

**European Communities—Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002.** European Communities, Appellant; Peru, Appellee; Canada, Chile, Ecuador, United States and Venezuela, Third Participants. Division: Bacchus, Abi-Saab, Baptista. **Major Topics Addressed by the Appellate Body: Definition of “technical regulation” under the TBT Agreement; Definition of “relevant international standard” under the TBT Agreement; Article 2.4 of the TBT Agreement; Allocation of burden of proof under Article 2.4 of the TBT Agreement; *Amicus Curiae* Briefs.**

## 1. Abstract

Interestingly, Morocco, a member state, was permitted to file an *amicus* brief. The Appellate Body seems to have determined that the fact that there are specific provisions in the DSU regarding the participation by third states does not lead to a conclusion that those provisions are *exclusive*. The Appellate Body rejected the argument that Article 2.4 of the TBT Agreement applies only to technical regulations that come into force after the TBT Agreement came into force. With respect to the allocation of the burden of proof under Article 2.4 of the TBT Agreement, the Appellate Body followed its *Hormones* precedent in determining that the “general rule-exception” approach is not viable, and that it is for the complaining state to make the case of violation, including the ineligibility for exception. The Appellate Body determined that even standards that are not adopted by standard setting bodies through consensus may be “relevant international standards” under the TBT Agreement.

## 2. Facts

This case addressed a European Communities regulation establishing common marketing standards for preserved sardines (the “EC Regulation”). The EC Regulation provided that only *Sardina pilchardus Walbaum* may be marketed under the name “sardines.” Peru produced and exported products of the species *Sardinops sagax*. These species are different, but have certain similarities. The former is mostly found in the Eastern North Atlantic and Mediterranean, while the latter is found in the Eastern Pacific. A Codex Alimentarius standard, Codex Stan 94, reserves the name “sardines,” used alone, for *Sardina pilchardus Walbaum*, but allows other species, such as *Sardinops sagax*, to be referred to, *inter alia*, as “X sardines” of a country, “in a manner not to mislead the customer.”

## 3. Analysis of the Appellate Body Report

Peru argued that the EC Regulation violated Articles 2.1, 2.2 and 2.4 of the TBT Agreement and Article III:4 of GATT. The panel had found that the EC measure violated Article 2.4, and so did not examine the other issues.

There were several interesting procedural issues, including the question of whether member states (Morocco) were permitted to file *amicus* briefs. A “procedural” issue with great substantive importance was the question of the “retrospective” application of Article 2.4 of the TBT Agreement: whether the TBT Agreement applies to regulations existing prior to January 1, 1995. A second “procedural” issue was the allocation of the burden of proof under Article 2.4. This is similar to a critical issue in the *Hormones* decision: whether the failure to use international standards shifts the burden of proof to the respondent.

The Appellate Body also considered the definition of “technical regulation” in Annex 1.1 of the TBT Agreement, as well as the definition of “relevant international standard” under Article 2.4.

#### a. Amicus Briefs

Morocco had submitted an *Amicus* brief to the Appellate Body. The Appellate Body recalled its jurisprudence in the *U.S.—Shrimp*<sup>1</sup> and *U.S.—Lead and Bismuth Steel II*<sup>2</sup> decisions. The Appellate Body found that it had broad authority to accept *Amicus* briefs. However, individuals and NGOs have no *right* to submit or have considered their briefs. Here, Peru argued that Morocco, by submitting an *amicus* brief, circumvented the DSU provisions relating to third party submissions: Articles 10.2 and 17.4. The Appellate Body responded to the effect that these provisions are not the *exclusive* means by which a WTO member may participate. This is a corollary, in essence, of the position taken earlier by the Appellate Body, to the effect that these provisions relating to third party participation were not exclusive in the sense of excluding private persons from submitting *amicus* briefs. These positions raise questions about the way that the Appellate Body uses the *expressio unius* canon of interpretation. The Appellate Body seems to decline to draw negative inferences from positive treaty statements.<sup>3</sup>

The Appellate Body distinguishes third participants under articles 10 and 17.4: these member states have a *right* to be heard, while *amici* do not.<sup>4</sup> The acceptance of an *amicus* brief is a matter of discretion. The Appellate Body concluded that, as Morocco’s brief was largely devoted to matters of fact, which are not subject to appeal, it would ignore most of the brief.

#### b. Definition of “Technical Regulation”

The European Communities argued that the EC Regulation was not a technical regulation in respect of *Sardina pilchardus Walbaum* and not in respect of *Sardinops*

<sup>1</sup> WT/DS58/AB/R, adopted 6 November 1998.

<sup>2</sup> WT/DS138/AB/R, adopted 7 June 2000.

<sup>3</sup> See Appellate Body Report, para. 165.

<sup>4</sup> Appellate Body Report, para. 166.

*sagax*. Here, the Appellate Body agreed with the panel<sup>5</sup> to the effect that, under the *Asbestos* jurisprudence, the products covered need only be identified, and may be addressed in either a positive or negative way, to be included within a technical regulation. The Appellate Body rejected the European Communities' argument that the EC Regulation did not identify *Sardinops sagax* as irrelevant to the question of whether the EC Regulation *negatively* regulated *Sardinops sagax* by prohibiting its labeling as sardines.

#### c. Coverage of Pre-Existing Technical Standards under TBT Agreement

The EC Regulation, and the Codex Stan 94 standard on which it was based, both predated the 1995 TBT Agreement. Here, the EC did not argue that the TBT Agreement does not apply to continuing measures. Rather, the EC argued that there is no ongoing obligation to reassess pre-existing measures in the light of the adoption or modification of international standards. Indeed, one might imagine that the negotiators of the TBT Agreement and SPS Agreement did not expect the procedural requirements of those agreements would apply to pre-existing technical standards. Thus, according to the EC, Article 2.4 addresses the preparation and adoption of technical standards, which “measures” in this case were completed and, in effect, ceased to exist, prior to the coming into force of the TBT Agreement. There was little explicit textual basis for the EC argument. The Appellate Body referred to its statements in the *EC—Hormones* decision to the effect that continuing measures cannot be assumed to be excepted without greater textual support.<sup>6</sup>

#### d. Definition of “Relevant International Standard”

The panel had determined that Codex Stan 94 was a “relevant international standard” within the meaning of Article 2.4. The EC argued that only standards adopted by *consensus* may qualify as “relevant international standards,” and that the panel failed to determine whether Codex Stan 94 was indeed adopted by consensus. This argument related to the interpretation of the definition of “standard” contained in Annex 1.2 of the TBT Agreement. This definition simply refers to documents “approved by a recognized body,” without specifying “consensus”. In addition, an “explanatory note” to this definition adds the following two sentences: “Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.” The Appellate Body accepted the panel’s interpretation to the effect that the latter sentence serves to include within “standard” documents that do not achieve consensus.<sup>7</sup> Neither the panel nor the Appellate Body dealt with the logical absurdity of the quoted language of this explanatory note: if these standards are indeed based on consensus, then anything not based on consensus is not a

<sup>5</sup> European Communities—Trade Description of Sardines, WT/DS231/R, 29 May 2002, WT/DS231/R/Corr.1, 10 June 2002. The panelists were Margaret Liang, Merit Janow and Muhan Kumar.

<sup>6</sup> Appellate Body Report, para. 208.

<sup>7</sup> Appellate Body Report, para. 222.

standard. However, in order to give effect to the second sentence—to allow it *effet utile*—it seems appropriate to reach the conclusion reached by the panel and Appellate Body.

It is worth noting that this conclusion has ramifications for international governance and democratic accountability. That is, states may find that standards that they did not accept—that they in fact rejected—are required to be taken into account and have other legal significance under Article 2.4 of the TBT Agreement.

e. Use “As a Basis For”

Of course, Article 2.4 requires that members use “relevant international standards” “as a basis for” their technical regulations. The EC argued that the EC Regulation is based on Codex Stan 94 because it adopts the portion of Codex Stan 94 that reserves the term “sardines” exclusively for *sardina pilchardus*.<sup>8</sup> It argued that this relationship satisfies the requirement, in the EC view, for a “rational relationship” between the international standard and the technical regulation.

The Appellate Body rejected the EC arguments. It recalled its decision in *EC-Hormones*, addressing the meaning of “based on” in Article 3.1 of the SPS Agreement. The Appellate Body here agreed with the panel’s use of the *EC Hormones* decision, finding that in order for a standard to be used “as a basis for” a technical regulation, it must be “used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation.”<sup>9</sup> Furthermore, one thing cannot be the “basis” for another if the two are contradictory.<sup>10</sup> Article 2.4 requires that members use relevant international standards, “or the relevant parts of them, as a basis for their technical regulations.” The Appellate Body determined that the relevant parts of Codex Stan 94 are those relating to the use of the term “sardines” to identify fish products, and not only those portions that reserve the term “sardines” alone for *sardina pilchardus*.<sup>11</sup> The Appellate Body narrowed the scope of its examination to evaluate the relationship between only the portion of the EC Regulation challenged by Peru, and the portions of Codex Stan 94 that address these issues. The Appellate Body found that the EC Regulation contradicts the portion of Codex Stan 94 that *permits* the use of the term “sardines” in combination with, *inter alia*, the name of the country of origin.<sup>12</sup>

f. “Except when such international standards or relevant parts would be an ineffective or inappropriate means for fulfilment of the legitimate objectives pursued”

<sup>8</sup> European Communities Appellant’s Submission, para. 150, quoted by Appellate Body Report, para 241.

<sup>9</sup> Appellate Body Report, para. 243.

<sup>10</sup> Appellate Body Report, para. 248.

<sup>11</sup> Appellate Body Report, para. 251.

<sup>12</sup> Appellate Body Report, para. 257.

The Appellate Body then turned to the question of whether the EC could take advantage of the exceptional language of Article 2.4 of the TBT Agreement. The first question is which state would have the burden of proof as to the matters comprising the basis for this exception. The Appellate Body recalled its statement in *EC-Hormones* that merely characterizing a provision as an “exception” does not alone result in allocation of the burden of proof to the respondent, and criticized the panel’s conclusion that this logic is irrelevant in connection with Article 2.4 of the TBT Agreement.<sup>13</sup> The Appellate Body’s concept is founded in legal realism: there is no general rule-exception relation, but rather a more refined, or more limited, rule. Under this reasoning, it is for the complainant to show the violation of the more limited rule, including the unavailability of the exception. This logic may be compared to, and contrasted with, the search by the Appellate Body in the *FSC* case for general rule-exception relationships to determine the existence of a subsidy (in the context, of course, of treaty language that refers to income “otherwise due”).

Accordingly, the Appellate Body found no general rule-exception relationship between the first and second parts of Article 2.4. Therefore, it was for Peru to bear the burden of proving violation of Article 2.4 *as a whole*. “This burden includes establishing that Codex Stan 94 has not been used “as a basis for” the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the “legitimate objectives” pursued by the European Communities through the EC Regulation.”<sup>14</sup> For those concerned about restrictions on domestic regulatory prerogatives pursuant to the TBT Agreement, this allocation of the burden of proof will provide some comfort.

#### 4. Conclusion

Of course, the focus here is on the degree to which the TBT Agreement constrains domestic regulatory autonomy. This case involved a regulation that does not pertain to health or safety, but is intended to protect against consumer fraud. The Appellate Body found that the obligations imposed by Article 2.4 in respect of relevant international standards apply to existing technical regulations. It also found that these relevant international standards include standards that are not adopted by consensus. These two holdings may be seen as incursions on domestic regulatory autonomy. On the other hand, the Appellate Body found that the burden of proof in a case under Article 2.4 is broadly on the complaining state.

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<sup>13</sup> Appellate Body Report, para. 274.

<sup>14</sup> Appellate Body Report, para. 275.