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European Communities – Trade Description  
of Sardines:  
Textualism and its Discontent\*

BY

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## 1 Introduction

The facts of *EC – Sardines* are simple enough. A European Communities (EC) regulation stipulated that the designation Sardines could be used on preserved fish only for the genus *Sardina pilchardus*. The broad rationale claimed for this measure was to prevent consumer confusion. Allegedly European consumers associated the appellation “Sardines” with the *pilchardus* genus. Subsequently the *Codex Alimentarius Commission* set an international standard which effectively would allow other types of fish e.g. the genus *Sardinops sagax*, to use the word Sardine as part of its packaging designation. Peru, which exports *Sardinops* to Europe could not, under the Community regulation, use the designation Sardines in any shape or manner even though this prohibition would be contrary to the international standard set by the Codex Commission. Obviously, this

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would have adverse effects on the marketability of Peruvian sardines. Peru challenged the Community regulation claiming it violated Art. 2.1, 2.2, and 2.4 of the *Agreement on Technical Barrier to Trade* (TBT) as well as Art. III.4 of the *General Agreement on Tariffs and Trade* (GATT). The Panel exercised judicial economy and decided the case entirely on the basis of Art. 2.4 TBT, which provides as follows:

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 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.

The Panel's general finding was that the EC measure was in fact inconsistent with that provision.

The Panel determination was appealed by the EC. In the language of the AB, the following issues were on appeal:

- (a) whether the appeal is inadmissible as a result of the conditional withdrawal of the Notice of Appeal filed on 25 June 2002, and the filing of a new Notice of Appeal on 28 June 2002;
- (b) whether the *amicus curiae* briefs submitted by the Kingdom of Morocco and a private individual are admissible, and, if so, whether they assist us in this appeal;
- (c) whether the Panel erred by finding that Council Regulation (EEC) 2136/89 (the "EC Regulation") is a "technical regulation" within the meaning of Annex 1.1 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement");
- (d) whether the Panel erred by finding that Art. 2.4 of the *TBT Agreement* applies to existing measures, such as the EC Regulation;
- (e) whether the Panel erred by finding that CODEX STAN 94–1981, Rev.1–1995 ("Codex Stan 94") is a "relevant international standard" within the meaning of Art. 2.4 of the *TBT Agreement*;
- (f) whether the Panel erred by finding that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Art. 2.4 of the *TBT Agreement*; whether the Panel correctly interpreted and applied the second part of Art. 2.4 of the *TBT Agreement*, which allows Members not to use international standards "as a basis for" their technical regulations "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued";

- (g) whether the Panel properly discharged its duty under Art. 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”) to make “an objective assessment of the facts of the case”;
- (h) whether the Panel has made a determination that the EC Regulation is trade-restrictive, and, if so, whether the Panel erred in making such a determination;
- (i) and whether we should complete the analysis under Art. 2.2 of the *TBT Agreement*, Art. 2.1 of the *TBT Agreement*, or Art. III:4 of the *General Agreement on Tariffs and Trade 1994* (the “GATT 1994”), in the event that we find that the EC Regulation is consistent with Art. 2.4 of the *TBT Agreement*.

The Panel decision was in substance largely upheld by the AB with reversals of certain methodological points. The main point where the AB took a radically different position than the Panel concerned the distribution of the burden of proof.

In this analysis of the AB decision we do not intend to cover all the issues on appeal, nor take direct issue with any of the substantive outcomes – though we will raise serious doubts as regards some of them. We will instead concentrate on two main themes. The first is the method of interpretation exemplified in this decision with its rhetorical emphasis on “textual” interpretation. We say rhetorical since we believe that in its actual practice, even in this case in the very way Article 2.4 itself is construed, the AB does not always practice what it preaches and that many of its holdings which masquerade as textual are in fact driven by other hermeneutic bases. This textualist leaning of the adjudicating bodies will be discussed in the next Section.

The second main theme to be discussed is the question of how to allocate the burden of proof in the context of Art. 2.4 TBT disputes. The Panel claimed it was for the EC to establish that the international standard is inefficient and/or inappropriate to fulfill its legitimate regulatory objectives, but the AB instead put the burden on the complainant, Peru.

To our mind, both the textualist approach and the unsatisfactory analysis of the burden of proof issue, result from the unwillingness of the AB to analyze the more general role of the TBT. There is a focus on details, but there is no overarching vision of the agreement that guides the AB in its determinations concerning the details or at the least, no such vision is made explicit. As a consequence, there is a risk of a “tyranny of the incremental steps,” whereby the cumulative effect of the often reasonable incremental decisions is to substantially restrict WTO Members’

regulatory sovereignty without such an outcome ever being explicitly analyzed by the AB.

## 2 The AB's textualist approach to legal interpretation

The TBT (alongside the *Agreement on Sanitary and Phytosanitary Measures* (SPS)) represents as big a paradigm shift to international economic law as, say, the prohibition on the use of force and the introduction of the Security Council with binding resolution and police powers represented within the classical world of international law. A central facet of this shift is the move towards an internationally determined normativity – the central issue in *EC – Sardines* – whereby international standards achieve a prominent role as a basis for Members' individual technical regulations. What is critical is that an unjustified deviation from an international standard could constitute a violation even if it were not discriminatory, i.e. even if it were not such as to afford protection to domestic production. In *EC – Hormones*, the EC was held in violation not because its measure gave less favorable treatment to imported beef and afforded protection to competing domestic products.<sup>1</sup> The EC measure was found to violate the Agreement because it did not conform to SPS normativity independently of the question of discrimination. The same type of legal logic informs the TBT.

The paradigm shift is so profound that it should call into reexamination many of the hermeneutic presumptions which were formed, developed and consolidated either in an epoch of international economic law in which national administrations were accorded not only normative but full procedural autonomy, or in the context of the GATT, where the main constraint on regulatory autonomy came through Art. III.

The single biggest failing of *EC – Sardines* is not related to the actual decisions adopted by the AB which, perhaps with the exception of the issue of burden of proof, are (as far as outcome is concerned) at least defensible if not always compelling. The failing lies in the pedestrian way in which such an important paradigm shift – *EC – Sardines* being the first major TBT case – was treated or not treated as a background to its hermeneutic choices.

<sup>1</sup> *EC Measures Concerning Meat and Meat Products (Hormones) – Report of the Appellate Body* (WT/DS26/AB/R and T/DS48/AB/R, January 16, 1998).

AB hermeneutics is, of course, not made of one cloth. The composition of the AB is ever changing, introducing different sensibilities and different emphasis practiced by different Divisions in different time. But there is one strand which is present in a considerable number of cases: the strand which privileges in its rhetoric a certain type of textualism. This strand is driven by an understandable concern for the legitimacy of the AB and is based on the premise that a pretense to determine the legal meaning of a text based on the ordinary meaning of words somehow bestows greater hermeneutic propriety on the resultant interpretation. Any critical reading of the case law will show that when it appears fit the AB is no less teleological, contextual, or systematic than any other tribunal of similar standing. The difference lies in the level of its pretense, in its often obsessive use of dictionaries, and in its repeated claims about self-evident textual propositions which, at times, as for example in the LAN case, are evident to the AB alone to the exclusion of Panel, Parties and Secretariat of the WTO.<sup>2</sup> *EC – Sardines* is a striking example of this strand but unfortunately in a dispute where the stakes are unusually high, being the first TBT case.

Art. 31 of the Vienna Convention, often referred to by the AB to motivate its textualist mode of interpretation, provides that words have to be interpreted in their context and in the light of the object and purpose of the instrument in question. Clearly the paradigm shift from local discretion to an internationally determined standard and, even more importantly from a regime of discrimination to one of non-justified obstacles is the most germane factor establishing the object and purpose and the context of the TBT (and SPS) and should cast a hermeneutic shadow and/or light over any interpretation of its specific terms.

It may (or should) for example, influence hermeneutic choices and tests. In the domestic law of many jurisdictions there is a different standard of judicial review of public measures depending on the norm which they allegedly violate. A public measure allegedly compromising a constitutional principle such as, say, a fundamental human right or the principle of non discrimination will receive very strict scrutiny requiring the public authority to give compelling reasons in justification. A lower level of scrutiny, requiring simply that the measure not be unreasonable

<sup>2</sup> *European Communities – Customs Classification of Certain Computer Equipment – Report of the Appellate Body* (WT/DS62/AB/R, WT/DS67/AB/R and WT/DS68/AB/R, May 6, 1998).

may be applied in other circumstances such as judicial review of an administrative regulatory measure. Greater deference is given the public authority in the latter case than the former. To the extent that TBT and SPS may involve disputes which do not involve protectionism and discrimination, but a dispute about the reasonableness of a non-discriminatory measure in achieving a certain public policy, one might expect also a hermeneutic shift by AB or at least a discussion of the yardstick against which alleged violations would be judged. This cannot be found in the *EC – Sardines* decision. This, in our view, is regrettable.

It is not self-evident that a narrow textualist approach necessarily bestows greater legitimacy on the decisor and that a broader approach will inevitably appear more “activist” and hence less legitimate. There is an appreciable difference in the legitimacy of a decision where the decisor is seen to have recognized fully the context (understood here in its broad sense) of the text under interpretation and which is seen to inform its decision whatever the outcome, and a decision in which the decisor seems oblivious to the context of its decision. Likewise, and no less importantly, there is a difference between a decision which is seen to be aware of its consequences, and is seen to have made its hermeneutic choices in full awareness of such consequences. When the Vienna Convention speaks of interpretation in the light of object and purpose it simply invites a consequentialist approach. Jurists’ prudence is usually a recipe for good jurisprudence, but it is not to be confused with narrow textualism.

Textualism is now threatening to become more than a hermeneutic curiosity, becoming counterproductive to the very legitimating purposes for which it is employed. It actually affects the credibility of the AB to be, *de facto* at least, the World Trade Court. There is beginning to emerge a wide gap between the jurisprudence of the World Court and that of the World Trade Court. The former is no less skilled or sophisticated in its hermeneutics – without, however, a reductionist textualism. But what distinguishes even more the approaches between the two Courts is *the unwillingness of the AB to situate its legal analyses within a framework which firmly articulates both the normative and policy considerations and consequences of its decisions*. The willingness of the World Court to go much further in this respect is noticeable in major decisions such as *Nicaragua* and *Nuclear Weapons*, but is typical of most of its cases in the last twenty years.

We will in the next subsections illustrate this textualist approach to legal interpretation by the adjudicating bodies, as it was applied to two principal issues which came up on appeal.

### 2.1 *The legitimacy of international standards*

The EC argued that only standards that had been adopted by an international body *by consensus* should constitute a relevant international standard for the purposes of Art. 2.4 TBT.

In the explanatory note to the definition of standard in Annex 1.2 of the TBT, we find the following:

... Standards prepared by the international standardization community are based on the consensus. This Agreement covers also documents which are not based on consensus.

The hermeneutic choice presented itself as follows: according to the EC the last sentence refers to documents prepared by bodies which are not part of the international standardization community. According to Peru (and the Panel) the last sentence refers to documents prepared by international bodies which were not based on consensus.

Which is the better argument? The treatment of this issue by the AB is the most telling in the entire decision. The AB goes through a minute analysis of the text – comparing the word “document” in the explanatory note to the word “document” in the principal text. Much turns, in the AB view, on the word “also” in the last sentence. And it refers to the chapeau of Annex 1 to find further textual support for the Panel view. Logic is also at play:

The definition of “Standard” in the ISO/IEC Guide expressly includes a consensus requirement. Therefore, the logical conclusion, in our view, is that the *omission* of a consensus requirement in the definition of “standard” in Annex 1.2 of the *TBT Agreement* was a deliberate choice on the part of the drafters of the *TBT Agreement*, and that the last two phrases of the Explanatory note were included to give effect to this choice.

(225, emphasis in original)

This logic is compelling only if you have already decided that the last phrase refers to the said international bodies whose decision must form the basis for decision by a Member. Some would say that the reasoning of the AB is a *non sequitur*. But it is not the conclusion we wish to fault but the striking absence of any consideration beyond the textual of the stakes involved in this decision.

There are profound issues of democracy and legitimacy both in the relationship between domestic decision making and its international counterpart and in the legitimacy and efficiency of international decision making itself. In effect, the decision of the Panel, upheld by the AB, would

accord “bindingness” to non-consensual international decisions in circumstances where those very bodies, composed of largely the same Members, do not ascribe the same bindingness to their own decisions. Absurdity and unreasonableness are grounds to depart from the standard interpretative rules according to Art. 32 of the Vienna Convention. Is this outcome plausible? It might be, but it would at least require some explanation. There are, as it is, serious problems with the accountability and representativeness (and hence legitimacy) of decisions by bodies like the Codex even when adopted by consensus. These problems are aggravated by ascribing bindingness to non-consensual decisions.

Other issues are involved too: the AB in an off the cuff remark states that its interpretative decision on consensus is of no legal relevance to the international bodies themselves which have to follow their own rules. But this is naïve at best, disingenuous at worst. One of the most important ways the international standard achieves legal teeth (rather than being a voluntary enterprise) is through the legal obligations, presumptions and consequences accorded to it in the TBT and SPS. Surely a decision by the AB which holds that outcomes of the decisional process within, say, the Codex will have the same legal consequence within the TBT or SPS, whether or not adopted by consensus, is going to impact the decisional dynamics in those institutions. There is something startling to see this problem being resolved by an argumentation which is focused almost exclusively on the existence or otherwise of a word such as “also.”

It is important to emphasize, at this point, what we are not arguing. We do not, of course, advocate disregard for words or language. Nor are we arguing that policy argumentation should replace legal reasoning. We are arguing in the first place that legal hermeneutics is a discourse which is far richer than the thin gruel served up by the AB in this decision; we further argue that since the AB itself often departs from its textual strictures it would be better to abandon the posture and rhetoric since they seem to have the corrosive effect of blinding it to the richer contextual matrix of its decisions.

We do not want to suggest that the broader context and a deeper examination of object and purpose should always be decisive and trump clear meaning of text. But we do argue that an acknowledgement and discussion of these broader contexts is important not only to the correct outcome of cases, but also to the dialog which should exist between a court and a legislator. A court may find that its hands are tied by the regnant canon of interpretation. But its hands should not be tied in the dialectical relationship with other constitutional actors.



It could be objected that the AB is in some ways the prisoner of the parties and lawyers before it, and that the fault for the textually reductionist judicial reasoning falls on the shoulders of those who argue before the AB. This, we think, can only be partially true. Litigators are in the business of winning cases and they adapt their vocabulary to follow the signals which issue from the courts before which they argue. In the WTO, the Panels are being conditioned into the same hermeneutic mindset. Panels are in the business of deciding cases, but they are also in the business of not being overturned on appeal and browbeaten by a disrespectful AB. The results are progressively seen in the Panel Reports that come out.

In conclusion, the decision of the AB on the requirement of consensus may or may not be correct in terms of substance. But the hermeneutics behind this outcome does not give credibility to the outcome.

## 2.2 *The meaning of "... as a basis for ..."*

The first part of Art. 2.4 TBT does not oblige Members to use international standards, but to use international standards "*as a basis for*" their regulations, analogously to the SPS. This is clearly a weaker requirement, but in what sense?

In our view there are at least two possible approaches to this issue: a procedural approach and a substantive approach. Indeed, these two approaches can explain some of the most interesting differences in the jurisprudence of the Panel and the AB in *EC – Hormones*. What is the "procedural" approach? An example will best illustrate. In the EU it is said that the Commission proposes and the Council disposes: for most legislation the Commission of the EU has an exclusive right of initiative meaning that all legislation adopted by the Council and Parliament must start with a proposal submitted by the Commission. Strictly speaking, all legislation is *based on* a Commission proposal. This means that the Commission proposal is in fact the "basis" for the process. But in that process, amendments can be proposed, even radical amendments which *frequently* contradict the original Commission process. These amendments will be discussed, deliberated and either accepted or rejected according to the decisional rules. Procedurally the Commission proposal serves "*as a basis for*" *all* Union legislation whatever the ultimate content, even content which, *pace* the AB, contradicts the original Commission proposal.

A substantive approach, on the other hand, is not concerned with the process but with the end outcome. It might define the concept of "*as a basis for*" by considering the degree to which the resulting legislation is in

conformity with the international standard, even if in the process of adoption it did not have in mind at all the international standard.

There can be much merit in either approach or in a combination of both approaches to defining the term “as a basis for.” A procedural approach (if we return to the European example we gave) allows the Commission proposal to set the terms of the debate, and to condition a yardstick or benchmark against which amendments could be made, but gives the decisor ultimate freedom to decide the content. The substantive approach, in its extreme form, would not even interest itself whether the decisor had the original proposal before its eyes, but would only ensure that the outcome fell on the right point between conformity and loose influence.

In our view, a correct hermeneutic enquiry for the terms “as a basis for” (or “based on” in the SPS) should have articulated the two approaches, and tried to decide which (or what combination of the two) was signified by these words in the TBT (and SPS). A great deal turns on this. Is the idea of the TBT, for example, that in setting their regulatory standards, as a matter of process (like in the EU) the national decisor will have the international standard in front of them and use it as a basis for their deliberation – notably conditioned by the second phrase of Art. 2.4, namely the need, internally, to articulate reasons why the national regulation should depart from the international standard based on appropriateness and effectiveness? This approach would force the national regulator to articulate objectives, to assess means, and to rationalize results – a significant improvement in the process of regulatory decision making in many jurisdictions – but being less concerned with the eventual substantive compliance. One can see huge advantages for the overall purposes of the WTO, and the TBT in particular, for this approach and one could not *a priori* exclude that this was the idea. Or, is the idea of the TBT instead to provide a yardstick for *post hoc* substantive analysis of content? In addressing this issue as a hermeneutic matter, international law offers the decisor a wide range of interpretative approaches – especially if, as is often the case, the drafters of the Treaty may not have addressed their mind to this issue directly, but drafted with inchoate unarticulated notions, or if, as is also often the case, different negotiators had different conceptions in mind and the text represents a compromise.

And how do the adjudicating bodies address this *hugely* consequential issue? True to their belief in a textualist method of interpretation, out come the dictionaries! The Panel comes armed with Webster. The AB fields its favorite Oxford Shorter. And we let the learned wordsmiths whose dictionary definitions are the most extreme example

of understanding language independently of context, and with no reference to object and purpose (i.e. the exact opposite approach to meaning of words which a legal interpreter of international texts should adopt), decide for the WTO the relationship between international standard setting and national administrative procedures.

It may or may not be that in this case the EU did use the international standard “as a basis for” its regulation; we are not objecting to the AB’s bottom line. But we find the arid reasoning on which this decision was based inappropriate to address one of the most fundamental problems of the WTO: how to draw the line between national sovereignty and international commitments regarding domestic regulations.

### *2.3 Seemingly innocuous discrete determinations may have significant cumulative consequences*

The AB Decision reads as a point by point analysis of the various issues on appeal. But, in our view, these issues are not discrete, as the AB would have it, and to treat them as such is another unsatisfactory dimension of the hermeneutics of this Decision. It is their aggregate effect which will define the contours of the new paradigm which TBT (and SPS) represent. Seeing all issues as part of a whole is essential to the individual determination of each of them. Consider the following selection of determinations made by the AB in *EC – Sardines*:

- a new standard applies to pre-existing measures;
- a standard must serve as a basis even if adopted without consensus; and
- “as a basis for” may not introduce a requirement of conformity, but does mean a lot more than “relates to” and certainly is not to be upheld if the national regulation contradicts the international standard.

Viewed one by one these are defensible if not compelling arguments. But note the inevitable legal connections between them: if you decide (in a teleological manner masquerading as textual!) that the new international standard applies to pre-existing measures, you will inevitably have to adopt the substantive rather than procedural approach to “based on.” After all, there could not have been a procedural reliance on an international standard which had not come into existence. But seeing the interconnection between these two arguments, should they not have been discussed in conjunction with each other? Should the fact that a determination on the intertemporal effect of the international standard impacts the question of “based on” not have been part of the considerations to be taken into

account in reflecting on intertemporality? Note, too, how the cumulative effect of these determinations is to cut significantly into the discretion of the Member States to apply even non-discriminatory measures. And yet this cumulative effect of the discrete determinations is neither discussed nor acknowledged. The point is that one cannot let a series of discrete determinations of individual points determine the TBT's overall regulatory contours. The individual determinations must be guided by a more general vision of the appropriate scope of the Agreement, but we cannot detect such a vision in the AB report.

#### 2.4 *Naming and labeling*

The European Community argued for a distinction to be drawn between labeling requirements and naming. For its part, the Panel

... fail[ed] to see the basis on which a distinction can be drawn between a requirement to “name” and a requirement to “label” a product for the purposes of the TBT Agreement.

(7.40)

and the AB instructs us that

... a ‘means of identification’ is a product characteristic. A name clearly identifies a product ...

(191, emphasis in original, footnote omitted)

*Ergo* a name is a product characteristic.

There is something ironic that a Panel and a Division of the AB so deeply concerned with textuality and language did not develop the potentially important principle implicit in the EC argument. For the Panel and the AB language is merely instrumental, a means of communication, and has no independent cultural value. Therefore it is not useful to distinguish between naming and labeling. But is this so?

Imagine the following hypothetical: A national regulation, say in Italy, stipulates that no product may be marketed as “Vinegar” if it is not made of wine. In Britain, there is a vinegar which is made of something, but certainly not of wine, which is referred to as “Malt Vinegar”. Imagine a (non consensual) international standard which defined a standard for labeling vinegars and stipulated “X Vinegar” where X could stand for the content of the vinegar as in “Wine Vinegar” or “Malt Vinegar.”

The approach of the Panel, approved by the AB, would focus on the means of identification test, based on a notion of language as an

instrument of communication. But the interesting point about the distinction between naming and labeling is that there is a question of language integrity as a cultural asset. The objection to allowing non-wine vinegars to appropriate the name “Vinegar” and be labeled accordingly is because in the Italian language (as in Spanish), Vinegar means a product made of wine. The issue is not only consumer protection but language protection. To allow other products to take that name will not compromise the market place but a cultural asset. Whether or not this would be the case in the dispute over *EC – Sardines* is doubtful. But the categorical dismissal of the differentiation between labeling and naming would seem to deny in other more deserving cases the possibility to argue on the basis of cultural and linguistic integrity.

### 3 *EC – Sardines* and the evidentiary rules in the TBT

Art. 2.4 TBT only contains one sentence, but this sentence comprises two parts with very different implications. The first stipulates that Members shall use international standards. The second part specifies conditions under which international standards need not be adhered to. A crucial question is whether a country that is not following an international standard has to be able to prove that the second part of the sentence is applicable, or whether it is for a complaining country to prove that the standard would suffice to reach the respondent’s policy targets? This issue is discussed in *EC – Sardines* under the heading of “burden of proof.”

In the dispute the Panel argues that the EC has the burden to motivate the use of a regulation which differed from the international Codex Stan 94, and that the EC had not managed to do this convincingly. Reaching this conclusion, the Panel took the view that the default position of Art. 2.4 of the TBT is that where technical regulations are required and relevant international standards exist, Members should use them as a basis for their technical regulations. It would, thus, suffice for the complainant state to make the *prima facie* case that the defendant’s regulation was not so based. Since Art. 2.4 provides justification for not using international standards, namely

... *except* when such international standards would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued . . .  
(Art. 2.4 TBT, emphasis added)

the Panel took the view that if the defendant then wished to use this “exception” in explaining why it did not base its regulation on the

international standard, it would carry the burden of *prima facie* proof of showing that the international standard is ineffective or inappropriate to achieve the legitimate objectives pursued. This Principal–Exception structure would be similar to the relationship in GATT between, say, Art. III and Art. XX (where the *prima facie* burden is on the party relying on the exception ex Art. XX). As will be discussed later, the Panel also took into account the difficulties for the claimant to spell out the legitimate objectives pursued by the defending Member.

The AB, basing itself on its earlier jurisprudence on this issue in *EC – Hormones*, and notably Art. 3.1 and 3.3 of the SPS (which are structurally similar, but not identical, to 2.4 TBT) dismissed this reasoning and insisted that the claimant, in this case Peru, had the burden to make the *prima facie* case as regards both parts of 2.4 TBT. It found, however, that Peru had fulfilled its task in this respect. While reasoning differently, the Panel and the AB thus both found the EC measure illegal. But the burden of proof is not a mere technical issue. On its face, the AB and the Panel produced fundamentally different views on the role of international standards in the TBT, and on the resulting appropriate allocation of the burden of proof.

In what follows we will argue that the analysis of the AB as regards allocation of the burden of proof is wanting.

### 3.1 *What yardstick to use when evaluating evidentiary rules for the DS system?*

The literature on evidentiary rules distinguishes between legal presumptions and burden of proof. The former concept refers to the adjudicating bodies' assessment of the probability that a party is guilty of an unlawful act, absent certain evidence. The burden of proof has two aspects. The first is the level of confidence required by the adjudicating body to change the initial presumption. This is “the burden of persuasion” (or the “level of confidence”, or the “quantum of proof,” or the “standard of proof”) and may be expressed in terms of rules such as “preponderance of evidence” or “beyond reasonable doubt.” The second aspect is the question of who has the responsibility to bring the evidence before the adjudicating bodies or else risk losing the case – “the burden of proof”, or the “burden of production” or, sometimes, the “onus of proof.” While these different aspects of evidentiary evidence often are hard to separate, it is useful to treat them separately as far as possible. In *EC – Sardines*, the discussion under the heading “burden of proof” seems to primarily

concern the burden of production which may change during the proceeding, and less the weight of evidence of proof necessary to discharge the burden of production.

In order to determine the appropriate design of rules for the burden of proof, there are at least two issues that need to be addressed. First, one has to specify the *objective* of the dispute settlement system in the WTO, since it should be the extent to which the various possible rules achieve this objective that determines which rules to choose. As far as we can tell, there is no discussion at all of this in *EC – Sardines*.

Second, one needs to determine the “mechanics” of how different rules affect the outcome of the agreement. This is a highly complex issue, and we cannot here describe in any detail how current rules and interpretations thereof influence the working of the WTO. But it may anyway be of value to point to some of the channels through which the distribution of the burden of proof affects the outcome. It deserves to be emphasized that while the discussion is very general and “theoretical,” the effects pointed at are often highly relevant in practice.

It is clear that within a given dispute, the distribution of burden of proof will *ceteris paribus* affect the probability that the different parties win, by making it harder for the party who is assigned this burden to prevail. It is customary to distinguish between two types of errors that the allocation of burden of proof should seek to minimize. The first is to strike down a measure that should be viewed as legal (Type I), the second is to allow a measure that should be declared illegal (Type II). When determining the allocation of the burden of proof, one has to take into account the costs associated with both of these kinds of mistake.

The *ceteris paribus* assumption is obviously only an analytical simplification. It is highly likely that the rules on evidentiary evidence will affect Members’ behavior in a number of ways. To start with, it will affect the incentives of the parties to spend resources on the proceeding, and thus indirectly affect the outcome. But by affecting the balance between the parties, the allocation of the burden of proof will also affect the probability that the parties will actually end up in such a dispute, since it will influence decisions made by Members at earlier stages of the interaction. It may importantly influence the parties’ incentives to settle issues before they are brought to the WTO, or to reach mutually agreed solutions. These effects will in turn affect the incentives for countries to search for illegalities to bring up with trading partners, and to possibly complain about. And if the propensity by which trading partners detect and complain about illegalities is affected, so will their incentives to search for

illegalities. All of this will affect the incentives for Members to adopt illegal measures. Taking a step further back, changes in the extent to which the Agreement is adhered to, will feed into Members' incentives to make concessions in trade rounds. The problem is further significantly compounded by the fact that Members also interact in the setting of international standards in organizations outside the WTO. A complete analysis should take into account how the two processes are interrelated. For instance, countries' incentives to participate actively in the setting (or not setting) of international standards may increase significantly if a presumption is created that countries should adhere to standards.

A decision on the burden of proof will for the above-mentioned types of reasons inevitably have fundamental effects on the working of the dispute settlement system. The task before the adjudicating bodies, whether they like it or not, is therefore to weigh all these consequences, as well as the administrative costs of the system, both those directly connected with litigation, as well as those stemming from the supervision of trading partners' adherence to the agreement, taking into account the possibility for committing the Type I or Type II errors mentioned above. Needless to say, such a balancing act cannot be made with any degree of precision.

But the AB has hardly addressed these aspects at all. This is understandable, given their complexity. The AB may (and perhaps rightly so) have felt that nothing useful would come out of such an exercise. What it means however, is that *when discussing appropriate rules for the burden of proof, the AB has neither specified the yardstick by which to measure the usefulness of different rules, nor has it in any more systematic manner analyzed how the rules may affect the outcome.*

It should be noted that the effects mentioned in the discussion above may be very significant when it comes to the issues at stake in *EC – Sardines*. For instance, it is likely to make a significant difference to Members' willingness to make concessions in rounds, and to agree on international standards in other contexts, if these standards are seen as norms, and it is up to countries not following these standards to prove why the standards are inadequate, compared to the situation where complaining countries have to prove that the standards are adequate.

### 3.2 Who bears the “burden of proof”?

In *EC – Sardines* the AB discusses or at least touches upon at least four possible directions in which to allocate the burden of proof (we henceforth use this term as is done by the AB in the dispute):



- (i) to the informed party;
- (ii) to the party who asserts the affirmative;
- (iii) to the complainant; and
- (iv) to the party claiming an exception.

These different rules are not all mutually exclusive, of course. For instance, a complainant can be interpreted as asserting the affirmative, and a complaining country may be better informed. In what follows, we will briefly discuss more principled aspects of these rules, and how they are dealt with in *EC – Sardines*.

### 3.2.1 Allocating the burden of proof to the more informed party

Although it is hard to point to a well-defined body of papers, economic contract theory, as well as the Law and Economics literature, suggest that in a choice between laying the burden of proof on the better or on the worse informed party, it is normally better to put it on the more informed party. The AB completely rejects such a notion, however:

There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.

(281)

An immediate question here is of course whether there is anything in the WTO dispute settlement system that would *prevent* the AB from using information asymmetries as a motive for a particular allocation of the burden of proof.

More importantly, the AB seems to argue that exporting Members' lack of knowledge of the reasons why importing Members choose not to adhere to international standards is not a serious problem for the enforcement of the TBT. The AB asserts that the TBT affords every Member adequate opportunities to obtain information on the objectives which inform other Members' TBT measures – either under Art. 2.5 or at the “enquiry point” ex Art. 10.1. But the AB itself realizes that these mechanisms may afford insufficient information for the purpose of legal assessment. And, as argued by Peru, although one should assume the good faith of Members, one cannot exclude the possibility of a Member being less than forthcoming in the context of these two procedures. Thus, the AB itself further explains:

... [T]he dispute settlement process itself also provides opportunities for the complainant to obtain the necessary information to build a case. Information can be exchanged during the consultation phase and additional information may well become available during the panel phase itself. (280)

But would not the very ruling of the AB on burden of proof provide an incentive to the defendant state to be extremely circumspect in providing such information? If the burden on the less informed complainant is not simply to establish a *prima facie* case that the national measure was not based on the international standard, but also that the international standard was not inappropriate or ineffective in pursuing the legitimate objective of the defendant, could the defendant not simply insist that the complainant make this *prima facie* case before it even has the duty to respond? How could the complainant then assert the appropriateness or effectiveness of the measure in respect of objectives which it would have to guess? Also, is there not something odd in saying that the complainant will receive the information which would enable it to build a case during the case that it has presumably built in order to be successful in discharging its *prima facie* duty? And how systematically should this source of information be used? Should a dispute be initiated every time a Member uses a measure that does not correspond to an international standard, in order to determine its legality?

Furthermore, the AB states that:

A complainant could collect information before and during the early stages of the panel proceedings and, on the basis of that information, develop arguments relating to the objectives or to the appropriateness that maybe put forward during subsequent phases of the proceedings. (280)

Does this mean that Members are meant to bring cases without having any pronounced suspicion concerning the extent to which the challenged measures are illegal? And at what scale should they be able to do this?

### 3.2.2 Allocating the burden of proof to the party claiming an exception

As mentioned above, the Panel interpreted Art. 2.4 TBT as defining a hierarchical relationship, where the second part is an *exception* to the first. Employing the rule that the party using an exception should demonstrate that the required conditions are fulfilled, the Panel determined that the EC should prove that the international standard was ineffective or

inappropriate. But referring to its decision in *EC – Hormones*, the AB points out that

... characterizing a treaty provision as an “exception” does not, by itself, place the burden of proof on the respondent Member.

(271, emphasis added)

The AB also makes this point by quoting its decision in *EC – Hormones*, where it stated:

The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency is taken on by the defending party, is *not* avoided by simply describing that same provision as an “exception”.

(272, original emphasis)

Note that the AB in these two recitals discusses whether exceptions *as a rule* should be treated differently than other provisions, stating that they should not. Hence, even if there were a Rule–Exception relationship, this should not matter to the burden of proof issue.

In the next two recitals (273 and 274) the AB explains why the Panel is wrong to view the reasoning in *EC – Hormones* as “not having a direct bearing” on *EC – Sardines*, arguing that there are strong similarities between Art. 3.1 and 3.3 SPS, on the one hand, and Art. 2.4 TBT on the other.

In recital 275 the AB then draws the conclusion concerning the role of exceptions that the Panel should have drawn, had it relied on the AB’s findings concerning Art. 3.1 and 3.3 SPS in *EC – Hormones*. But the conclusion it draws is now of a different nature than the conclusion drawn in recital 271–272: it here concludes that there *does not exist* a Rule-Exception relationship in Art. 2.4 TBT. But why does the AB address this issue of whether there is a Rule–Exception relationship in Art. 2.4 TBT, when it has already in recitals 271–272 determined that the existence of such a relationship is irrelevant for the allocation of the burden of proof?

The reason why the AB does not see a Rule–Exception relationship, as we understand it, is that in the AB’s view, the first part of Art. 2.4 TBT refers to certain circumstances, and the second part refers to *other* circumstances. The right to take a certain measure in the latter case is therefore not due to an *exception* to the former situation – it might be an exceptional event in a probabilistic sense, but not as a matter of hierarchy.

At a more superficial level, and using the textual “normal meaning of the word” approach to interpretation, the term “except” in 2.4 TBT that links

the two parts of the sentence, strongly suggests that the second part should be seen as an exception. The AB here takes a step away from its usual textualism, but in the wrong direction, as we see it. In fact, we cannot exclude the possibility that the AB was more concerned to impose its authority on the Panel by insisting that it follow its ruling in *EC – Hormones* than by the actual rational allocation of the burden of proof.

But the more important question is whether and how the existence of a Rules–Exception relationship matters to the distribution of the burden of proof. To clarify the structure of the issue, suppose that a country may find itself either in circumstance A or in circumstance B. Circumstance A may for instance be thought of as situations where either consumers do not care about the distinction between the two types of fish, or where they would not be confused by the label “Peruvian Sardines”. B would be the case where they both care about the distinction, and would be confused by the label.

Let us now compare two alternative interpretations of Art. 2.4 in this context. Assume that the intention is to allow for the possibility not to use the international standard if and only if the circumstances are B.

The AB’s interpretation would then seem to be the following:

**“AB’s interpretation”:**

- (i) Use the international standard if A;
- (ii) use any standard you wish if B.

This would then mean that the two parts are treated symmetrically, and there is no “general rule–exception” relationship between them. If there would be a hierarchy between them, the interpretation of the provision might take the form:

**“Panel’s interpretation”:**

- (i) Use the international standard *regardless* of the circumstances,
- (ii) but use any standard you wish if B.

The sense in which this seems to capture the notion of an exception is that the possibility offered in part (ii) applies to circumstances for which part (i) requires that something else should be done; that is, part (ii) introduces a change to what part (i) just stated.

The AB seems to argue that it follows from its interpretation of the lack of hierarchy between the two parts of Art. 2.4 TBT, that the burden of proof to show that a country should have used an international standard when it didn’t, rests with the complainant and not the respondent. The only underlying reason we can see for this would be that the respondent is

not to a larger degree asserting particular facts when abstaining from using the international standard than when using it; in one case it is implicitly asserting that circumstances are B and in the other that they are A. Since it should not be required of countries to prove that the particular circumstances are in place that allow them to use international standards, it should not be requested of them to do this when circumstances are B, if A and B are just viewed as two alternative possible sets of circumstances, with no particular relationship.

However, as far as we can see, A and B are not symmetric in this sense. For instance, the implications for a trading partner are very different (given the partner's limited information concerning whether it truly is A or B). The costs of falsely determining that it is A when it is B (Type I error), and conversely, are also likely to differ. Speculating, it seems as if in the context of TBT (or SPS – as in the *EC – Asbestos*) cases, the cost of a false positive finding – which would force the respondent to revoke the measure – is often larger than of a false negative finding – which would permit a measure that should not be permitted. This would suggest a rather high burden of persuasion for a complainant, from a *within* dispute perspective. But there will of course also be systemic effects to take into account. For instance, a high burden of persuasion is likely to invite the abuse of regulations for protectionist purposes. But given the often politically very sensitive nature of decisions under TBT, this may be necessary in order to induce Members to liberalize. However, these are just speculations to indicate what type of considerations a more satisfactory analysis has to take into account.

One possible difference between the two interpretations made above, and one which would partly speak in favor of the AB's interpretation, is that the lack of a Rule–Exception relationship implies that the importing country is not asserting the affirmative.

### 3.2.3 Allocating the burden of proof to the complainant or to the party making an affirmative assertion

In *EC – Sardines* the AB seems to use two somewhat different standards that happen to give the same outcome in this particular dispute. The first is that it is the party that makes an assertion who carries the burden of proof. The AB quotes its report in *US – Blouses from India*,<sup>3</sup> where it stated that

<sup>3</sup> *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India – Report of the Appellate Body* (WT/DS33/AB/R, April 25, 1997).

... the burden of proof rests upon the party, whether complaining or defending, who *asserts the affirmative* of a particular claim or defence.

(270, emphasis added)

The second principle is that the *complainant* has the burden of proof. The AB refers to its determination in *EC – Hormones* where it said that

The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case ...

(272)

In *EC – Hormones* (109) the AB also stated that

... the Panel should have begun the analysis by examining whether [the complainants] had presented evidence and legal arguments sufficient to demonstrate that the [respondents'] measures were inconsistent with ... the SPS Agreement ... Only after such a *prima facie* determination may the onus be shifted to the [respondent] to bring forward evidence and arguments to disprove the complaining party's claim.

(footnote omitted)

It is clear that there is an overlap between the two notions: a complaint is an assertion about an illegality. But they are not identical. For instance, the principle that the party who makes a claim should bear the burden to show it is correct according to the AB also applies to the respondent. It seems to us that while both these notions have intuitive appeal, they are at a slightly closer look not self-evident.

First, this argument, together with the above-mentioned interpretation that there is no Rule–Exception relationship, could be taken to show that a Member asserting the affirmative when using an international standard is in the same position when not using it. But this argument would not suffice to explain why the complainant is asserting the affirmative to any higher degree than the respondent, and thus should bear the burden of proof: the complainant makes an assertion – the measure is illegal. But the respondent also makes a claim by asserting that the measure is legal. The principle that the party who makes a claim carries the burden of proof implies that *both* should prove their positions. The principle thus does not have enough “bite” to put the burden solely on the complainant.

There is indeed nothing self-evident about letting the complainant bear the burden of proof. For instance, the “principle of good faith” that the AB refers to, suggests that the reason why the respondent chooses not to use the international standard is that the respondent has information concerning the ineffectiveness and/or inappropriateness of the

international standard. Otherwise it would not be acting in good faith. Since the information is already at the disposal of the respondent, the burden of proof should weigh relatively lightly, and it would save on transaction costs to let the respondent bear the burden of proof.

Put differently, consider a case where at the end of the proceedings, when the parties have made their claims and counterclaims, it turns out that nothing has been learnt from their arguments. The AB would presumably rule in favor of the respondent since the complainant did not make a *prima facie* case for the illegality of the measure. But why should this be the presumption? After all, the situation is (by construction) such that nothing is known about who is right and who is wrong. It might equally well be argued that if there were any legitimate reason for the contested measure, the respondent, having access to information on why it is pursued, should be able to bring this information to the adjudicating bodies, regardless of whether the accusation is substantiated or not. If this is not done, it signals that there is no such defense for the measure, so the burden of proof should rest on the respondent, being the more informed party.

Of course, if one were to allocate the burden of proof to the respondent, this might have significant implications for the incentives to complain. If Members could with just a few words force other countries to motivate each and every policy, the DS system might be swamped by complaints. In addition, the respondents would have to spend enormous resources defending all their policies. This strongly speaks against allocating the burden of proof to the respondent.

Again, the point here is not to argue that any particular distribution of the burden of proof is necessarily right, but to suggest that there are a number of considerations to take into account when determining the rules for the burden of proof. These issues seem particularly important when there is a potential conflict between domestic regulations and trade agreements. We are simply not sure why the AB chose a particular path.

### 3.3 *How convincing should proofs be?*

The discussion above concerned the assignment of the burden of production. Of equal importance at least is the question of the appropriate burden of persuasion, the quantum of proof necessary for a party to discharge its burden of production. As we will argue, there are two important issues raised in *EC – Sardines* in this respect: first, the level of evidence that suffices for the complainant to discharge its burden of

persuasion; and second, how the determination of evidentiary standards may determine what are legitimate (professed) regulatory objectives.

### 3.3.1 The limited burden of persuasion that suffices for a complainant to show that an international standard is effective and appropriate

The stated objectives of the EC Regulation are consumer protection, market transparency and fair competition. Since the parties agreed that these were legitimate objectives, the adjudicating bodies did not have to pronounce on their legitimacy in the context of Art. 2.4 TBT. But a central issue was still whether Codex Stan 94 is an appropriate and effective means to reach these objectives.

The Panel summarizes its findings as follows:

We therefore conclude that it has not been demonstrated that Codex Stan 94 would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued by the EC Regulation, i.e., consumer protection, market transparency and fair competition. We conclude that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation.

(7.138)

The AB, while allocating the burden of proof differently than the Panel, agrees:

We note that the Panel concluded that “Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation.” We have examined the analysis which led the Panel to this conclusion. We note, in particular, that the Panel made the factual finding that “it has not been established that consumers in most member States of the European Communities have always associated the common name ‘sardines’ exclusively with *Sardina pilchardus*”. We also note that the Panel gave consideration to the contentions of Peru that, under Codex Stan 94, fish from the species *Sardinops sagax* bear a denomination that is distinct from that of *Sardina pilchardus*, and that “the very purpose of the labelling regulations set out in Codex Stan 94 for sardines of species other than *Sardina pilchardus* is to ensure market transparency”. We agree with the analysis made by the Panel. Accordingly, we see no reason to interfere with the Panel’s finding that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 meets the legal requirements of effectiveness and appropriateness set out in Art. 2.4 of the *TBT Agreement*.

(290, emphasis in original, footnotes omitted)



The AB thus first notes that the Panel had determined that Peru had fulfilled its burden of proof establishing the positive fact the Codex is not inefficient or inappropriate (which presumably implies that it is effective and appropriate). However, examining the analysis which led the Panel to this conclusion, the AB points to the negative finding that it had *not* been established that EC consumers associated “sardines” with fish of the species *Sardina pilchardus* only. It also notes that the purpose of Codex Stan 94 is the same as that of the EC Regulation, and that it stipulates different names for the two species of fish. On this basis the AB determines that it had been established that the Codex *is* effective and appropriate.

The ruling is important since it determines what constitutes a *sufficient* amount of evidence in order to prove the positive statement that an *international standard is efficient and appropriate*. In the dispute Peru submitted evidence suggesting that “sardines” by itself, or combined with the name of a country or region, is a common name for *Sardinops sagax* in the EC. Peru here referred to three dictionaries/publications, two of which were produced in cooperation with, or with support by, the European Commission, and one prepared by the OECD. But it should be noted that this evidence does not directly show that consumers would not confuse *Sarinops sagax*, if labeled as “Peruvian Sardines”, with *Sardina pilchardus*. On the contrary, it might perhaps be argued that the existence of these lexica suggests that the classification of fish is not a simple matter, and that consequently there are reasons to suspect that consumers might be confused about the different species of fish. Hence, it is strictly speaking not clear what these publications say about consumer perceptions.

It is also established that “sardine-type” products have been sold in several EC Member states prior to the adoption of the EC Resolution under names such as “Canadian sardines.” Again, this does not actually show that consumers have not been misled, it could instead be argued that it is exactly because of this practice that the Regulation is necessary.

The point here is not to argue that the evidence points one way or the other, but to highlight the rather *limited evidentiary weight that is put on the complainant*. This is more of a marginal observation in the context of the Panel report, since the Panel would strictly speaking not need any positive evidence of this form. It puts the burden on the EC to show that the standard is ineffective and/or inappropriate, and the EC has failed to do so. It is more noteworthy with regard to the AB decision, however, since the complainant has the burden of proof according to the AB.

According to the AB one does not have to bring any direct evidence on consumer perceptions in order to determine whether consumers would be confused by a certain type of labeling. It also seems as if, in the final analysis and without admitting it, the AB accepts the Panel's approach which puts the burden of proof on the EC. It could be argued that the burden is placed on the EC only because Peru had satisfied its *prima facie* burden. But, as indicated above, if this is the case, the evidentiary weight required to discharge the burden of proof is so flimsy as to nullify de facto the significance of the reversal of burden from Panel to AB.

The important consequence of setting the burden of persuasion this low in *EC – Sardines* is thus to effectively put the evidentiary burden of production on the Member that wants to deviate from international standards, to show the ineffectiveness and/or inappropriateness of these standards, despite their questionable legitimacy.

### 3.3.2 Do evidentiary standards in the TBT effectively restrain regulatory autonomy?

It is a premise of TBT and of *EC – Sardines* that the TBT discipline does not compromise the autonomy of the Member to determine the degree of risk acceptable and used as a basis for its regulatory regime. The duty in Art. 2.4 to base a decision on the international standard can be set aside if such standard is inappropriate or ineffective. A key factual finding by the AB in *EC – Sardines* is that Peru had indeed discharged its duty to demonstrate that the international standard met the legal requirements of effectiveness and appropriateness:

We note, in particular, that the Panel made the factual finding that “it has not been established that consumers in *most* member States of the European Communities have always associated the common name ‘sardines’ exclusively with *Sardina pilchardus*.

(290, emphasis added)

First, and questions of burden of proof apart, the AB imposes the requirement that consumers in *most* Member States should be adversely affected for the EC measure to be legal. Can it be denied that at least *some* consumers in *some* Member States of the European Communities have always associated the common name “sardines” exclusively with *Sardina pilchardus*? Is it not self-evident that they will assume that, say, Peru Sardines means *Sardina pilchardus* coming from Peru and not *Sardinops sagax* coming from Peru? Should it not be left to the EC to decide the balance between the interests of various consumer groups in the EC?

More generally, is this perhaps an inevitable feature of the TBT, that when determining the evidentiary weight necessary to establish that a national regulation that deviates from an international standard violates the TBT, the adjudicating body also indirectly puts a ceiling on how far a Member can go to eliminate risk, and how to weigh the welfare of different consumer groups? This is not the first place where the AB seemed to have made inroads into the regulatory autonomy of States through requirements for evidentiary burden. In *Korea – Beef*, the AB indicated the vitality of the interest protected (in that case too this interest was consumer protection) will determine what will be acceptable as necessary to enforce a national measure.<sup>4</sup> We would not necessarily argue against the line taken by the AB. After all, almost any regulatory measure can be defended as protecting the interests of at least some consumers. This ambiguity in TBT is clearly not easily resolved. But we would have liked to see at least a discussion of these crucial issues in *EC – Sardines*.

#### 4 Concluding remarks

As regards the substance of the decision, a problematic aspect is the holding that since “it has not been established that consumers in *most* member States of the European Communities have always associated the common name ‘sardines’ exclusively with *Sardina pilchardus*,” the EC regulation could not be justified. As we said, this could be seen as an encroachment of the AB into the autonomy of the Member State to determine its own level of risk, or its own balance of the interest of different consumer groups. While this argument is not unproblematic, it cannot be discarded without analysis.

On the burden of proof, we believe that the only way the AB can sustain its position that the complainant bears the burden to prove both a deviation from the international standard and the non-justifiability of the reasons for such deviation, is by stipulating an extremely low evidentiary weight required to discharge such burden. The AB has thus through its determination on the burden of proof effectively underscored the legitimacy of international standards.

We have not taken a firm stance on whether the outcome of the dispute – the declared illegality of the EC measure – is correct or not.

<sup>4</sup> *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body* (WT/DS161/AB/R and WT/DS169/AB/R, November 12, 2000).

Instead, the brunt of our analysis has been to question the explanatory apparatus used by the AB. Both on issues of substance and on procedure, it helps neither the legitimacy of the AB nor the legitimacy of the WTO as a whole to decide issues such as the relevance of consensus decision making, the cultural integrity of a language, or the presumptions on burden of proof, without any meaningful analysis or even indication of an awareness of the deeper policy issues and consequences that are at stake. That is not, in our view, the correct way to apply the rules of interpretation of the Vienna Convention.