

An Analysis of the WTO Appellate Body's Report in the *Sardines* Case: Implications for Ecolabels¹

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August 10, 2005**

In the *Sardines* dispute,² the WTO's Appellate Body found that a European Union (EU) regulation, which allowed only one fish species to be labeled as "sardines," violated the WTO's Agreement on Technical Barriers to Trade (TBT Agreement). Article 2.4 of the TBT Agreement requires members to use "relevant" international standards "as a basis for" establishing mandatory product characteristics unless such standards are "ineffective or inappropriate" to achieve legitimate objectives. The Appellate Body affirmed the Panel's ruling³ that the EU regulation contradicted international standards and that the international standard was not ineffective or inappropriate to meet EU objectives. The Appellate Body's ruling reveals the WTO's strong support for the use of international standards over conflicting domestic standards for product characteristics. However, the full effect of the Appellate Body's report is difficult to discern, because the EU regulation at issue clearly contradicted the relevant international standard and its motives were arguably protectionist.

The Dispute

Peru, supported by the United States, Venezuela, and other countries, challenged European Council Regulation (EEC) No. 2136/89, which allowed only fish of the species *Sardina pilchardus Walbaum* to be marketed as "sardines." This species is commonly found in the waters of the European Atlantic coast, the Mediterranean Sea, and the Black Sea. No other fish displaying characteristics similar to *Sardina pilchardus Walbaum*, including *Sardinops sagax sagax* which Peruvian fishermen catch along the South-American coast, could be marketed as "sardines" in the EU. The EU maintained its regulation despite an international standard defining *Sardina pilchardus Walbaum* and 20 other species including *Sardinops sagax sagax* as "sardines" provided that these 20 other species were further identified in the marketplace by country or region (e.g., Peruvian sardines). The EU claimed that the international standard was inappropriate and ineffective for meeting the regulation's goals of consumer protection against deceptive practices, market transparency, and fair competition.

¹ This summary is adapted from: CHRIS WOLD, SANFORD GAINES, & GREG BLOCK, *TRADE AND THE ENVIRONMENT: LAW AND POLICY* (2005) and HEINZ HAUSER, *WTO News No. 8, The Swiss Institute for International Economics and Applied Economic Research* "The Sardines Case and the Potential of the TBT Agreement" (April 2003), at [http://www.siaaw.unisg.ch/org/siaaw/web.nsf/SysWebRessources/wton8epdf/\\$FILE/wton8e.pdf](http://www.siaaw.unisg.ch/org/siaaw/web.nsf/SysWebRessources/wton8epdf/$FILE/wton8e.pdf) (accessed Feb. 7, 2005).

² European Communities–Trade Description of Sardines, Report of the Appellate Body, WT/DS231/AB/R (decided Sept. 26, 2002) (adopted Oct. 23, 2002).

³ European Communities–Trade Description of Sardines, Report of the Panel, WT/DS231/R (decided May 29, 2002) (adopted as modified by the Appellate Body Oct. 23, 2002).

In rejecting the EU's claim, the Appellate Body adopted a broad definition of a "technical regulation" under the TBT Agreement. The TBT Agreement defines a technical regulation as a document that lays down one or more characteristics of a product. These product characteristics must relate to the product and may include labeling and packaging requirements. In this case, the question was whether a regulation that restricted the naming of products as "sardines" constituted a product characteristic. The Appellate Body ruled that listing the species that can be labeled "sardines" is a product characteristic "intrinsic to" preserved sardines, because identifying a product in this way objectively defines the features and qualities of preserved sardines and, thus, lays down product characteristics within the meaning of the TBT Agreement's definition of "technical regulation."⁴

The Appellate Body also concluded that the EU was required to use the relevant international standard rather than adopt its own technical regulation. Article 2.4 of the TBT Agreement states that "Members shall use [relevant international standards], as a basis for their technical regulations except when such international standards ... would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives." With respect to sardines, Codex Alimentarius adopted an international standard — Codex Stan 94 — which permits a larger group of related fish species to be marketed as sardines provided that they are identified by country or region (e.g., Peruvian sardines or Pacific sardines). The EU argued that the standard was not relevant because the EU's regulation only dealt with one species (*Sardina pilchardus*) whereas the Codex standard dealt with 21 species. The Appellate Body rejected this argument not only because preserved *Sardina pilchardus* is specifically covered by Codex Stan 94, but also because the 20 other fish species covered by the standard are legally affected by their exclusion from the EU market as "sardines" under the regulation.⁵ Because the EU Regulation did not allow these 20 fish species to be marketed as "sardines" as the Codex standard did, the Appellate Body concluded that the EU regulation did not use the Codex standard "as a basis for" its regulation. In fact, the EU regulation contradicted the international standard.⁶

The EU Regulation could still differ from the international standard if the international standard would be an "ineffective or inappropriate" means to fulfill the EU's "legitimate objectives" of market transparency, consumer protection, and fair competition. The Appellate Body acknowledged that the term "legitimate objectives" in Article 2.4 of the TBT Agreement extended beyond the list of objectives specifically mentioned in the TBT Agreement — the quality of its exports; protection of human, animal or plant life or health, protection of the environment; and prevention of deceptive practices.⁷ Thus, a wide range of legitimate objectives, including the EU's stated objectives, may

⁴ Sardines, Appellate Body Report, *supra* note 2, at paras. 181-190.

⁵ *Id.* at 232.

⁶ *Id.* at para. 248.

⁷ *Id.* at para. 285.

allow a WTO Member to deviate from the international standard, provided that the international standard is ineffective or inappropriate.

Nonetheless, the Appellate Body affirmed the Panel's conclusion that "it has not been established that consumers in most [EU] members have always associated the common name 'sardines' exclusively with *Sardina pilchardus*."⁸ For example, the United Kingdom imported 97% of Peruvian exports of *Sardinops sagax* to the EU and labeled them as "Pacific pilchards," but imports of *Sardina pilchardus* were also labeled as "pilchards." The Panel concluded that this indicated that EU consumers could distinguish species if provided the proper geographic or other qualifying terms, such as "Pacific." The Panel also found that the EU's stated objectives were undermined because "the very purpose of the labeling regulations set out in Codex Stan 94 for sardines of species other than *Sardina pilchardus* is to ensure market transparency."⁹

The Implications of *Sardines* for Ecolabeling

The Appellate Body in the *Sardines* case made several conclusions regarding the TBT Agreement that may have important implications for ecolabeling and other regulations that define product characteristics. First, the Appellate Body ruled that the obligations of the TBT Agreement are triggered whenever a Member country requires specific names to be used for marketing specific products or otherwise defines the characteristics of a product. Merely "naming" or "defining" a product may constitute a "technical regulation," even if the name is based on characteristics intrinsic to the product.

Second, the Appellate Body suggested that the TBT Agreement strongly favors compliance with an international standard. Both the Appellate Body and the Panel in *Sardines* gave a hard look to the EU's argument that the international standard was an "ineffective or inappropriate" means to fulfill the legitimate objectives of its regulation.

The potential scope of the *Sardines* report can be seen in the U.S. labeling requirements for organic foods. The United States defines "organic" only with respect to pesticides and herbicides used to produce the food product; genetically modified food products may also be labeled as "organic" as long as they were grown without chemical inputs. However, Codex Alimentarius has proposed a definition of "organic" that which expressly excludes all products or materials that are produced from genetically modified organisms, as well as products treated with pesticides and herbicides.

The U.S. definition of "organic" would seem to be a technical regulation, because it requires only certain products to be labeled as organic in the same way that the EU's regulation only allowed certain products to be labeled as sardines. Whether the United States would need to amend its

⁸ *Id.* at para. 290 (citing the *Sardines* Panel Report, *supra* note 3, at para. 7.137).

⁹ *Sardines* Panel Report, *supra* note 3, at para. 7.130.

definition of organic to be consistent with Codex's definition is more difficult to predict. The EU's sardines regulation clearly contradicted the relevant international standard by narrowing the definition of sardines from 21 species to one species. Moreover, the EU's underlying motives were arguably protectionist, because *Sardina pilchardus Walbaum* is found primarily in waters of EU member states. The U.S. definition of organic could also be viewed as contradicting the proposed international standard. However, it broadens the definition of "organic" rather than narrows it and includes the international standard's elements relating to chemical inputs. Because many other countries produce large quantities of genetically modified foods, the U.S. definition of "organic" is not so clearly protectionist.

The Appellate Body also suggested that factual evidence of consumer practice could be a crucial factor to validate domestic objectives of the regulation in question. If the U.S. can provide sufficient evidence that American consumers have always recognized that genetically modified foods could be organic, then the United States might have a better chance of surviving a challenge under the TBT Agreement. In addition, food security and price stabilization could be considered legitimate objectives for allowing the United States to label genetically modified food products as organic. While the Appellate Body created some space for regulatory autonomy by affirming a Member's right to establish technical regulations different from the international standard, it did not clearly identify how wide that space might be.

The TBT Agreement includes other requirements that the Appellate Body did not need to address. For example, Article 2.2 mandates that a technical regulation not be more trade-restrictive than necessary to fulfill a legitimate objective. The effect of this so-called "necessity" requirement in the context of ecolabels is not yet known. Ecolabels could be viewed as the least trade restrictive option because they do not actually impose any restrictions on trade in goods. Nonetheless, most ecolabels are designed to affect consumer choices and alter the competitive relationship between those products that earn the ecolabel and those that do not. Future trade disputes may help resolve whether ecolabels are the least trade restrictive option available to regulators and policymakers.