EC - Sardines (2002)
And a word about standards
Three issues

use! (2.4) explain / presumption (2.5) participation (2.6)
A Case Study
EC - Trade Description of Sardines (Peru)

(first TBT case)
EC - Sardines (2002)

World Trade Organization

WT/DS231/AB/R
26 September 2002

(02-5137)

EUROPEAN COMMUNITIES – TRADE DESCRIPTION OF SARDINES
AB-2002-3

Original: English
## EC - Sardines (2002)

<table>
<thead>
<tr>
<th>Description of Sardines</th>
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<tbody>
<tr>
<td>European Communities,</td>
<td>Bacchus, Presiding Member</td>
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<tr>
<td>Appellant</td>
<td>Abi-Saab, Member</td>
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<td>Peru, Appellee</td>
<td>Baptista, Member</td>
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<th>Third Participant</th>
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<td>United States, Third Participant</td>
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### Timeline

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The measure at issue
This dispute concerns the name under which certain species of fish may be marketed in the European Communities.
Article 2 of the EC Regulation:

“Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
- they must be prepared exclusively from fish of the species "Sardina pilchardus Walbaum";
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
- they must be sterilized by appropriate treatment.”
Only products prepared exclusively from fish of the species "Sardina pilchardus Walbaum" may be marketed as preserved sardines in the EC;
Sardina pilchardus Walbaum ("Sardina pilchardus")

found mainly:
- around the coasts of the Eastern North Atlantic Ocean
- the Mediterranean Sea
- in the Black Sea
Peru

- Peru exports preserved products prepared from *Sardinops sagax sagax* ("Sardinops sagax").

- This species is found mainly in the Eastern Pacific Ocean, along the coasts of Peru and Chile.
EC: Sardina pilchardus

... only Sardina pilchardus may be marketed as preserved sardines in EC (Article 2)

Peru: Sardinops sagax
Is this a TBT measures - or SPS?
Is it a “technical regulation”? 
Technical Regulation

“Document 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.”

TBT Agreement, Annex 1, para 1
Technical Regulation

document
which lays down
product characteristics
or
their related
processes and production methods
with which compliance is mandatory
...

TBT Agreement, Annex 1, para 1 (words)
The EC Regulation:

Does it apply to an identifiable product or group of products?

Does it lay down product characteristics?

Is compliance mandatory?

Yes
What should Peru do?
Sardina Pilchardus

Sardinops Sagax
Peru’s claims

- Peru argued that the EC Regulation is inconsistent with
  - Articles 2.4, 2.2 and 2.1 of the TBT Agreement
  - Article III:4 of the GATT 1994
Peru’s claim

- Peru argued that the EC Regulation is inconsistent with
  - Articles 2.4, 2.2 and 2.1 of the TBT Agreement
  - Article III:4 of the GATT 1994

Panel considered Article 2.4 only
Peru’s claim

EC Regulation \(\times\) TBT Article 2.4
Article 2.4 of the TBT Agreement
2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations ...."
“2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations ....”
“2.4 ... except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”
Four key questions

Does a relevant international standards exist?

If so, has this standard been used as a basis for the measure at issue?

Was it a situation where the relevant standard would be and "ineffective or inappropriate means" of fulfilling the legitimate objective?

What was the nature of the "legitimate objective" pursued?
(i) Does a relevant international standard exist?
Does an international standard exist?

Is it a relevant standard?
• Standard adopted 1978

• For preserved sardines and sardine-type products

• Regulates matters such as presentation, essential composition and quality factors, food additives, hygiene and handling, labelling, sampling, examination and analyses, defects and lot acceptance

• From 21 fish species
Does an international standard exist?

*Is it a relevant standard?*
EC claim on “consensus” (1st)

Only standards that have been adopted by consensus are “relevant”.
EC claim on “consensus” (1st)

Definition and explanatory note on “Standard”

“.... For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.
EC claim on “product coverage” (2\textsuperscript{nd})

Codex Stan 94 is not a "relevant international standard" because its \textit{product coverage} is different from that of the EC Regulation.
Coverage of Codex Standard
(21 fish species)

*Sardinina pilchardus*
*Sardinops melanostictus, S. neopilchardus, S. ocellatus, S. sagax*, S. caeruleus
*Sardinella aurita, S. brasiliensis, S. maderensis, S. longiceps, S. gibbosa*
*Clupea harengus*
*Sprattus sprattus*
*Hyperlophus vittatus*
*Nematalosa vlaminchi*
*Etrumeus teres*
*Ethmidium maculatum*
*Engraulis anchoita, E. mordax, E. ringens*
*Opisthnonema oglinum.*
“... although the EC Regulation expressly mentions only Sardina pilchardus, it has legal consequences for other fish species that could be sold as preserved sardines, including preserved Sardinops sagax.”
Does an international standard exist?

Is it a relevant standard?

YES
(ii) Was the Codex Standard used as a basis for the measure at issue?
The heart of Article 2.4

“the heart of Article 2.4 of the TBT Agreement is a requirement that Members use international standards as a basis for their technical regulations”

(para. 274)
6. LABELLING

6.1 NAME OF THE FOOD
The name of the product shall be:

6.1.1 (i) "Sardines" (to be reserved exclusively for Sardina pilchardus (Walbaum)); or

(ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

(Codex Alimentarius (Secretariat of the Joint FAO/WHO Food Standards Programme, 2001), Volume 9A, Fish and Fishery Products, pp. 75-81)
EC’s argument
(as summarized in AB)

“substantial relationship”

the relevant part of Codex Stan 94 is section 6.1.1(ii)!
Peru’s argument:
(as summarized in AB)

the relevant part of Codex Stan 94 is section 6.1.1(ii)!
6. LABELLING

... 

6.1 NAME OF THE FOOD
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(Codex Alimentarius (Secretariat of the Joint FAO/WHO Food Standards Programme, 2001), Volume 9A, Fish and Fishery Products, pp. 75-81)
(ii) "Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce en conformité des lois et usages du pays où le produit est vendu, de manière à ne pas induire le consommateur en erreur.
The heart of Article 2.4

“the heart of Article 2.4 of the TBT Agreement is a requirement that Members use international standards as a basis for their technical regulations”

(para. 274)
Meaning of “as a basis for”

Similar issue in EC-Hormones

Very strong, very close relationship

At a minimum, no contradiction!
Thus, the EC Regulation and Codex Stan 94 are manifestly contradictory.
To us, the existence of this contradiction confirms that Codex Stan 94 was not used "as a basis for" the EC Regulation."
Was it a situation where the relevant standard would be and “ineffective or inappropriate means” of fulfilling the legitimate objective?
The requirement to use international standards is not absolute.

(para. 274)
In Sardines, this was for Peru to prove the claim

The AB concluded that it was for Peru to establish that Codex Stan 94 was effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

(para. 275, 282)

Did Peru do so? Yes

But why is the burden on Peru?
(iv) What was the nature of the legitimate objective pursued?
Legitimate objective

“The European Communities argues that the objectives pursued by Article 2 of the EC Regulation are consumer protection, market transparency and fair competition and that these are separate but interdependent objectives.”

(Panel Report, para. 4.60)

Legitimacy of objectives not disputed by Peru

(Panel Report, para 7.122)
national security requirements;
the prevention of deceptive practices;
protection of human health or safety, animal or plant life or health, or the environment.

(examples of legitimate objectives explicitly mentioned in TBT Agreement)
Summing up on Article 2.4

yes
Does a relevant international standards exists?

no
If so, has this standard been used as a basis for the measure at issue;

no
Was it a situation where the relevant standard would be and "ineffective or inappropriate means" of fulfilling the legitimate objective?

(not an issue)
What was the nature of the "legitimate objective" pursued.
The EC Regulation was found inconsistent with Article 2.4 of the TBT Agreement
mutually agreed solution
EC Regulation No 1181/2003 of 2 July 2003 amending Council Regulation No 2136/89 laying down common marketing standards for preserved sardines

WT/DS231/18
29 July 2003
Mutually Agreed Solution

Notified to WTO in July 2003

“Preserved sardines” means products prepared from fish of the species *Sardina pilchardus* (« European Sardine »)

Preserved “*sardine-type products*” means products prepared from the other 20 species, including *Sardinops sagax*
Mutually Agreed Solution
Notified to WTO in July 2003

WT/DS231/18
29 July 2003

Preserved sardine-type products may be marketed in the EC under a trade description consisting of the word 'sardines' joined together with the scientific name of the species

“Sardines - Sardinops sagax”
What are the lessons?
Small country v.s. big, participate!, role of Codex, science / politics... Article 2.4! (shall use)
A few points - no real order ...
Why?
Compatibility/ Interoperability
Minimum Quality/ Safety
Variety Reduction
Benefits are difficult to quantify
Role of the WTO? (and TBT)
WTO ↔ standards

Definitions

Standards

WTO

Other
WTO ↔ standards

- Standards
  - Definitions
  - Who sets?

WTO

Other
Does WTO set standards?
WTO ↔ standards

- WTO
- Other
- WTO?

Definitions

Who sets?

Standardizing bodies
Standardizing bodies

- Central government bodies
- Local government bodies
- Non-governmental bodies
- Governmental regional standardizing bodies
- Non-governmental regional standardizing bodies

Code of Good Practice – Paragraph B
WTO ↔ standards

Standards
- Disciplines
  - On standardizing bodies
    - On WTO Members
- Definitions
- Who sets?
  - WTO
  - Other
  - WTO?
  - Standardizing bodies
On Members

- Members shall use relevant international standards, guides or recommendations as a basis for technical regulations and conformity assessment procedures (TBT 2.4)

- Rebuttable presumption (TBT 2.5)

- Participation in the work of international standardizing bodies (TBT 2.6)
WTO ↔ standards

- Standards
  - Disciplines
    - On standardizing bodies
    - On WTO Members
  - Who sets?
  - Definitions
    - WTO
    - Other
    - WTO?
    - Standardizing bodies
Which international standards?

• The TBT Agreement leaves each Member with the choice to decide which international standard is “relevant” in a particular situation,

• And the SPS Agreement?
Standard-setting organizations

- **food safety**: CODEX
- **animal health**: OIE
- **plant health**: IPPC

**Codex** = Joint FAO/WHO Codex Alimentarius Commission
**OIE** = World Organisation for Animal Health
**IPPC** = International Plant Protection Convention (FAO)
TBT Agreement contains separate disciplines for “standardizing bodies”. These are set out in the Agreement’s Code of Good Practice (CGP)

(Annex 3 of the TBT Agreement)
Disciplines on “standardizing bodies”
(Article 4, and Annex 3 on the CGP)

Substantive provisions in CGP ≈ main body of TBT Agreement

non-discrimination
avoidance of unnecessary barriers to trade
use / participation international standards
transparency / consultation
# TBTC Decision on International Standards

*(Nov 2000)*

<table>
<thead>
<tr>
<th>WORLD TRADE</th>
<th>G/TBT/9</th>
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<td>13 November 2000</td>
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Committee on Technical Barriers to Trade

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Set of principles Members considered important for international standards development.
TBTC Decision on International Standards
(Nov 2000)

- Improve the quality of international standards
- Ensure the effective application of the Agreement
- Clarify and strengthen the concept of international standards under the Agreement
- Contribute to the advancement of its objectives
Principles:
- transparency
- openness
- impartiality and consensus
- relevance and effectiveness
- coherence and
- development dimension
WTO ↔ standards

- Participation
  - Play full part ...
- Disciplines
  - On standardizing bodies
  - On WTO Members
- Definitions
- Who sets?
  - WTO
  - WTO?
  - Standardizing bodies
  - Other
Points of tension
(1) To name or not to name?
Structure of NAMA NTB Package

Current Framework

- Transparency
- Conformity Assessment
- International Standards

Plus

- Framework
- Autos
- Chemicals
- Electronics
- Textiles Labelling

WAGON 1

- TBT-Related

WAGON 2

- Other

- The Legal Texts
  The Results of the Uruguay Round of Multilateral Trade Negotiations

- Horizontal Mechanism
- Remanufactured Goods

- Export Licensing
- Export Taxes
- Unilat. Trade Measures

- Fireworks
- Forestry Products
- Lighters
standstill since
Obligation

“shall use”
(international standards)

Flexibility

“relevant”, “as a basis”, “appropriate”, “effective”, special and differential treatment...
(2) not always clear
(3) How to use the standard in regulation?
(4) How does the regulator know that it will achieve the desired regulatory objective (risk of “non fulfilment”)?
(5) What if there is no one obvious international "candidate" standard (coherence)?
(6) No international standard (new technology, lack of multilateral cooperation)