however, contrary to its stated objective by requiring *Placopecten magellanicus* to comply with a measure that places it at a competitive disadvantage *vis-à-vis* the commercially indistinguishable French *Pecten maximus*. Therefore, the Order is not necessary to ensure fairness in commercial transactions as it would not fulfil that objective.

40. A fifth stated objective is the protection of the French language. Although Canada agrees that labelling requirements may contribute to the protection of language, it is clear in this case that the protection of the French language would not be attained through the implementation and enforcement of the Order.

41. The term "coquilles Saint-Jacques" is not a scientific designation. It originated in the Middle Ages to describe the shells worn on the hats and coats of the pilgrims of Saint-Jacques-de-Compostelle.¹⁹ Linguistically, the term has never been associated with a particular species of pectinid. The only dictionary reference to any particular characteristic associated with the word is size: historically, the term "coquilles Saint-Jacques" has denoted large scallops, while the word "pétoncles" has denoted small scallops.²⁰ To describe large scallops such as *Placopecten magellanicus* as "pétoncles" is to completely ignore the historic meaning and roots of the two terms. Thus, the Order is not necessary to protect the French language as it would not fulfil that objective.

42. Therefore, even if it were accepted that the stated objectives were legitimate, there is no nexus between the imposition of the Order and fulfilment of those objectives. The Order is not necessary to attain those objectives, and would not, if implemented, fulfil them.

¹⁹ *Dictionnaire Historique de la Langue Française.*

²⁰ See *ibid.*, and *Petit Larousse Illustré*. For example, *Petit Larousse* notes that the word "pétoncles" is a diminutive form of "*Pecten*".

(ii) The Order is more trade-restrictive than necessary

43. Even if the stated objectives of the Order were found to be legitimate and even if the Order were found to be rationally connected to and capable of fulfilling those objectives, the analysis under Article 2.2 requires the panel to determine whether the Order is more trade-restrictive than necessary. In other words, is the Order appropriate and proportionate to the stated objectives?

44. Article 2.2 provides that in determining whether a measure is more trade-restrictive than necessary, the risks that would be created if the legitimate objective is not met must be taken into account. The relevant elements to be considered in assessing such risks include "available scientific and technical information, related processing technology or intended end-uses of products".²¹

45. It is clear that no risks would arise from the non-fulfilment of the stated objectives.

46. There would be no risk to consumers if they did not receive the type of information to be provided pursuant to the Order. Indeed, the Order would likely result in confusion for French consumers. For example, consumers choosing a package of scallops labelled "coquilles Saint-Jacques" in the expectation that the package contains large scallops, may discover on opening the package that they have purchased small *Pecten alba*. On the other hand, permitting large scallops from Canada to be labelled "coquilles Saint-Jacques" will not result in any harm to the consumer.

47. No risk would arise if the objective of preventing fraud was not met in this case, as there is no evidence that fraud has ever been a factor in the labelling of scallops in France.

48. No risk would arise if the objective of ensuring fairness in commercial transactions were not met as the Order would not ensure fairness in commercial transactions. Rather, as noted above, it would adversely affect the attainment of such fairness.

49. No risk would arise if the objective of protecting the French language were not met as the basis for the Order is inconsistent with the linguistic origin of the terms "coquilles Saint-Jacques" and "pétoncles".

50. In any event, the Order is out of all proportion to the stated objectives. It is not necessary to place Canadian scallops at a competitive disadvantage in order to meet the types

²¹ Canada has considered scientific and technical information including domestic and international scientific works, and has considered the intended end-use of the products (a survey of French consumers and importers, and the views of Canadian exporters were considered).

of objectives advanced by France. Other labelling regimes, such as the labelling guidelines that were in place prior to the introduction of the Order, could, in fact, better meet the stated objectives without creating an obstacle to trade.

c. The Order creates an unnecessary obstacle to trade

51. Even if it were accepted that the stated objectives were legitimate, the Order is not rationally connected to and capable of achieving those objectives. Moreover, there is no evidence that there would be any risks arising from the non-fulfilment of the six stated objectives if the Order was not imposed. Certainly, France has not advised that it has identified any potential adverse effect or risk if the Order were not imposed. Therefore, the Order is more trade restrictive than necessary.

52. The labelling requirement creates an unnecessary obstacle to trade for exports of Canadian scallop to France, contrary to Article 2.2 of the TBT Agreement.

3. The Order is inconsistent with Article 2.1

53. Article 2.1 of the TBT Agreement incorporates the non-discrimination principles set out in Articles III:4 and I:1 of the GATT.²² Similar to an analysis of the consistency of a measure in respect of GATT Articles III:4 and I:1, a panel examining a measure under Article 2.1 must determine if the measure in question is a measure to which the provision applies (i.e. is it a technical regulation), if the products in question are like products, and if the measure results in less favourable treatment for the imported Canadian product than for the like domestic and imported products.

54. As set out in paragraphs 23 - 25 above, the Order is a technical regulation, thus Article 2.1 applies. As stated in paragraphs 57 - 58 below, Canadian *Placopecten magellanicus* is like the domestic French *Pecten maximus*, and is also like *Pecten maximus* imported into France from other countries. Canadian *Placopecten magellanicus* imported into France is accorded less favourable treatment than the domestic French *Pecten maximus*. Canadian *Placopecten magellanicus* is also accorded less favourable treatment than the like *Pecten maximus* imported into France from other countries.

²² Article 2.1 provides:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

55. In respect of the Canadian imported scallop and the like French *Pecten maximus*, the different and discriminatory labelling requirements disrupts the conditions of competition between the two products, as set out in paragraphs 59 - 72. Requiring the Canadian product to be labelled "pétoncles" while the like domestic product is permitted to use the premium label "coquilles Saint-Jacques" alters the conditions of competition in favour of the domestic *Pecten maximus* and to the detriment of Canadian scallops. Similarly, in respect of the imported Canadian scallop and *Pecten maximus* imported into France from other countries, the Order alters the conditions of competition in favour of the imported *Pecten maximus* and to the detriment of the imported Canadian *Placopecten magellanicus*.

56. The Order therefore accords less favourable treatment to the Canadian *Placopecten magellanicus* than to the like domestic and imported products, contrary to Article 2.1 of the TBT Agreement.

B. THE GATT

57. The Order is inconsistent with Articles III:4 and I:1 of the GATT. Articles III:4 and I:1 apply in respect of measures discriminating between like products. Canadian *Placopecten magellanicus* is a like product to domestic French *Pecten maximus*, and to *Pecten maximus* imported into France from other countries.²³

58. GATT 1947 panels have considered a variety of criteria in making "like product" determinations, including: physical characteristics;²⁴ product end-use;²⁵ tariff classification and

²³ For example, *Pecten maximus* is exported from the United Kingdom to France.

²⁴ *EEC - Measures on Animal Feed Proteins*, Report of the Panel adopted on 14 March 1978, BISD 25S/49; *EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables*, Report of the Panel adopted on 18 October 1978, BISD 25S/68; *Spain - Tariff Treatment of Unroasted Coffee*, Report of the Panel adopted on 11 June 1981, BISD 28S/102; *United States - Taxes on Petroleum and Certain Imported Substances*, Report of the Panel adopted on 17 June 1987, BISD 34S/136; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Report of the Panel adopted on 10 November 1987, BISD 34S/83; and *European Economic Community - Restrictions on Imports of Dessert Apples*, Report of the Panel adopted on 22 June 1989, BISD 36S/93.

²⁵ *Spain - Tariff Treatment of Unroasted Coffee*, Report of the Panel adopted on 11 June 1981, BISD 28S/102; *United States - Taxes on Petroleum and Certain Imported Substances*, Report of the Panel adopted on 17 June 1987, BISD 34S/136; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Report of the Panel adopted on 10 November 1987, BISD 34S/83; and *United States - Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel adopted on 19 June

tariff treatment;²⁶ consumer tastes and habits;²⁷ and the practices of other countries.²⁸ It is clear that *Placopecten magellanicus* is a "like product" to *Pecten maximus*, when it is assessed against these criteria typically employed to determine the "likeness" of products. For example:

- a. the basic physical characteristics of shucked frozen *Placopecten magellanicus* and *Pecten maximus* scallops are the same:
 - i. there is no pattern of physical or compositional characteristics in respect of size, weight, colour, texture or moisture content that justifies differentiating between *Placopecten magellanicus* and *Pecten maximus*, and
 - ii. in terms of size and colour (the most important determinants of consumer purchase decisions) *Placopecten magellanicus* are more like domestic French *Pectens* (e.g. *Pecten maximus*) than are certain other *Pectens*, such as *Pecten alba*);
- b. *Placopecten magellanicus* and *Pecten maximus* have the same end-use - human consumption;
- c. although the EC tariff schedule distinguishes frozen *Pecten maximus* from frozen scallops of all other species, including several *Pectens* that may be labelled "Saint-Jacques" under the Order, all scallops are subject to the same tariff rate of 8%, and French import statistics show that *Placopecten magellanicus* from Canada have entered France under the *Pecten maximus* tariff line, even though it is well known that *Pecten maximus* are not found in Canadian waters;

1992, BISD 39S/206.

²⁶ *The Australian Subsidy on Ammonium Sulphate*, Report of the Working Party adopted on 3 April 1950, BISD II/188; *EEC - Measures on Animal Feed Proteins*, Report of the Panel adopted on 14 March 1978, BISD 25S/49; *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Report of the Panel adopted on 10 November 1987, BISD 34S/83; and *United States - Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel adopted on 19 June 1992, BISD 39S/206.

²⁷ *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, Report of the Panel adopted on 10 November 1987, BISD 34S/83.

²⁸ *The Australian Subsidy on Ammonium Sulphate*, Report of the Working Party adopted on 3 April 1950, BISD II/188; and *Spain - Tariff Treatment of Unroasted Coffee*, Report of the Panel adopted on 11 June 1981, BISD 28S/102.

- d. French consumer tastes and habits and the preferences of French importers are based on product characteristics such as size, colour and texture - neither consumers nor importers differentiate between *Placopecten magellanicus* and *Pecten maximus* on the basis of their taxonomic classification; and
- e. a review of fourteen countries' (not including Canada and France) scallop labelling regulations did not reveal any countries with measures making a distinction similar to that made by the Order.

1. *The Order is inconsistent with GATT Article III:4*

59. Article III:4 provides:

The products of the territory of any [Member] imported into the territory of any other [Member] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale ...

60. Article III:4 requires the panel to determine whether:

- a. the imported product is a like product to the domestic product;
- b. the impugned measure is a law, regulation or requirement affecting, *inter alia*, the sale or offering for sale of the products; and
- c. the imposition of the measure could result in the imported products receiving less favourable treatment than the like domestic product (i.e. whether there is the potential that the imported product may be accorded competitive opportunities less favourable than those accorded to the like domestic product).

61. As noted above, Canadian *Placopecten magellanicus* is a like product to French *Pecten maximus*, thus it satisfies one element of the analysis.

62. The Order is a regulation governing the marketing and labelling of frozen scallops in France. As discussed in paragraphs 17 - 19 above, scallops marketed in France under the label "coquilles Saint-Jacques" have a competitive advantage over those labelled "pétoncles"; thus, the Order affects the relative competitive condition between the two products. By affecting the relative competitive conditions between the two like products, the Order clearly constitutes a "law, regulation or requirement" affecting the internal sale or offering for sale of scallops in the French market.

63. Therefore, Article III:4 requires that *Placopecten magellanicus* imported into France must be accorded treatment no less favourable than that accorded to French *Pecten maximus*. GATT 1947 Panels have consistently interpreted this obligation to mean that imported products must be granted competitive opportunities no less favourable than those accorded to domestic products.²⁹

64. The fundamental purpose of Article III is to protect the expectations of the Members as to the competitive relationship between their products and those of other Members.³⁰ Article III:4 therefore calls for *effective* equality of opportunity in respect of the application of laws, regulations and requirements affecting the conditions of competition between the imported good and the like domestic product in the internal market.³¹ Previous GATT 1947 Panels have stated that Article III:4 covers "any laws or regulations which *might* adversely modify" such conditions of competition.³² In essence, Article III:4 applies not only to *actual* distortions of competitive opportunities or discriminatory application of laws, regulations or requirements, but also to the potential impact³³ of distinctions created by such application and the risk of discrimination³⁴ against the imported product. In addition, Article III is intended not merely to protect current trade but also to create the predictability to plan future trade.³⁵

65. Requiring Canadian scallops to be labelled "pétoncles" while like product French scallops may be labelled "coquilles Saint-Jacques" has disrupted the competitive relationship between Canadian *Placopecten magellanicus* and French *Pecten maximus*. Prior to the Order, *Placopecten magellanicus* and *Pecten maximus* could both be labelled with the words "Saint-

²⁹ *United States - Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel adopted on 19 June 1992, BISD 39S/206, para. 5.30.

³⁰ *United States - Taxes on Petroleum and Certain Imported Substances*, Report of the Panel adopted on 17 June 1987, BISD 34S/136, para. 5.2.2.

³¹ *United States - Section 337 of the Tariff Act of 1930*, Report of the Panel adopted on 7 November 1989, BISD 36S/345, paras. 5.11-5.13.

³² Emphasis added; *Italian Discrimination against Imported Agricultural Machinery*, Report of the Panel adopted on 23 October 1958, BISD 7S/60, paras. 11-13.

³³ *United States - Section 337 of the Tariff Act of 1930*, Report of the Panel adopted on 7 November 1989, BISD 36S/345.

³⁴ *EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins*, Report of the Panel adopted on 25 January 1990, BISD 37S/86, paras. 137-141.

³⁵ *United States - Taxes on Petroleum and Certain Imported Substances*, Report of the Panel adopted 17 June 1987, BISD 34S/136, para. 5.2.2.

Jacques". The products competed directly with each other and consumers perceived them to be of equal quality. The labelling requirement has altered this competitive relationship to the detriment of Canadian scallops by requiring them to be labelled with a label that carries a negative connotation in the market, while *Pecten maximus* are permitted to retain the premium label.

66. The consumer survey confirms that the labelling requirement would place Canadian scallops at a competitive disadvantage in respect of the French *Pecten maximus*. French consumers perceive scallops labelled "coquilles Saint-Jacques" to be a premium product and perceive that scallops labelled "pétoncles" are an inferior product. The consumer survey also confirmed that there is greater consumer demand for "coquilles Saint-Jacques" than for "pétoncles" and that French consumers are willing to pay a substantial premium for "coquilles Saint-Jacques".

67. Canadian exporters and French importers have advised that the effect of the Order has been a reduction in the number of orders placed for Canadian *Placopecten magellanicus*. There has also been a reduction in the quantity ordered and the price offered for Canadian scallops. The exporters and importers have also advised that the introduction of the Order and its modification through subsequent amendments has made it difficult to plan future trade as the demand, and the price paid, for Canadian *Placopecten magellanicus* depend to a large extent on how the product may be labelled.

68. The labelling requirement grants *Placopecten magellanicus* less favourable competitive opportunities than that accorded to domestic French *Pectens*. Thus, the Order accords less favourable treatment to Canadian *Placopecten magellanicus* contrary to Article III:4.

2. *The Order is inconsistent with GATT Article I:1*

69. Article I:1 provides:

... any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the "like product" originating in or destined for the territories of all other [Members].

70. Article I:1 has been interpreted as prohibiting:

a contracting party from according an advantage to a product originating in another country while denying the same advantage to a *like product*

originating in the territories of other contracting parties.³⁶

71. As noted above, *Placopecten magellanicus* is a "like product" to *Pecten maximus*. Frozen *Pecten maximus* is imported into France from other countries including the United Kingdom, and is permitted to be labelled "coquilles Saint-Jacques". Permitting *Pecten maximus* from other countries to be labelled "coquilles Saint-Jacques", while requiring *Placopecten magellanicus* to be labelled "pétoncles", gives *Pecten maximus* a competitive advantage over *Placopecten magellanicus*.

72. As the labelling requirement would preclude *Placopecten magellanicus* from receiving the competitive advantage gained through the use of the term "coquilles Saint-Jacques" on a label, the Order is inconsistent with GATT Article I:1 as that treatment has not been accorded "immediately and unconditionally" to *Placopecten magellanicus*.

C. The Order Nullifies or Impairs Benefits Accruing to Canada under, and Impedes the Attainment of the Objectives of, the WTO Agreement, the GATT and the TBT Agreement

73. The Order's inconsistency with the WTO Agreement, namely the GATT and the TBT Agreement, establishes a *prima facie* case of nullification or impairment pursuant to GATT Article XXIII:1(a) and Article 3.8 of the DSU.³⁷

74. However, even if the Panel were to decide that the Order is consistent with the WTO Agreement, the application of the Order nullifies or impairs benefits accruing to Canada under that Agreement.³⁸ Three conditions have been established by GATT 1947 panels for determining whether a case of "non-violation" nullification or impairment exists. The conditions are:

³⁶ *United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil*, Report of the Panel adopted on 19 June 1992, BISD 39S/128, para. 6.11.

³⁷ Previous GATT 1947 Panels have determined that a *prima facie* case of nullification and impairment is established where there is an infringement of obligations under the GATT. The DSU codifies this in Article 3.8 which provides that where obligations under an agreement such as the GATT or the TBT Agreement are infringed, the action is considered *prima facie* to constitute a case of nullification or impairment.

³⁸ Article XXIII:1(b) has been interpreted to mean even if a measure is not inconsistent with a provision of the GATT, it may be challenged as nullifying or impairing benefits. *EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, Report of the Panel adopted on 25 January 1990, BISD 37S/86, paras. 142 - 154. Article 26.1 of the DSU confirms this interpretation.

- a. the negotiation of a tariff concession;
- b. the subsequent introduction of a government measure that upsets the competitive relationship between the bound product with regard to like or directly competitive imported products; and
- c. the government measure could not have been reasonably anticipated at the time of the negotiation of the tariff concession.³⁹

75. All three conditions are satisfied in this case. First, the EC tariff rate for scallops (tariff items 0307.21 and 0307.29 in the EC tariff schedule) was bound at 8% in 1964 and 1973, and has not been altered since.

76. Second, the introduction of the Order, and its subsequent amendments, have upset the competitive relationship between Canadian and French scallops. As discussed above, there is ample evidence that the labelling regulation has and continues to upset the competitive relationship between Canadian and domestic imported scallops in the French market.

77. Third, at the time the tariff binding was negotiated, Canada could not have reasonably foreseen the introduction of the Order. At the time the tariff concession was negotiated, there was no indication that the French would take steps to undermine the value of that binding through the imposition of an unnecessary internal labelling requirement.

78. Therefore, benefits accruing to Canada under the WTO Agreement have been nullified or impaired.

79. Moreover, the Order impedes the attainment of the trade-liberalizing objectives of the WTO Agreement, the GATT and the TBT Agreement, contrary to GATT Article XXIII:1(b).⁴⁰

³⁹ *The Australian Subsidy on Ammonium Sulphate*, Report of the Working Party adopted on 3 April 1950, BISD II/188; *Treatment by Germany of Imported Sardines*, Report of the Panel adopted on 31 October 1952, BISD 1S/53; and *European Community: Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, Report of the Panel adopted on 25 January, 1990, BISD 37S/86.

⁴⁰ Article 26.1 of the DSU provides that "[W]here the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel ... may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement." [Emphasis added] The provisions of GATT Article XXIII:1(b) are applicable to the WTO Agreement (as the GATT is an integral part of the WTO Agreement pursuant to Article 2.2 of the WTO

IV. EFFECTS OF THE ORDER ON CANADA

80. The Order has had an adverse effect on imports of Canadian scallops into France. Prior to the introduction of the Order, the volume of Canadian scallop exports to France and the share of the French market had been increasing. Canadian scallops gained an increasing share of the French market in the early 1990's, with exports rising sharply from 1989 to 1992.

81. The Order and its subsequent amendments caused a decrease in Canada's share of the French scallop market. The Canadian market share, which had risen to over 11% in 1992, fell to 8% in 1994 and is expected to fall much further in 1995. French monthly import statistics to May 1995 indicate that there has already been a sharp drop in Canadian scallop exports to France, since the requirement to use the term "pétoncles" on the label came into force on January 1, 1995. The volume of Canadian scallop exports to France are at the lowest level of the past five years.

82. The annual import statistics included in the EC's written response to Canada's questions raised in the June 19, 1995 consultations also reflect the adverse impact of the Order and its amendments on Canadian scallop exports.

83. As a result of the Order, food products containing scallops may only use the term "coquilles Saint-Jacques" if the scallops used in the production of the product are *Pectens*. The consumer preference for "coquilles Saint-Jacques" extends to food products that are made with scallops identified as "coquilles Saint-Jacques". Thus, seafood products containing "pétoncles" could not compete effectively in the market.

84. In addition, the Order, including the modifications of December 1993 and October 1994, has created great uncertainty regarding labelling requirements for scallops in France and has destabilized the French market for scallops. This has led to generally lower sales and higher costs for Canadian exporters who are now as a result were required to make several packaging changes and to export in smaller lot sizes. Again, French import statistics show that imports of Canadian scallops rose until March 1993, then dropped following the introduction of the Order, rose again in 1994 as exporters found that they were again able to sell using the words "Saint-Jacques", and then fell again in late 1994 following the October amendment.

85. Exports in 1995 have been especially poor. Despite strong international prices for scallops, French importers have lowered the price they are willing to pay for Canadian scallops, and are reducing orders or simply not purchasing large Canadian scallops that would normally compete directly with other large scallops still permitted to use the label "coquilles Saint-

Agreement), the GATT and the TBT Agreement (pursuant to Article 14.1 of the TBT Agreement).

Jacques". Thus, the Order has resulted in decreased demand for Canadian scallops labelled "pétoncles" and such scallops command a lower price. Canadian exporters have advised that there is a price difference of up to 20% between the two labels.

86. Canadian exporters anticipate that export volumes and prices will fall further in 1996 once only the label "pétoncles" is permitted and the full implications of the change in the labelling requirements are absorbed by French importers, wholesalers and retailers.

V. CONCLUSIONS AND SUGGESTED RECOMMENDATIONS

87. Canada therefore requests the Panel to conclude that the Order, as amended:

- (i) is inconsistent with the EC's and France's obligations under the WTO Agreement;
- (ii) nullifies or impairs benefits accruing to Canada under the WTO Agreement including the GATT and the TBT Agreement; and
- (iii) impedes the attainment of the objectives of the WTO Agreement, the GATT and the TBT Agreement.

88. Accordingly, Canada requests that the panel recommend that the French labelling requirement under the Order be brought into conformity with the WTO Agreement.

LIBRARY E / BIBLIOTHEQUE A E



3 5036 20006543 4

CA1 EA495 95E71 ENG DOCS
European Communities - trade
description of scallops 43275151

NON - CIRCULATING ;
CONSULTER SUR PLACE