EUROPEAN COMMUNITIES - TRADE DESCRIPTION OF SCALLOPS

Public Version of the Second Submission of Canada

PUBLIC VERSION

SUMMARY OF THE CANADIAN SUBMISSION

In this second submission Canada responds to the arguments put forward by the European Communities (the "EC") and elaborates upon arguments made by Canada in its first submission.

French consumers prefer to purchase scallops labelled "coquilles Saint-Jacques" or "noix de Saint-Jacques" even when they are more expensive than scallops labelled "pétoncles". French producers of prepared dishes containing scallops consider "pétoncles" to be a commercially less-valuable term than either "coquilles Saint-Jacques" or "noix de Saint-Jacques". The French consumer survey does not establish that consumers consider the species of scallop important when purchasing shucked frozen scallops. The only clear evidence on the record is that the French consumer considers the name "coquilles Saint-Jacques" to be important.

The EC has asserted throughout its first written and oral submissions that the "true" or "correct" trade name for *Pectens* is "coquilles Saint-Jacques" but has failed to demonstrate that there is an exclusive connection between "coquilles Saint-Jacques" and *Pecten* scallops. There is no clear consistent usage in France of the non-scientific term "coquilles Saint-Jacques" to refer to *Pectens* nor does international usage support the distinction made in the French Order. Further, the scientific classification of *Pectinids,* which an international expert on scallop taxonomy has said is in need of drastic revision, cannot be linked to commercial nomenclature and therefore cannot be used as the basis for regulation.

The EC has claimed that it is the development of a sophisticated electrophoretic technique which made it possible to determine which scallops should be labelled "coquilles Saint-Jacques" and which "pétoncles". However, not only is this technique not new, it is not capable of supporting the distinction made in the Order. It is also significant that the information provided by the EC appears to indicate that electrophoretic analysis was not used until after the Order was made and after Article XXII consultations failed to lead to a mutually satisfactory result. The electrophoretic analysis argument is a self-serving *ex post facto* justification, not the underlying reason for the making of the Order.

Canada has experienced a severe decline in its exports of scallops to France which cannot, as has been alleged by the EC, be attributed to a supply problem in Canada. The sharp decline coincides with the requirement to include the term "pétoncles" on the label, although scallop exports to France had already begun to decline before then due to the prolonged period of uncertainty as to the labelling requirements.

The Order creates an unnecessary obstacle to trade contrary to Article 2.2 of the Agreement on Technical Barriers to Trade (the "TBT Agreement"). Contrary to the assertion made by the EC that the Order fulfils a number of legitimate objectives which meet the requirements of the TBT Agreement, it is clear that the motivation for the making of the Order is economic and that the real purpose of the Order is to deny 95 per cent of the world scallop production equal access to the French market. The discriminatory intent of the Order is evident,

both from the chronology of the events leading up to the Order which Canada presented at the first oral hearing and from correspondence between the French Prime Minister and the Minister of Agriculture and Fisheries and his officials on one hand and representatives of the French scallop processing industry and French deputies writing on their behalf on the other. Neither the EC nor France has provided any evidence of consumer complaints, let alone evidence that consumers were consulted on the issue, except after the initiation of these proceedings.

The Order is arbitrary and unjustifiable. Even if it were accepted that some of the stated objectives of the Order are legitimate, the Order is more trade-restrictive than necessary to meet such objectives. There are many available alternatives which would be less trade-restrictive.

The Order discriminates against Canadian scallops in favour of the like domestic scallops contrary to Article III:4 of the General Agreement on Tariffs and Trade 1994 (the "GATT") and Article 2.1 of the TBT Agreement.

The impact of the Order has been to ensure that the scallops that are produced in the greatest quantities globally cannot compete on an equal basis with like domestic products. France has attempted to disguise the discriminatory effects of the Order by permitting a small number of imported species that are harvested in much lower quantities to have the same competitive opportunities as domestic French scallops. France has, however, limited competition in its domestic scallop market by restricting "coquilles Saint-Jacques" and "noix de Saint-Jacques" to *Pectens* which comprise less than five percent of the world scallop harvest while effectively excluding from its market the large quantities of non-*Pectens* that have competed in the past and would now otherwise compete directly with the domestic French scallop.

The Order denies to Canadian scallops the competitive opportunities that are given to other scallops that are indistinguishable from Canadian scallops. In the French market, scallops labelled "coquilles Saint-Jacques or "noix de Saint-Jacques" command a premium price and are in greater demand than scallops labelled "pétoncles" because consumers consider "pétoncles" an inferior product. *Placopecten magellanicus* scallops labelled "Saint-Jacques" would have the same competitive opportunities as *Pecten* scallops and market share would be determined by commercial factors rather than by government fiat; labelled "pétoncles" these competitive opportunities are not available to them. The Order, therefore, is inconsistent with Article III:4.

The Order accords scallops from other countries an advantage not accorded to like Canadian scallops contrary to GATT Article I:I and TBT Agreement 2.1. The EC argues that Article I:I does not oblige a country to permit a product to use a particular trade name if the product is not the "same" as other imported products that are permitted to use that trade name. However "like" does not mean identical and *Placopecten magellanicus* are like products to *Pectens*. The EC also argues that the objective of Article I:I is not to force France to permit *Placopecten magellanicus* to continue to profit by using a trade name that has a favourable reputation in the French market. However, this is exactly what Article I:I requires in this case.

By the EC's own admission, there is a benefit or "profit" accorded to scallops that are permitted to be labelled "coquilles Saint-Jacques" or "noix de Saint-Jacques". As such scallops have a significant competitive advantage over scallops labelled with the pejorative term "pétoncles", the Order grants *Pecten maximus* from other countries an advantage not given to *Placopecten magellanicus*.

The EC argues that if the Order is inconsistent with one or both of GATT Articles III:4 and I:I it is justifiable under the general exception contained in GATT Article XX(d). GATT 1947 Panels have construed this exception narrowly, placing the burden of proof on the party invoking the exemption. The EC has failed to meet its burden of proof in this case.

The EC has alleged that Canada has not properly raised nullification and impairment as it was not set out specifically in the consultations and the request for the establishment of a panel and that Canada has failed to satisfy the conditions of Article 26(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"). Canada confirmed during the oral hearing before the Panel on October 12-13, 1995 that it had raised nullification or impairment in its request for consultations dated May 19, 1995 and in its request for the establishment of a panel dated July 7, 1995. Canada also raised nullification and impairment generally during the consultations held in June, 1995. Canada has therefore properly raised non-violation nullification or impairment.

In response to the EC's assertion that Canada should provide a more detailed non-violation or impairment complaint Canada reiterates its earlier arguments on this matter. Canada disagrees with the EC's assertion that the only reasonable expectation that Canada could have had at the time the tariff for scallops was bound was that France and the EC would observe the provisions of the TBT Agreement and GATT Article III. This is a misstatement of the concept of reasonable expectation.

Canada requests the Panel to find that the provisions of the Order discussed above are not consistent with France's or the EC's obligations under the WTO Agreement and that the Order nullifies or impairs benefits accruing to Canada under that Agreement whether or not the Order is found to be inconsistent with the WTO Agreement. Canada requests that the Panel recommend that France and the EC ensure that the Order is brought into conformity with their obligations under the WTO Agreement.

I. INTRODUCTION

1. Canada's second written submission should be read in conjunction with Canada's first written submission, its first oral submission, and the replies of Canada to questions from the Panel and the European Communities (the "EC") at the first meeting with the Panel.

II. RESPONSE TO THE SUBMISSIONS OF THE EUROPEAN COMMUNITIES

A. Factual Aspects

1. "Correct" Trade Names for Scallops

2. The EC has asserted throughout its first written and oral submissions that the "true" or "correct" trade name for *Pectens* is "coquilles Saint-Jacques". This claim has not been substantiated. All available historical and commercial information supports Canada's position that there has been no exclusive use of the term "coquilles Saint-Jacques" or "noix de Saint-Jacques" in respect of *Pectens*.

a. Historically, the terms "coquilles Saint-Jacques" and "noix de Saint-Jacques" have not been limited to Pectens

3. The EC has not demonstrated that there is an exclusive connection between "coquilles Saint-Jacques" and *Pecten* scallops. There is no clear, consistent usage of the non-scientific term "coquilles Saint-Jacques" to refer to *Pectens*. Over time, the terms "coquilles Saint-Jacques" and "noix de Saint-Jacques" have been used broadly to describe quality scallops from a variety of *genera* and species. For example, *Placopecten magellanicus* from Canada have been permitted to use those terms in France for over forty years.

b. International practice establishes that the terms "coquilles Saint-Jacques" and "noix de Saint-Jacques" are not limited to Pectens

4. The EC states at paragraph 11 of its first written submission that "the distinction between coquilles Saint-Jacques and *Placopecten magellanicus* is also recognized internationally." It appears that the EC is suggesting that the distinction made in the Order is a distinction that is recognized internationally. This is not the case.

5. References to several publications of international organizations have been made during the course of this dispute, including to the *OECD Multilingual Dictionary of Fish and Fish Products* (the "OECD Dictionary"), the FAO Yearbooks on Fishery Statistics (the "FAO Yearbooks"), and the European Commission's *Multilingual Illustrated Dictionary of Aquatic*

Animals and Plants (the "European Commission Dictionary"). None of these publications make the distinction made in the French Order. The publications do not list *Placopecten magellanicus* as "pétoncles", and all list *Placopecten magellanicus* either as "Pecten d'Amerique", "Pecten magellanicus" or simply "Placopecten magellanicus".[1]

6. The pattern of nomenclature in these four publications does not support the differentiation between *Pectens* and non-*Pectens* that has been artificially and arbitrarily imposed on scallops under the French Order. It is interesting to note that in the introduction to the OECD Dictionary, there is a caveat that the Dictionary does not purport to make recommendations for commercial practice.[2]

c. Domestic French practices reveal that even within France the term "coquilles Saint-Jacques" has not been limited to Pectens

7. A December 1994 Order of the French Ministry of Agriculture and Fish regarding the Saint Pierre et Miquelon fishery establishes that, despite the EC's assertions to the contrary, within France the term "coquilles Saint-Jacques" is not limited to *Pectens*.[3] Article 1 of that Order clearly refers to *Placopecten magellanicus* as "coquilles Saint-Jacques". As well, a quota monitoring report prepared by French authorities in Saint Pierre indicates that *Placopecten magellanicus* in Saint Pierre et Miquelon were called "coquilles Saint-Jacques" prior to the December 1994 Order.[4]

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[1] The OECD Dictionary applies the term "pétoncles" to one species only, *Chlamys varius*. The 1993 FAO Yearbook only uses the term "pétoncles" for *Pecten yessoensis*.

[2] The introduction provides:

> It should be stressed that, however desirable it would be to discourage the use of a number of confusing names, no attempt has been made here either to harmonize existing nomenclatures where discrepancies exist or to indicate preferences or to make recommendations of commercial practice.

[3] Arrêté du 23 décembre 1994 modifiant l'arrêté du 20 mars 1987 fixant certaines mesures de gestion et de conservation des ressources halieutiques dans les eaux territoriales et la zone économique au large des côtes de Saint-Pierre-et-Miquelon pris en application du décret n° 87-182 du 19 mars 1987; NOR: AGRM9402498A.

[4] The quota monitoring report is dated 25 January 1990, and bears the signature of the "L'Administrateur en Chef des Affaires Maritimes BEAUVALOT, Chef du Quartier." The report shows that "coquilles Saint-Jacques" were landed by fishermen in the waters of Saint Pierre

8. The EC argues that the terms used in Canada to describe scallops generically -"scallops" in English, "pétoncles" in French - support its view that the term "coquilles Saint-Jacques" must be limited to *Pectens*.[5] However, this dispute is about the commercial labelling and marketing of scallops in the French market and how French consumers perceive scallops labelled with a particular term. The terms used in Canada would only be relevant to this dispute if Canadian consumers had the same perceptions of the term "coquilles Saint-Jacques" and "pétoncles" as do French consumers. This is not the case. In Canada, the term "pétoncles" is a generic term; it is not perceived by consumers to represent a less desirable or less valuable product. The term "coquilles Saint-Jacques" is not used in Canada to describe shucked frozen scallops. Rather, it refers to a cooked preparation of scallops, wine and cream. Thus, terms used in the Canadian market are not relevant to this dispute.

d. There is no connection between scientific classification and limiting the terms "coquilles Saint-Jacques" and "noix de Saint-Jacques" to Pectens

9. There is no logical way to link the scientific classification of *Pectinids* to commercial nomenclature. First, the scientific classification of *Pectinids* is far from being clearly delineated. In a recent paper, Dr. T. Waller, an internationally recognized expert on scallop taxonomy, stated: "many generic names have been and are still being introduced in a haphazard fashion based upon local morphological distinctions rather than on phylogenetic grounds based on an overview of the entire family in space and time, and it is clear that pectinid taxonomic nomenclature and classification are in need of drastic revision."[6] It is not reasonable to base a regulation on a largely unresolved area of scientific classification.

e. There is no reliable method of determining scallop species

10. In its first written and oral submissions, the EC asserted that France's perfection of a sophisticated electrophoretic analytical technique made it possible to determine which scallops should be labelled as "coquilles Saint-Jacques". However, not only is the technique incapable of supporting the type of distinction made by the Order, but also it appears that France's use of the technique to compare scallops began after the introduction of the Order.

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et Miquelon. This is significant as there are no *Pectens* harvested in those waters, only scallops of the species *Chlamys icelandica* and *Placopecten magellanicus*.

[5] See paragraphs 15-19 of the EC's first written submission.

[6] Shumway, S.E. (ed.) 1991. *Scallops: Biology, Ecology and Aquaculture*, Elsevier, Amsterdam.

11. The EC stated in its first oral submission that confusion has reigned in the French scallop market for many years because there was no reliable test to distinguish between "true" and "false" "coquilles Saint-Jacques". The EC asserted that since the mid-1980s France has been "perfecting" a method to differentiate between species of scallops using electrophoretic analysis.

12. However, the EC has failed to provide the Panel with adequate information on its process of developing such a method, and has provided limited information on the final results of France's work in this area. The information that has been provided relates to work conducted in 1995, *two years after the Order came into force*. The EC has failed to show that France used electrophoretic analysis either during the formulation of the Order or in respect of the later amendments to the Order. This contradicts the EC's assertion that it was France's "perfection" of this methodology, after many years of work, that led to the introduction of the Order.[7]

13. It is Canada's understanding that the EC's claim is based on profiles made using iso-electric focusing.[8] Iso-electric focusing normally is not used as a regulatory tool to distinguish between species because the iso-electric profiles generated are too detailed. For example, iso-electric focusing profiles would show clear differences between populations of the same species from different geographic locations. Therefore, the establishment of a single profile defining a species or a *genus* using iso-electric focusing would be problematic, if not impossible.

14. For the EC's claim to be tenable, France would have had to have developed a baseline standard that covers all species of the genus *Pecten* and against which comparisons of other scallops could be made. However, the only information that has been provided by the EC is a comparison of profiles for *Pecten maximus* and *Placopecten magellanicus*. On the basis of this single comparison the EC states incorrectly that it can make a valid and reliable determination of which scallops are *Pectens* and can be called "coquilles Saint-Jacques" and which scallops are non-*Pectens* and must be called "pétoncles".

15. Even if the profiles were assumed to be different, they do not show that *Placopecten magellanicus* can be differentiated from all scallops of the genus *Pecten*. Moreover, if the profiles of all *Pectens* and *Placopecten magellanicus* were compared, there would be greater

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[7] Iso-electric focusing is a refinement of electrophoretic techniques that allow more detailed analysis of the protein composition of seafood products. Basic electrophorectic profiles consist of a series of bands which indicate the presence of certain proteins in a sample, and can be used to distinguish between species of fish and seafood. Iso-electric focusing gives more detailed resolution of these broad bands of proteins into many sub-bands.

[8] It should be noted that iso-electric focussing has been available for over twenty years. Neither France nor the EC has provided any indication that France has made significant advances in the use of technology that would substantiate this claim.

differences between some the species of *Pectens* than between *Placopecten magellanicus* and *Pecten maximus*. Basic electrophoresis reveals that there are more differences between *Pecten alba* (which can be labelled "coquilles Saint-Jacques") and *Pecten maximus* than there are between *Placopecten magellanicus* and *Pecten maximus*. It is clear, therefore, that France does not have an analytical technique that can be used to make reliable and valid distinctions between the various species. This means that in practical terms, the Order is unenforceable.

16. Finally, even if there was a reliable and valid electrophoretic technique available that could consistently and accurately distinguish between all species of scallops, the results would be irrelevant to this dispute. The differences that would be revealed would be irrelevant to the purposes for which scallops are used. Such a technique would probably only be useful for purely scientific purposes unrelated to commercial classification.

2. Consumer Perceptions

a. The Canadian surveys establish that French consumers prefer to purchase scallops labelled "coquilles Saint-Jacques" or "noix de Saint Jacques" even if more expensive than scallops labelled "pétoncles"

17. Canada's surveys make two things clear. First, the size, colour and texture of shucked frozen scallops are important characteristics that consumers take into account when purchasing scallops. Second, in addition to the importance of such characteristics, scallops purchasers perceive shucked frozen scallops labelled "pétoncles" to be a lower quality of scallop than scallops labelled "coquilles Saint-Jacques". Accordingly, there is less demand for shucked frozen scallops labelled "pétoncles", and such scallops command a lower price in the French market, than for those scallops labelled "coquilles Saint-Jacques".

b. The French survey fails to establish that consumers consider the species of scallop important when purchasing shucked frozen scallops

18. It is surprising that having spent so much time analyzing the Canadian-commissioned consumer survey, the EC should have commissioned a survey with only two questions. It seems rather a leap to conclude, as the EC did in its first oral submission, that consumers would be "shocked" to learn that their scallops did not come from a specific shell, i.e., that of *Pecten maximus*.

19. Consumers were not asked about purchasing shucked frozen scallops, nor were they asked if they cared which species the scallop meat came from, or whether French consumers consider species an important factor when purchasing such scallops. This is important as the

question before the Panel is the treatment of shucked frozen scallops. The results of questions posed to interviewees regarding photographs of scallops in-shell are not relevant to this matter. As it appears that the interviewers enquired only about scallops in-shell, the French survey does not establish that consumers are concerned about the species of shucked frozen scallops.

20. The survey did not address characteristics that consumers consider relevant in purchasing shucked frozen scallops (such as colour, texture, size, price and trade names), or whether they consider species an important factor when purchasing such scallops. Consumers were not asked whether they were familiar with "pétoncles", nor were they asked what they expected to receive if they were to purchase "pétoncles".

21. As the survey did not specify that it was discussing shucked scallops, and participants were shown photographs of shells, it is likely that they assumed that they were speaking about scallops in-shell. It seems natural that the French consumer survey participants considering scallops in-shell would likely recognize the shell of *Pecten maximus* as the vast majority of fresh scallops purchased in-shell by French consumers are *Pecten maximus*.[9] Canadian scallops are not sold in-shell in France. Therefore, consumers would not be familiar with *Placopecten magellanicus* shells. However, identification or recognition of a shell does not imply that consumers consider the shell important or even relevant when purchasing shucked scallops.

c. The presence or absence of roe is not relevant to this dispute

22. The EC argues that the roes of Canadian scallops and French scallops are substantially different due to the hermaphroditic nature of French scallops, thereby rendering the scallops significantly different.[10] Roe is not relevant to the trade description of shucked frozen scallops, for three reasons.

23. First, Canada notes that a percentage of *Placopecten magellanicus* populations have been found to be hermaphroditic like *Pecten maximus*. Likewise, a percentage of *Pecten maximus* scallops are "single sexed". More interestingly, *chlamys opercularis*, long known as "pétoncles" in France, is a hermaphrodite.

24. Second, while some French consumers may attach importance to the roe, up to 35 per cent of scallops harvested in France are sold without roe and an estimated 75 per cent of imported shucked frozen scallops are sold without roe.

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[9] Also, *Pecten maximus* shells (or plastic replicas) are used to sell many prepared dishes in France, even if there are no scallops in the preparation.

[10] See paragraph 10 of its first written submission.

25. Third, an estimated 68 per cent of shucked frozen scallops are sold into the food service sector almost exclusively without roe. At the retail level, both shucked frozen *Pectens* and shucked frozen non-*Pectens* are also often sold without roe.

26. Thus, there are simply too many variables to permit roe to be considered a relevant characteristic to be taken into account in determining whether a scallop is "coquilles Saint-Jacques" or not.

3. Trade Effects

a. The decline in the volume of Canadian scallops imported into France cannot be attributed to a supply problem in Canada

27. The EC has argued that Canadian exports of scallops to France have declined because there has been a decline in Canada's supply of scallops.[11] This is not the case. A review of Canadian scallop catch and quotas from 1990 to 2 November 1995, (catch data for areas not under quota are not available yet for 1995) clearly shows that Canada's supply was in fact increasing over the period 1990 to 1994. Although Canada's supply will decline somewhat in 1995, the total supply in 1995 is expected to exceed the level of 1991, when Canada's scallop exports to France were at their highest volume ever. In any event, fluctuations in supply are not unusual in a well-managed fishery where biological cycles affect catch on a regular basis. In recent years, Canada has established a conservative management regime to ensure the long-term viability of the fishery.

28. The sharp decline in French imports of Canadian scallops since 1995, when the term "pétoncles" had to be included on the label, has been caused by the Order. Export volumes to August 1995 are at their lowest level since 1990 and are less than fifty per cent of 1993's poor level. Although from March 1993 to October 1994 exporters could often sell their scallops with a version of "Saint-Jacques" on the label, changes in labelling requirements and the resulting uncertainty about such requirements were also significant factors in the decline. The sharp decline in Canadian scallop exports, especially in 1995 now that exporters must include the term "pétoncles" on the label, cannot be attributed to a supply problem.

29. The EC has compared Canada's fluctuating exports with those of Australia and New Zealand, suggesting that Canada's sharp drop in exports is not unusual given the normal variations in the patterns of trade for this sector. However, Australia and New Zealand experienced well-documented short-term declines in supply that reduced the quantity available to be exported to the French market. Supply is not expected to be a problem for these two

[11] See paragraph 45 of the EC's first written submission.

exporters in 1995, and their earlier decline cannot be attributed to variations in the supply and demand pressures of the French market.

b. Scallops labelled "pétoncles" consistently command a lower price than scallops labelled "coquilles Saint-Jacques"

30. The EC argues that the decline in the value of Canadian scallop exports to France has been less than the decline in the volume of exports.[12] However, prices for Canadian scallops imported into France have not risen as quickly, nor to the same level, as prices for scallops still permitted to use the term "coquilles Saint-Jacques" on their label. Import prices for Canadian scallops did not rise as quickly up to the present time as did prices for scallops still permitted to be labelled "coquilles Saint-Jacques". In fact, in 1995 prices have dropped for Canadian scallops while prices for scallops still using the term "coquilles Saint-Jacques" have continued to rise.

31. Canada's review of retail prices in the French market found that prices of scallops which can no longer use the label "Saint Jacques" (normally these scallops were labelled "noix de Saint-Jacques") have risen less than prices for scallops which can continue to use the term "Saint Jacques", and that scallops which use the term "pétoncles" consistently receive a lower price than scallops which may be labelled "coquilles Saint-Jacques". Thus, the EC's assertion that the label "pétoncles" does not have a negative meaning in the French market cannot be maintained.

B. Legal Arguments

1. The TBT Agreement

32. Canada's first written and oral submissions show that the Order: (a) is a technical regulation and is subject to the TBT Agreement; (b) creates an unnecessary obstacle to international trade, contrary to Article 2.2; and (c) 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.[13]

33. The EC disputes Canada's assertion that the Order is a technical regulation governed by the TBT Agreement, and argues that the Order is not inconsistent with either Article 2.2 or 2.1.

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[12] See paragraph 46 of the EC's first written submission.

[13] See paragraphs 22-56 of Canada's first written submission.

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.[14] 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.[15] 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.[16] 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.[17] 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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[14] See paragraph 51 of the EC's first written submission.

[15] *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.

[16] See paragraph 52 of the EC's first written submission.

[17] See statement by Dr. T. Waller, *supra*, paragraph 9.

to use it) is not subject to the disciplines of the TBT Agreement" is not a reasonable interpretation of the scope of the TBT Agreement.[18] The obligation to use a particular term on a label is connected inextricably to the "definition" of the term or what the term means or is perceived to mean. It is not logical to consider an obligation to label and to affix a trade name to a product separately from the name by which that product is required to be known. Indeed, the EC recognizes implicitly that the two must be considered together where, at paragraph 39 of its first oral submission, it states that the definition of product characteristics that are determined by nature, when combined with an obligation to label a product in a particular manner, falls within the definition of a technical regulation.

b. The Order creates an unnecessary obstacle to trade contrary to Article 2.2

38. Canada showed in its initial written and oral submissions that to determine whether a measure is inconsistent with Article 2.2 a panel must:

i. determine whether the objective of a measure is one that falls within the range of legitimate objectives set out in Article 2.2; and

ii. be satisfied that the measure is not more trade-restrictive than necessary: that is, be satisfied that the measure is rationally connected to and can fulfil the legitimate objective, and that any adverse impact of the measure on the conditions of competition in the domestic market is appropriate and proportionate to the legitimate objective.[19]

39. Canada recognizes generally that all but one (the regulation of trade descriptions) of the stated objectives of the Order fall within the range of legitimate objectives set out in Article 2.2, but has shown that the Order is more trade-restrictive than necessary. In contrast, the EC incorrectly claims that the regulation of trade descriptions is itself a legitimate objective under Article 2.2, and that it is legitimate and justified under the TBT "to ensure that all shellfish do not appropriate the name of a well-known shellfish".[20]

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[18] See paragraph 57 of the EC's first written submission.

[19] See paragraph 26 of Canada's first written submission.

[20] See paragraph 66 of the EC's first written submission.

i. The regulation of trade descriptions is not in itself a legitimate objective

40. Canada recognizes that most of the stated objectives of the Order, such as consumer protection, prevention of fraud and deceptive practices, ensuring fairness in commercial transactions and the protection of language, can fall within the scope of legitimate objectives contemplated under Article 2.2 of the TBT Agreement. However, Canada has shown that one of the stated objectives -- the regulation of trade descriptions -- is simply a means of fulfilling policy objectives and is not a legitimate objective in and of itself within the scope of the TBT Agreement.[21] In contrast, the EC asserts that "ensuring precision in the use of terminology in general and regulating trade descriptions in particular are legitimate objectives in themselves."[22] Moreover, the EC has challenged Canada's evaluation of the elements that can be considered in determining whether a particular government policy objectives constitutes a legitimate objective under the TBT Agreement.

41. Trade descriptions are regulated for the purpose of achieving public policy objectives. States do not regulate trade names simply for the sake of regulating. States regulate trade descriptions *for specific purposes*. For example, trade descriptions might be regulated to provide consumers with accurate information, to prevent deceptive practices, to protect the health and welfare of consumers, or for several other public policy reasons. However, trade descriptions are not regulated in isolation.

42. In fact, the EC's argument supports Canada's position. The EC notes that precision in terminology allows "distinctions" and "choices" to be made.[23] This is simply another way of saying that precision in terminology is necessary *to do something* or *to achieve* some purpose, such as giving people adequate information so that they can make informed choices. Similarly, the EC observes that a consumer can only make an informed decision if provided with adequate information. This means that the objective of providing precision in terminology is *to meet an objective* of providing consumers with such information.[24] The EC's examples establish that the regulation of trade descriptions is a means to an end. Without a separate policy objective, there is no reason to regulate trade descriptions. The regulation of trade descriptions and precision in terminology are not policy objectives and therefore cannot constitute legitimate objectives within the scope of the TBT Agreement.

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[21] See paragraph 31 of Canada's first written submission.

[22] See paragraph 65 of EC's first written submission.

[23] See paragraph 65 of the EC's first written submission.

[24] See paragraph 66 of the EC's first written submission.

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

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[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.

internationally recognized trade description related to a particular species such as "Beluga" (*Huso huso*). Similarly, in the case of labelling *Placopecten magellanicus* "coquilles Saint-Jacques" could be supplemented by "du Canada", or "Placopecten magellanicus" or "noix de Saint-Jacques" followed by either of these terms. Of course, any alternative measure would have to be applied to *all genera* and species of scallops, including all *Pectens*.

c. The Order is inconsistent with the non-discrimination obligation in Article 2.1

48. As noted by both the EC and Canada in their first written submissions, Article 2.1 incorporates the non-discrimination principles set out in GATT Articles III and I. However, as Canada stated in its first oral submission, the non-discrimination principles in the TBT Agreement are broader than those in the GATT. Whereas the non-discrimination principles under the GATT may be interpreted by a panel in the light of the language of the particular Article incorporating the obligation, there is no language in Article 2.1 of the TBT Agreement that qualifies or limits the scope of its non-discrimination obligations.

49. Therefore, although a panel assessing the consistency of a measure with Article 2.1 may be guided generally by the type of analysis that might be conducted under GATT Articles III and I, it is not required to adhere rigidly to the precise form of such analyses. This is relevant to analyses of whether there is discrimination between imported and like domestic products and imported and like imported products, and to an analysis of whether such products are "like", under the TBT Agreement.

2. The GATT 1994

a. Pecten maximus and Placopecten magellanicus are like products

50. The EC has raised two issues regarding the like product analysis proposed by Canada in respect of Articles I and III. The EC argues that: (i) the like product analysis is not the same for Articles I and III; and (ii) Canada has not proposed the relevant criteria for likeness.

i. Contrary to the EC contention, in this case the like product analysis is the same for Articles I and III

51. In this case, the relevant criteria to be taken into account in conducting a like product analysis under GATT Articles I and III include the products' physical characteristics, end-use, tariff classification and treatment, and consumer tastes and preferences.[27]

[27] See paragraph 58 of Canada's first written submission.

52. Different like product analyses may be conducted under different GATT Articles. However, nothing in past GATT practice suggests that WTO dispute settlement panels must adhere rigidly to a particular test applied in respect of a specific Article in an earlier case. Rather, GATT 1947 panels have repeatedly stated that like product analyses are to be conducted on a case-by-case basis. Although one GATT 1947 Panel noted that a like product determination under one GATT Article is "without prejudice" to like product concepts in other GATT provisions as the other provisions *might* have different objectives and which *might* therefore also require different interpretations,"[28] this cannot be interpreted as requiring that different criteria *must* be used in like product analyses conducted under separate GATT Articles. Nothing in past GATT practice precludes a panel from using the same criteria to determine whether two products are like under different GATT provisions.[29]

53. In this case, there is no reason to conduct a different analysis under different Articles where the same measure, the same products, and the same market are at issue. Under Article I, the analysis compares *Pecten maximus* (from countries other than France) to Canadian scallops. The analysis under Article III also compares *Pecten maximus*, this time from France, with Canadian scallops. The products at issue under both Articles I and III are the same. Moreover, the matter in question is the same: this dispute is about the treatment of *Pecten maximus* relative to *Placopecten magellanicus* in the French market. It is the same advantage under both Articles I and III that is being bestowed on *Pecten maximus* that is being denied to *Placopecten magellanicus*.

ii. The context of the like product analysis

54. The regulatory purpose of a measure can form a significant part of the context within which a like product analysis ought to be conducted. The EC argues that the most important criterion to be taken into account is the purpose of the regulatory measure; the purpose of the Order is to name scallops. However, this ignores the relevant criteria established in long-standing GATT practice.

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

[29] GATT 1947 Working Parties and Panels have used a variety of criteria in like product analyses under both Articles I and III of the GATT and typically have not distinguished between criteria to be used in determining whether products were like under GATT Articles III and I. In fact, generally the same criteria have been used for like product analyses under those Articles. *The Australian Subsidy on Ammonium Sulphate*, Report of the Working Party adopted on 3 April 1950, BISD II/188; *Border Tax Adjustments - Report of the Working Party*, Report of the Working Party adopted on 2 December 1970, BISD 18S/97; *EEC - Measures on Animal Feed Proteins*, Report of the Panel adopted on 14 March 1978, BISD 25S/49.

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.[30] 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.[31] This view is contrary to the language in Article III:4 and to past GATT 1947 panel decisions.[32] Past GATT 1947 panels have interpreted Article III:4 broadly, and to adopt the EC

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[30] These criteria include the products' physical characteristics, end-use, tariff classification and treatment, and consumer tastes and preferences.

[31] See paragraph 86 of the EC's first written submission.

[32] 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

argument would significantly narrow the scope of Article III:4 and undermine its utility.

59. For a measure to be covered by Article III:4 it must satisfy two conditions. First, it must be a law, regulation or requirement; and second, it must affect the domestic sale, offering for sale, purchase, transportation, distribution or use of the products in question. GATT 1947 panels have broadly interpreted Article III:4 to apply to laws, regulations and requirements *governing* and *affecting* the conditions of sale or purchase.[33] The Order is a law, regulation or requirement that affects and indeed governs conditions of sale of scallops in the French market. Thus, Article III:4 applies to the Order.

ii. The Order discriminates against imported scallops in favour of domestic scallops

60. The EC asserts that Canada has failed to establish that France intended to discriminate against imported products.[34] The EC argues that as the Order permits *Pectens* of other countries to be labelled "coquilles Saint-Jacques", the Order does not have the effect of discriminating against imported products. These arguments cannot be sustained as both the intent and the effect of the Order have been to discriminate against Canadian scallops. In *United States - Section 337 of the Tariff Act of 1930*, the GATT 1947 panel found that even where a formally identical legal provision is applied to domestic and imported products alike, if in practice the effect of the application of the measure is to accord less favourable treatment to imported products, the

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(G/TBT/W/11) dated 29 August 1995 setting out the "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".

[33] The GATT 1947 Panel in *Italian Discrimination Against Imported Agricultural Machinery* stated that:

> The selection of the word "affecting" would imply, in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.

Report of the Panel adopted on 23 October 1958, BISD 7S/60, paragraph 12.

[34] See paragraphs 93 and 94 of the EC's first written submission.

measure is inconsistent with Article III.[35]

61. The intent of the French Government in implementing the Order was to discriminate against imported products to protect the domestic French scallop industry.

62. The timing of the March 22, 1993 Order, coming as it did after two months of demonstrations by French fishermen and on the eve of a general election in France, is not mere coincidence. The French Minister of Agriculture and the Sea told the fishermen in February of 1993 that he understood their problem with imports and promised that he would take steps to correct the situation. One month later the Order was made.

63. The Order, although it was welcomed by the fishermen, caused problems for another sector of the French economy -- the producers of frozen prepared dishes containing imported scallops. These producers instituted an intensive lobbying campaign and wrote to Ministers and officials of the French government to complain that being required to use the term "pétoncles" which denigrated their product would cause the market for frozen prepared scallop dishes, which had been growing, to collapse.

64. The new French Minister of Agriculture and Fisheries indicated in letters to the producers that he also understood their problem and that he had given instructions to modify the Order. In a letter to another Deputy in August 1993 he wrote that the new text would retain the name "coquilles Saint-Jacques" for the species sold fresh by French fishermen and would permit the name "Noix de Saint-Jacques (Pétoncles)" for the imported product. He stated further that this solution appeared to him to guarantee to the fishermen the name that they had wanted for a long time, guarantee to consumers precise information and guarantee to processors the use of an attractive commercial name. This it was hoped would satisfy both sectors of the French economy. Even the French Prime Minister became involved in the file and wrote a letter stating that the March 1993 Order would be amended in response to the concerns expressed by the French food processors.

65. As might be expected, the modification of the Order made in December 1993 to appease the manufacturers of frozen processed scallop dishes, and as a result of representations made by Canada, was not acceptable to the fishermen who demonstrated again during the months immediately following the adoption of the amended Order.

66. The French Minister of Agriculture and Fisheries wrote in August 1994 that as a result of the response to the December 1993 Order, the Order would be amended again. After the Order was made in October 1994 he explained the reason for making the amendment, saying that

[35] Report of the Panel adopted on 7 November 1989, BISD 36S/345 at paragraph 5.11.

he wanted to take into account the interests of the French shellfish fishermen while at the same time safeguarding the interests of the French food processors. He hoped in so doing to avoid "la dévalorisation des fabrications que craignent les opérateurs économiques." It is significant that the Minister of Agriculture and Fisheries does not mention in either of these letters the need to protect the interests of consumers but only the need to balance the interests of French fishermen and French food processors. There is evidence that the Minister was successful in satisfying the demands of the French scallop fishermen if not those of the French food processors.

67. The EC stated in its first written and oral submissions that there is no evidence that "pétoncles" is perceived in the French market as being associated with a lesser quality product than "coquilles Saint-Jacques" and that "pétoncles" are also much appreciated by consumers. The letters cited above, both from the producers complaining about having to use a term which they consider "dévalorisante" and from the Minister recognizing the difficulty caused to the processors by having to use the term "pétoncles", refute this assertion. It is clear that "pétoncles" is a term "dévalorisante" in France and that that is the reason that imported scallops were required by the Order to be labelled "pétoncles", thereby protecting the French scallops fishery.

68. The effect of the Order has been to discriminate against imported scallops in favour of the like domestic scallops. The impact of the Order has been to ensure that the scallops that are produced in the greatest quantities globally cannot compete on an equal basis with like domestic products.[36] France has attempted to disguise the discriminatory effects of the Order by permitting a small number of imported species that are harvested in much lower quantities to have the same competitive opportunities as the domestic French scallops. France has limited competition in its domestic scallop market by limiting the terms "coquilles Saint-Jacques" and "noix de Saint-Jacques" to *Pectens* thus excluding the large quantities of non-*Pectens* that would otherwise compete directly with the domestic French scallop. Permitting imported *Pectens* to bear the advantageous label, meanwhile, imposes no competitive threat to the domestic French scallop as the world-wide supply of *Pectens* is small.

iii. The Order provides French scallops with competitive opportunities that are denied to Canadian scallops

69. The EC has characterized incorrectly Canada's argument regarding the inconsistency of

[36] *Pectens* comprise less than five per cent of the world scallop harvest, while Canada is the third largest producer of non-*Pecten* scallops.

the Order with GATT Article III:4.[37] Canada does not argue that the "obligation" in Article III:4 is to protect expectations on all competitive relationships. Rather, a fundamental purpose or rationale underlying Article III is to protect the expectations of Members as to the competitive relationship between their products and domestic like products of other Members. One GATT 1947 Panel characterized the objective of Article III, in a manner that parallels the obligation in Article III:4, as "to provide equal conditions of competition once goods had been cleared through customs".[38] It is against the backdrop of this fundamental purpose that the specific obligation in Article III:4 must be viewed: Article III:4 calls for *effective equality of opportunity* in respect of the application of laws, regulations and requirements affecting the conditions of competition between imported products and the like domestic products in the internal market.[39]

70. Article III:4 requires that imported products receive treatment that is no less favourable than that given to the like domestic product. GATT 1947 panels have consistently interpreted this to mean that imported products must be granted competitive opportunities that are no less favourable than those accorded to like domestic products.[40] The denial of competitive opportunities or advantages accorded to the domestic like product constitutes less favourable treatment.[41] Even if the imported product can still be sold in the domestic market, if it "is denied the *full range* of competitive opportunities accorded to domestic like products" the measure in question is inconsistent with Article III:4.[42]

71. In the French market, scallops labelled "coquilles Saint-Jacques" or "noix de Saint-Jacques" command a premium price and are in greater demand than scallops labelled "pétoncles" because consumers consider "pétoncles" an inferior product.[43] *Placopecten magellanicus* scallops labelled with the words "Saint-Jacques" have the same competitive opportunities as *Pecten* scallops. However, if *Placopecten magellanicus* must be labelled "pétoncles", a term

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[37] See paragraphs 87-92 of the EC's first written submission.

[38] *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 at paragraph 5.5(c).

[39] *Supra*, note 35, at paragraphs 5.11-5.13.

[40] *United States - Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel adopted on 19 June 1992, BISD 39S/206, at paragraph 5.30.

[41] *Ibid.*, at paragraph 5.31.

[42] *Ibid.*, at paragraph 5.34, emphasis added.

[43] See paragraph 18 of Canada's first written submission.

that denies it the full range of competitive opportunities that are available to the like domestic scallops labelled "coquilles Saint-Jacques", it would receive less favourable treatment than the like French scallops. The Order is therefore inconsistent with Article III:4.

c. The Order accords scallops from other countries an advantage not accorded to like Canadian scallops contrary to Article I:1

72. The EC argues that Article I:1 does not oblige a country to permit a product to use a particular trade name if that product is not the "same" as other imported products that are permitted to use that trade name. Canada notes that Article I:1 applies to "like", not "identical" or "same", products. As the products at issue in this case are like, Article I:1 does impose an obligation that any advantage accorded to imported *Pecten maximus* must be given immediately to the like Canadian product, *Placopecten magellanicus*.

73. The EC argues that the objective of Article I:1 cannot be used to force France to permit *Placopecten magellanicus* to continue to profit by using a trade name that has a favourable reputation in the French market.[44] However, this is exactly what Article I:1 requires in this case. As stated by the GATT 1947 Panel in *United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, Article I:1

> ... clearly prohibits 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.[45]

74. By the EC's own admission, there is a benefit or "profit" accorded to scallops that are permitted to be labelled "coquilles Saint-Jacques" or "noix de Saint-Jacques".[46] As such scallops have a significant competitive advantage over scallops labelled with the pejorative term "pétoncles", the Order grants *Pecten maximus* from other countries an advantage not given to *Placopecten magellanicus*.

d. Article XX(d)

75. The EC argues that if the Order is inconsistent with one or both of GATT Articles III:4

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[44] See paragraph 106 of the EC's first written submission.

[45] Report of the Panel adopted on 19 June 1992, BISD 39S/128, at paragraph 6.11.

[46] See paragraph 106 of the EC's first written submission.

and I:1, it is justifiable under the general exception in GATT Article XX(d).[47] However, the EC's argument fails to take into account the fact that GATT 1947 panels have construed Article XX narrowly, placing the burden on the party invoking an exception to justify its application.[48] The EC has not met its burden of proof in this case.

76. Several conditions must be satisfied to justify under Article XX(d) a measure that is otherwise inconsistent with the GATT, namely:

i. there must be a law or regulation that is not GATT-inconsistent requiring enforcement;

ii. the measure in question must be "necessary" to secure compliance with that law or regulation; and

iii. the measure must not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and must not constitute a disguised restriction on international trade.

Each of these conditions must be met if an inconsistency with another GATT provision is to be justified under Article XX(d).[49] A measure that fails to meet any one of these conditions cannot be justified under Article XX(d).[50]

(i) The EC has failed to identify a GATT-consistent law or regulation requiring enforcement

77. For the EC to establish that the Order meets the first condition under Article XX(d), it would have to establish that there is a GATT-consistent law or regulation that requires enforcement, and with which the Order would secure compliance.[51] The GATT 1947 Panel in *European Economic Community - Regulation on Imports of Parts and Components* stated that

> Article XX(d) covers only measures related to the enforcement of

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[47] See paragraph 109 of the EC's first written submission.

[48] *Supra*, note 40, at paragraph 5.41.

[49] *Supra*, note 35, at paragraphs 5.22-5.23.

[50] *Ibid.*

[51] *European Economic Community - Regulation on Imports of Parts and Components*, Report of the Panel adopted 16 May 1990, BISD 37S/132.

> obligations under laws or regulations consistent with the General Agreement.[52]

The Panel determined that Article XX(d) covers only measures to secure compliance with laws and regulations, but does not cover measures to secure compliance with the objectives of those laws and regulations.[53] Moreover, the measure must be able to actually enforce the obligation requiring compliance.[54]

78. This is particularly relevant to this case, as the EC argues that the Order is required to secure compliance with laws or regulations relating to the prevention of deceptive practices.[55] The only underlying law or regulation that the EC has put forward is the Order itself. There are two reasons why the Order cannot be used to justify the labelling requirement. First, the prevention of deceptive practices is an objective of the Order rather than an obligation set out in the Order, and Article XX(d) does not cover measures to secure compliance with the objectives of laws or regulations. Second, as there is no underlying obligation in the Order requiring enforcement except the labelling requirement itself, the allegedly Article XX(d)-consistent measure is the very provision that is GATT-inconsistent.

79. In sum, for the EC to meet the first condition under Article XX(d), it would have to establish that there is a law or regulation that is not GATT-inconsistent *other than the GATT-inconsistent Order* that requires enforcement and with which the Order can secure compliance. The EC has not advanced, in either its first oral or written submissions, any such law or regulation.

ii. The Order is not necessary to secure compliance

80. Even if it could be established that there is a GATT-consistent law or regulation that requires enforcement, the Order would not be "necessary" to secure such compliance. A measure is necessary under Article XX(d) if it is the least trade-restrictive measure available to

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[52] *Ibid.*, at paragraph 5.18.

[53] *Ibid.*, at paragraph 5.16.

[54] *Ibid.*, at paragraph 5.18, where the Panel noted "that the anti-circumvention duties do not serve to enforce the payment of anti-dumping duties. The Panel could, therefore, not establish that the anti-circumvention duties 'secure compliance with' obligations under the EEC's anti-dumping regulations."

[55] See paragraph 110 of the EC's first written submission.

secure compliance and if any less restrictive measures are not sufficient.[56]

81. The EC has failed to discharge its burden of proof of showing that the GATT-inconsistent Order is the least trade-restrictive measure available to secure such compliance. Even if it could be shown that the Order could actually enforce compliance with a GATT-consistent law or regulation, there are other less trade-restrictive alternatives reasonably available to France.[57]

iii. The Order is a means of arbitrary and unjustifiable discrimination, and is a disguised restriction on trade

82. The Panel must find that the Order is a means of arbitrary or unjustifiable discrimination if it determines that the Order is only directed to imports of scallops from certain countries rather than to such imports from *all* countries where the same conditions prevail.[58] The Panel must also find that the Order is a disguised restriction on trade if it determines that, although the Order does not on its face purport to restrict trade, it has the effect of restricting trade. In conducting these assessments under Article XX(d), the Panel must examine the manner in which the measure is applied.[59]

83. The Order is a means of arbitrary and unjustifiable discrimination as it is not directed against scallops from all countries where the same conditions prevail. Rather, the Order arbitrarily discriminates against imports of scallops from a number of countries including Canada. Scallops from countries such as Australia and New Zealand are permitted to be labelled "coquilles Saint-Jacques" while scallops from Canada must be labelled "pétoncles". There are no relevant conditions that are different between Canada and other countries permitted to label their scallops "coquilles Saint-Jacques" in the French market. This discrimination is unjustifiable as the Order cannot be supported by international labelling practices, scientific classification, scientific analytical methodologies such as electrophoresis, or most importantly, the criteria that normally are relevant to consumers.

84. The Order is also a disguised restriction on trade. Although it does not impose an import ban, a quota, or any other quantitative restriction, the application of the Order has the effect of restricting imports of Canadian scallops into France. France has attempted to disguise both

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[56] *Supra*, note 40, at paragraph 5.52.

[57] *Supra*, paragraph 47.

[58] *United States - Imports of Certain Automotive Spring Assemblies*, Report of the Panel adopted on 26 May 1983, BISD 30S/107, at paragraph 55.

[59] *Ibid.*, at paragraph 53.

the intent and the effect of the Order by permitting a small quantity of foreign species to use the term "coquilles Saint-Jacques". However, France intended the Order to have the effect of limiting imports of scallops from Canada and other countries.[60]

3. Nullification or Impairment

85. In the guise of asking the Panel to make a ruling on a "procedural" issue, the EC is also requesting a finding on a substantive issue. It argues that "[T]he absence of a clear reference to Article XXIII:1(b) also cannot be squared with the requirement of Article 26:1(a) of the DSU which enjoins the complaining party to present 'a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement.'"[61] Whether Canada has fulfilled the requirements of Article 26(1) of the DSU is a matter to be decided by the panel on the basis of all the information presented to it in both the first and second written and oral submissions.

86. The EC has made two separate and distinct allegations in respect of non-violation nullification or impairment:

a. first, that Canada has failed to raise properly non-violation nullification or impairment as it was not set out specifically in the consultations and the request for the establishment of a panel; and

b. second, that Canada has failed to satisfy the conditions of Article 26(1) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU").

87. The first allegation is a procedural argument, while the second allegation is a substantive argument. The two arguments must be considered separately, although the substance of the non-violation nullification or impairment argument need not be addressed unless the Panel determines that the Order is consistent with the provisions of the GATT and the TBT Agreement.[62]

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[60] *Supra*, paragraphs 61-68.

[61] See paragraph 7 of the EC's first written submission.

[62] GATT 1947 panels have not found it necessary to examine claims of non-violation nullification or impairment where the impugned measure was found inconsistent with one or more other provisions of the GATT as nullification or impairment is presumed where violation occurs.

a. Canada has raised properly non-violation nullification or impairment

88. As noted in its first oral submission, Canada raised nullification or impairment in its request for consultations dated May 19, 1995 (WT/DS/7/1), and in its request for the establishment of a panel dated July 7, 1995 (WT/DS/7/7). For example, in its request for consultations, after referring to nullification or impairment following a statement that the Order could not be justified under the WTO Agreement, Canada specifically noted that:

> De plus, le dommage économique important que l'Arrêté cause au Canada, par rapport à ses attentes raisonnable, constitue également une annulation et une réduction.

89. Also, Canada raised generally all of its legal claims, including its claim of nullification or impairment, in its request for the establishment of a panel. The EC misinterprets of the meaning of the word "and" in subparagraph (iii) of Canada's request for the establishment of a panel. If Canada had intended to state that it was only raising nullification or impairment in respect of the presumption arising from the Order's inconsistency with the WTO Agreement, it would have stated so precisely. Rather, in keeping with Article 6(2), Canada provided a brief summary of the legal basis of the complaint -- namely, that the Order is inconsistent with GATT Articles I and III, Article 2 of the TBT Agreement, and nullifies or impairs benefits accruing to Canada under the WTO Agreement.

90. In any event, there is nothing in the DSU that requires non-violation nullification or impairment to be raised separately from nullification or impairment generally in consultations or in the request for the establishment of a panel. Similarly, there is nothing in the DSU requiring that non-violation nullification or impairment must be argued in the alternative.[63]

91. Moreover, Article 7(2) of the DSU provides that panels must address the "relevant provisions" in any covered agreement "cited by the parties to the dispute". Clearly, Canada

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[63] To the contrary, Article 4(4) of the DSU provides that requests for consultations

> ... shall give the reasons for the request, including identification of the measures at issue and *an indication* of the legal basis for the complaint.

Similarly, Article 6(2) of the DSU provides that requests for the establishment of a panel:

> ... indicate whether consultations were held, identify the specific measures at issue and provide a *brief summary* of the legal basis of the complaint sufficient to present the problem clearly.

cited Article XXIII:1 in its request for consultations and in its request for the establishment of a panel.

92. The two cases cited by the EC in support of its position do not contradict Canada's view. First, the panel in *EC - Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil*, in finding that Brazil had not "specified" one of its claims, noted that the claim was not expressly referred to *anywhere* in the request for the establishment of a panel.[64] Similarly, in *United States - Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, the panel noted the complete absence of any reference to an allegation of a denial of national treatment in the document referring the matter to the panel.

93. In each case it was the total absence of any reference whatsoever to the claims subsequently made before the panel that led to a determination that the claims was not within the panel's terms of reference. In this case, however, Canada referred to its nullification or impairment claim in its request for consultations and its request for the establishment of a panel. As confirmed by the Panel in *EC - Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil*, Canada did not have to advance individually all arguments to be made in respect of nullification or impairment in order to make specific arguments in respect of that claim in its first written and oral submissions.[65]

b. Canada has satisfied the conditions of non-violation nullification or impairment

94. In response to the EC's assertion that Canada should provide a more detailed non-violation nullification or impairment complaint, Canada has already stated in its first written submission that there are three basic conditions for determining whether a case of "non-violation" nullification or impairment exists, including:

i. existence of a concession or other obligation e.g. the negotiation of a tariff concession;

ii. the subsequent introduction of a government measure that upsets the competitive relationship between the domestic product with regard to like or directly competitive imported product; and

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[64] Report of the Panel dated 4 July 1995, ADP/137.

[65] The EC conceded that "not all arguments made in support of claims identified in the document requesting the establishment of a panel had to be identified in the document requesting the establishment of a panel." *Ibid.*, paragraph 454.

iii. the government measure could not have been reasonably anticipated at the time of the negotiation of the tariff concession.[66]

i. Negotiation of a tariff concession

95. The EC tariff rate for scallops (tariff items 0307.21 and 0307.29 in the EC tariff schedule) was first bound at eight per cent in 1964 and has not been altered since. The tariff rate is the same for all scallops of all species. At the time the tariff was bound and until 1993, Canada's exports of *Placopecten magellanicus* to France were permitted to be labelled "noix de Saint-Jacques".

ii. The Order has upset the competitive relationship between domestic French and imported Canadian scallops

96. Prior to the French Order entering into force in 1993, *Pectens* and *Placopecten magellanicus* could both bear labels containing the words "Saint-Jacques". The products competed directly with each other and consumers perceived them to be of equal quality and value. Prepared food products containing scallops could use the words "Saint-Jacques" on the label whether *Pectens* or *Placopecten magellanicus* were used. The French industry considered the scallops to be of the same value and indistinguishable for the purposes for which they were used.

97. Under the Order Canadian scallops are required to be labelled "pétoncles", a term that French consumers consider to be inferior to a product labelled with the term "Saint-Jacques". Shucked and frozen "pétoncles" command a significantly lower price and are in much less demand than scallops labelled "coquilles Saint-Jacques" or "noix de Saint-Jacques". This 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" cannot compete effectively in the market, and manufacturers of such products will not use a product that is perceived negatively by consumers.

98. Moreover, the Order (and 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 Canadian scallops. This has led to generally lower sales and

[66] *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.

higher costs for Canadian exporters who have had to make several packaging changes and have had to export in smaller lot sizes.

99. Prior to the Order, Canadian scallops could be labelled with a term that did not place them at a competitive disadvantage to like domestic and imported scallops. France had treated *Pectens* and *Placopecten magellanicus* in the same manner; neither species of scallop received better treatment than the other and they competed on an equal basis. Under the Order, however, Canadian products are subjected to regulatory conditions that have upset the competitive relationship between *Pecten maximus* and *Placopecten magellanicus* that had existed for many years, even prior to the binding of the tariff in 1964.

iii. The government measure could not have been reasonably anticipated at the time of the negotiation of the tariff concession

100. Canada disagrees with the EC's assertion that the only reasonable expectation that Canada could have had at the time the tariff was bound for scallops was that France and the EC would observe the provisions of the TBT Agreement and GATT Article III.[67] This is a misstatement of the concept of reasonable expectation. If at the time a tariff binding is negotiated two products are grouped together and are treated uniformly by an importing Member, that exporting Member should be able to reasonably expect the continuation of the same treatment for the two products.[68] In other words, the reasonable expectation that a Member may have when a tariff is bound is that the importing Member will not undermine the value of the tariff concession by taking unilateral action that upsets the competitive relationship between the products in question.[69] Indeed, such a reasonable expectation may be assumed.[70]

101. As Canada could not have reasonably foreseen at the time the tariff binding was negotiated that France would take steps to undermine the value of that binding through the unilateral imposition of an unnecessary internal labelling requirement, the benefits of that tariff concession have been nullified or impaired.

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[67] See paragraph 118 of the EC's first written submission.

[68] *The Australian Subsidy on Ammonium Sulphate*, Report of the Working Party adopted on 3 April 1950, BISD II/188.

[69] *Treatment by Germany of Imports of Sardines*, Report of the Panel adopted on 31 October 1952, BISD 1S/53, at paragraph 16.

[70] Working Party on "Other Barriers to Trade", Report of the Working Party at the 1954-55 Review Session noted by the Contracting Parties on 16 February 1955, 3S/77.

III. CONCLUSION

102. Canada requests the Panel to find that the provisions of the Order discussed above are not consistent with France's or the EC's obligations under the WTO Agreement, and that the Order nullifies or impairs benefits accruing to Canada under that Agreement whether or not the Order is found inconsistent with the WTO Agreement. Canada requests that the Panel recommend that France and the EC ensure that the Order is brought into conformity with their obligations under the WTO Agreement.