Abstract: This essay examines the EC-Sardines case before the WTO dispute settlement system, in which a developing country, Peru, won a significant victory in WTO dispute settlement against the much more formidable legal services of the EC, in a case challenging an EC regulation that maintained that only a species caught in European territorial waters could be marketed in the EC under the name “sardines.” The case was important for three reasons. To start, it is the first time that a WTO panel has found a WTO member to be in violation of its obligations under the WTO Agreement on Technical Barriers to Trade. Second, the ruling shows the importance of Codex Alimentarius harmonized standards in WTO disputes. Third, the case demonstrates how even a small developing country such as Peru, with the help of the new Advisory Centre on WTO Law, can prevail against a great power in WTO litigation. Fourth, the case exhibits how, in certain circumstances, and despite some developing countries’ fears, a more transparent WTO dispute settlement system can work to developing countries’ advantage when they are able to work in coordination with consumer-based northern NGOs.

On September 26, 2002, Peru prevailed in WTO dispute settlement against the much more formidable legal services of the European Community. In the case EC-Trade Description of Sardines, the WTO Appellate Body for the first time held a WTO member to be in violation of its obligations under the WTO Agreement on Technical Barriers to Trade (TBT). The case is important for three systemic reasons. First, it demonstrates the potential importance of the Codex Alimentarius Commission in WTO disputes, since the Appellate Body based its holdings on the EC’s failure to base its regulations on Codex international standards. Second, it demonstrates how even a small developing country such as Peru can prevail against a great power in WTO litigation. Third, the case exhibits how, in certain circumstances, and despite some developing countries’ fears, a more transparent WTO dispute settlement system can work to developing countries’ advantage through helping forge North-South NGO-government partnerships in WTO litigation.

The Importance of Codex Alimentarius Standards

In the EC-Sardines case, Peru challenged an EC regulation that maintained that only the species *Sardina pilchardus* Walbaum could be marketed in the EC under the name ‘sardines.’
This species swims in European waters and is largely fished by EC vessels, and in particular those of Spain. Because of the EC regulation, similar fish species, such as *Sardinops sagax sagax* which inhabits the Pacific Ocean, could not be sold under the name ‘sardines’ in the vast EC market, even though this species is sold as sardines in most other world markets.

An international standard set by the Codex Alimentarius Commission, however, maintains that this species can be sold throughout the world under the name ‘sardines’ provided that a modifying phrase proceeds the designation, specifying ‘a country, a geographic area, the species, or the common name.’ Under Codex Standard 94, Peru should have been able to sell its product in EC markets under the designation ‘Pacific sardines’, ‘Peruvian sardines’ or ‘sardines – Sardinops sagax.’ In fact, the fish had been sold in Germany as ‘Pacific sardines’ until the Commission challenged that under the EC regulation, which triggered the WTO dispute.

In the EC-Sardines case, the WTO panel and Appellate Body both found that the EC failed to comply with Article 2.4 of the TBT Agreement because the EC did not base its internal technical regulations on the Codex standard, and failed to demonstrate that this international standard would not be ‘effective’ or ‘appropriate’ in fulfilling the EC’s ‘legitimate objectives’ of ensuring ‘market transparency, consumer protection, and fair competition.’¹ For reasons of judicial economy, the panel and Appellate Body did not address Peru’s claims concerning a violation of GATT Article III.4 (involving discrimination against ‘like products’ and other TBT provisions).

The Appellate Body decision demonstrates the importance that Codex standards can play in WTO disputes, raising issues about the accountability of this international body. The AB ruling held that, under the TBT Agreement, countries must modify pre-existing technical regulations to be based on international standards, unless a legitimate objective cannot otherwise be met.² Whether a ‘consensus’ decision is required for adoption of an international standard depends on the rules of the relevant international standard-setting body.³

The EC maintained in its submissions that the WTO panel was turning Codex into ‘world legislators.’ Developing countries, in particular, have complained in the past about their inability to meaningfully participate in Codex standard-setting procedures. However, the WTO panel’s decision demonstrates how Codex standards can be of great importance for developing countries to gain access to EC and US markets, especially where large countries have lowered their tariffs, but adopted other technical methods to foreclose market access.

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¹ The Appellate Body held that Peru had the burden of proof on both of these issues. See AB decision, par. 259-291.
² *Id.*, par. 196-216.
³ *Id.*, par. 219-227.
The Role of the Advisory Centre

The sardines case raises a second systemic issue that has received less sustained analysis – the ability of smaller developing countries to meaningfully participate in the WTO dispute settlement system. Developing countries clearly are at a disadvantage against the United States and EC before the WTO’s legalised system. Given the legal and factual complexity of bringing a successful complaint, countries often must hire lawyers and other consultants at great expense. The EC-Sardines case, for example, required a review of Codex Alimentarius standard-setting procedures, the history and application of relevant EC regulations, expert publications on fish species, and legal interpretation of the TBT Agreement in the context of GATT and WTO jurisprudence. The panel and Appellate Body addressed a number of legal issues under the TBT Agreement for the first time, including what constitutes a ‘technical regulation’, what constitutes a ‘relevant international standard’, what does it mean to ‘base’ a regulation on a standard, whether TBT obligations are retroactive in light of public international law, what are legitimate exceptions to international standards, and the burden of proof on these issues. Peru also had to rapidly respond to the European Commission’s sophisticated arguments and numerous questions from the WTO panel, all within the stringent time constraints of the Dispute Settlement Understanding (DSU). Peru’s legal counsel readily admitted that his country never would have even been able to bring, much less win, this case without outside assistance.

Fortunately for Peru, an Advisory Centre on WTO Law now exists in Geneva, with a corps of seven lawyers under the directorship of Frieder Roessler, former head of the GATT legal division. The Centre’s rates, which vary depending on a country’s membership status, share of world trade and per capita income, are typically much less than those of private law firms. In this case, Peru was charged a fee of only US$100 an hour for legal advice, since Peru is a category C country under the Centre’s rules. The Centre’s success could spur other developing countries to consider joining it or otherwise use its services.

The Advisory Centre represents a major advance for developing countries. In regularly participating in WTO litigation, the Advisory Centre will gain significant WTO expertise that individual developing countries cannot acquire cost-effectively on their own. The Centre eventually could provide services to developing countries in a manner somewhat analogous to the way in which the European Commission’s legal services division assists EC member states. It could develop a reservoir of WTO expertise into which developing countries could tap as needed. By working on WTO cases with the Centre’s lawyers, national officials can develop their own internal resources.

The Need for North-South Consumer NGO-Government Alliances
The largest European consumer group and its lawyers also supported Peru in the sardines case. Peru thereby overcame the tremendous resource disadvantage it initially faced in WTO litigation against the EC. Largely serendipitously, the Advisory Centre’s director, Mr Roessler, and a senior member of the UK Consumers’ Association had spoken at a conference in London concerning WTO law. There, the Consumers’ Association agreed to support Peru’s submissions in the EC-Sardines case.

The UK Consumers’ Association worked with a UK law firm, Clyde & Co, on a pro bono basis, to prepare a letter (like an amicus curiae brief) in support of Peru’s submissions to the panel. The Association’s ten page letter addressed how the EC regulation ‘clearly acts against the economic and information interests of Europe’s consumers,’ and rather constitutes ‘base protectionism in favour of a particular industry within the EU,’ and, in particular, the Spanish fishing industry. Peru attached the letter to its panel submission and cited it with approval. For example, Peru used the letter to point out how a ‘wide variety of tuna or bonito species can be marketed in the Community under a common standards regime,’ rendering it ‘difficult to understand why sardines should be marked out for a particularly restrictive regulatory regime.’

The opinion of the Consumers’ Association clearly had an impact on the WTO panel, which cited it concerning European consumer views. When the EC challenged the panel’s use of the Consumers’ Association letter during interim review, the panel confirmed that it justifiably considered the letter in ‘determining whether the European consumers associate the term ‘sardines’ exclusively with Sardina pilchardus’, and found that they did not do so, in contradiction of the EC’s position. The Appellate Body affirmed the panel’s use of the Consumers’ Association letter as evidence.

Amicus Briefs Redux

The WTO controversy over amicus curiae briefs took a new twist in the EC-Sardines case. The Appellate Body received two such briefs, one submitted by the government of Morocco and one by a US law professor. The Appellate Body found both of them to be ‘admissible’, although it maintained that ‘their contents do not assist us in deciding this appeal.’ The Appellate Body thereby put WTO Members on notice that, despite the fervent opposition of most Members, the Appellate Body retains the authority to admit amicus briefs and to refer to them in deciding future appeals. The Appellate Body further stretched its interpretation of the DSU in maintaining that Morocco could submit its amicus brief even though Morocco was not a

\footnote{See par. 7.131-7.132 and par. 6.13-6.15.}

\footnote{See par.153-170 & 315.}
third party to the dispute. The DSU expressly limits the conditions under which a WTO member can participate as a third party. However, once the Appellate Body agreed to admit amicus briefs from private persons, it had little choice but to accept Morocco’s brief; otherwise it would have subjected itself to the charge of granting private parties greater participatory rights than WTO members.

Transparency Measures Can Benefit Developing Countries

Developing countries have been extremely wary that opening the dispute settlement process to the general public could exacerbate the imbalances that they now face, since they would have to defend their positions not only against resource-rich US and EC trade bureaucracies, but also largely northern-based NGOs and multinational companies advancing northern priorities and interests. Southern delegates fear that an alleged ‘stakeholder model’ for WTO dispute settlement would operate to their disadvantage in a world of asymmetric power not only among states, but also among interest groups. Of the myriad transparency issues, the issue of amicus curiae briefs arguably raises the greatest risk of bias against them.

The EC-sardines case demonstrates that some modes of increased transparency can benefit developing countries. First, a panel’s acceptance of an amicus brief attached to a party’s submissions can work to a developing country’s advantage. Second, by posting its submissions on a web site, a developing country can forge closer relations with private groups that can provide them with valuable assistance, whether behind-the-scenes, in the media or through a legal brief. The UK Consumers’ Association and its lawyers provided significant free research to Peru and the Advisory Centre.

The Advisory Centre’s policy on transparency is ‘to offer its Members and the least-developed countries the possibility to post their submissions on the ACWL website. The public can therefore be informed already during the course of a WTO dispute settlement proceeding of all the facts and arguments presented by a Member or a least-developed country assisted by the Centre.’ In the EC-Sardines case, the Centre posted Peru’s briefs thus facilitating its work with Europe’s largest consumer group to counter a number of the EC’s arguments. Had Peru attempted to keep its position completely ‘confidential’ on the grounds that the WTO is an intergovernmental organisation for Members only, or had it attempted to keep its submissions from the public, Peru would not have benefitted from the key support of Europe’s largest consumer association and a British law firm.

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Anyone aware of how WTO litigation works in practice knows that it is incorrect to think that WTO disputes are purely intergovernmental. Even the largest WTO Members confirm that they need to work with private organisations and their lawyers to enhance their chances of prevailing in WTO litigation. If developing countries are to make effective use of their WTO rights, they too will have to increasingly work with outside assistance. The new WTO Advisory Centre and its alliance with Europe’s largest consumer group in the EC-Sardines case point to an effective way to proceed. Over time, non-governmental groups increasingly will visit the Centre’s web site, reading developing country submissions and other postings. Over time, the Centre will also learn which groups can be of assistance in specific matters. The Advisory Centre thereby can build closer relations with private groups that can be of assistance to developing country challenges of US and EC measures, as happened for Peru in the EC-Sardines case.

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(See Gregory Shaffer, The Public and The Private (forthcoming Brookings Institute Press).)