

European Communities – Trade Description of Sardines
(DS231)

Oral Statement of the United States at the
Third Party Session with the Panel

November 28, 2001

1. Madam Chair, members of the Panel, the United States appreciates the opportunity to appear before you today. We wish to make only a few points on the issues in this dispute. Based on the facts and arguments presented by the parties and third parties, the United States believes that the measure at issue is inconsistent with TBT Agreement Article 2.4. However, the United States disagrees in part with the reasoning presented by Peru and Canada in reaching this conclusion.

2. In particular, we believe that there is no reversal of the burden of proof with respect to certain elements set forth in Article 2.4 (nor those set forth in Article 2.2). The reasoning of the Appellate Body with respect to analogous provisions of the SPS Agreement would appear to us to apply with equal force here. The complaining party bears the burden of showing that the international standard is not an ineffective and inappropriate means for the fulfillment of the legitimate objective.

3. Having said this, we believe that, based on the record presented, the EC measure breaches Article 2.4. The TBT Agreement applies in full to technical regulations in place on or after January 1, 1995, regardless of whether the regulation was put in place before that date. In

addition, we believe it is clear that the Codex standard is a relevant international standard, and that the EC measure is not “based on” that standard. To the contrary, the EC measure prohibits the application of the portion of the standard relating to the species at issue here, as well as several other species. Finally, there is no reason why application of the standard, in particular permitting other species to be marketed as “X” sardines, would be an ineffective or inappropriate means for meeting the EC’s stated objectives of consumer protection, transparency and fair competition. There is ample evidence indicating that the EC measure, if anything, undermines the EC’s objectives, since European consumers have in fact come to know the Peruvian product as a form of sardine, and will likely be confused by the use of other names. Indeed, the use of a proper descriptor prior to the term “sardine,” as provided for in the international standard, appears to be a very effective means of assuring transparency and protecting the consumer.

4. The United States also wishes to endorse Peru’s request that the Panel exercise judicial restraint upon finding that the EC measure breaches Article 2.4, and not reach Peru’s other claims. Panels should address those claims necessary to resolve the dispute, and, as Peru recognizes, that can be accomplished through consideration of Article 2.4 alone.

5. Finally, the United States wishes to express its view that the Panel should refrain from offering a specific suggestion on how the EC should comply in this case. This case is not extraordinary in this regard, and the EC, like other Members, has the right to determine how it will bring its measure into compliance.