US - TUNA: IMPLICATIONS FOR THE DEFINITION OF TECHNICAL REGULATION AND FOR DEVELOPING COUNTRIES

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ABSTRACT

Before US – Tuna, defining a technical regulation was less confusing. Developing countries could rely on the guidelines provided by both the United Nations Conference on Trade and Development (UNCTAD) and the World Trade Organization (WTO) and the Panel could rely on the definition of technical regulation as explained in EC – Asbestos by the Appellate Body (AB). The paper at hand shows how the AB’s definition of a technical regulation in US – Tuna will affect future cases and examines its impact on developing countries’ understanding of Annex 1.1 of the Technical Barrier to Trade Agreement (TBT).

I. Introduction

Under World Trade Organization (WTO) law, members can implement domestic laws to protect human, animal and plant life and health, national security, the environment, consumers, and other policy interests.¹ They must do so without unnecessarily creating obstacles to international trade.² Indeed, findings suggest that – apart from, on the one hand, facilitating exchange by explicitly defining product characteristics, as well as improving compatibility and usability, and, on the other hand, advancing domestic social goals by establishing minimum standards or prescribing safety requirements – the regulations and industry standards devised

by WTO members often hide protectionist policies. These protectionist policies are called technical regulations, and a technical regulation, according to Annex 1 to the TBT Agreement, is a

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.

While a priori and in theory, this definition is clear in its language and seems easy to understand, in practice, however, determining whether a regulation or an industry standard implemented by a WTO member constitutes a technical regulation is no easy task. Since January 1995, the Appellate Body (AB) has only had three occasions in which it was called to interpret the language of this Annex, and in each case, the AB formulated a new approach.

The paper at hand focuses on one of those three cases, US – Tuna, with the aim of revealing the implications of the approach adopted by the AB on the definition of a technical regulation and how such an approach will influence future Panel decisions. The paper briefly highlights the importance of determining, in a WTO case, the nature of the measure at issue (II) and how the

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4 Annex 1 of the TBT Agreement.
AB body has interpreted Annex 1 in the past (III). Then, the paper analyzes and criticizes the approach used by the AB in *US -Tuna* to find that the U.S. measures constituted a technical regulation (IV).

II. **Importance of the Definition of a Technical Regulation in WTO Cases**

Determining whether the measure at issue constitutes a technical regulation is a “threshold issue”⁶ in WTO dispute settlement when the TBT Agreement is invoked. In fact, before the Panel can proceed to determine whether a violation of that Agreement has occurred, it must first determine whether the controversial law passes the first test,⁷ which is whether it is indeed a technical regulation.⁸ If the Panel determines that it is not a technical regulation, then the measure will not fall within the scope of the TBT Agreement and the Panel will not continue to examine the complainant’s claim under that Agreement.⁹

In principle, for the TBT Agreement to be triggered, the controversial measure must pass three basic tests.¹⁰ First, the measure has to pass the “substantive”¹¹ test, as follows: (i) it must be a technical regulation (Annex 1.1) governed by Articles 2 and 3 of the TBT, (ii) a standard (Annex 1.2) governed by Article 4, or (iii) a conformity assessment procedure (Annex 1.3), which is ‘any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.’¹² Second, it must pass the “personal”¹³ test; the

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⁶ See Appellate Body Report, *EC – Asbestos*, para. 59

⁷ This paper uses “test” to show the procedures followed.


⁹ *Id.*

¹⁰ See Peter Van Den Bossche, Denise Prevot and Marielle Matthe, WTO Rules on Technical Barriers to Trade, Maastricht Faculty of Law working paper 5 (2005) (the word “test” was not used by the others.)[http://www.worldtradelaw.net/articles/vandenboschbtb.pdf](http://www.worldtradelaw.net/articles/vandenboschbtb.pdf)

¹¹ *Id.*

¹² Annex 1.3 TBT Agreement.

¹³ See Van Den Bossche et al.
measure must be taken by the central government body or by any other body that has the authority to establish technical regulations, create standards, or carry out execution of conformity assessment procedures.\textsuperscript{14} Third, the measure at issue must pass the “temporal”\textsuperscript{15} test. In \textit{EC – Sardines}, the Panel had to decide whether the TBT Agreement could apply to measures that were previously in force.\textsuperscript{16} Its affirmative answer was upheld by the AB, which submitted that a measure entered into force before January 1, 1995 and that continues to exist falls within the scope of the TBT Agreement.\textsuperscript{17}

Since it is clear that determining the nature of controversial measure is a threshold matter in WTO law, it is important to examine how the AB has defined technical regulation in cases before \textit{US – Tuna}.

\textbf{III- WTO Jurisprudence on the Definition of Technical Regulation Before \textit{US - Tuna}}

The AB had to examine the meaning of a technical regulation as defined in Annex 1.1 for the first time in \textit{EC – Asbestos}. In this case, Canada complained that certain measures taken by France for the prohibition\textsuperscript{18} of asbestos and products containing asbestos, including a ban on imports of such goods,\textsuperscript{19} was inconsistent with a number of obligations of the European Community (EC) under WTO law, including Article 2 of the TBT Agreement.\textsuperscript{20} In determining

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\textsuperscript{14} See Van Den Bossche, Prevot and Matthe 11.
\textsuperscript{15} \textit{Id.}
\textsuperscript{17} Appellate Body Report, \textit{EC – Sardines}, para. 216.
\textsuperscript{18} The prohibiting language reads as follows: “the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibers shall be prohibited…” Article of the French Decree No. 96-1133 concerning asbestos and products containing asbestos (\textit{décret no. 96-1133 relatif à l’interdiction de l’amiante, pris en application du code de travail et du code de la consommation})
\textsuperscript{19} Decree No. 96-1133 of 24 December 1996 banning asbestos, issued pursuant to the Labor Code and the Consumer Code.
\textsuperscript{20} Appellate Body Report, \textit{EC-Asbestos}, para. 3.
\end{flushleft}
whether the measure was a technical regulation, the Panel found that it had two parts, the “prohibition” part and the “exception” part, and that those parts had to be examined separately.\textsuperscript{21} After its analysis, the Panel found that the “prohibition” part was not a technical regulation within the meaning of the definition in Annex 1.1 to the TBT Agreement,\textsuperscript{22} but that the “exception” part was.\textsuperscript{23} The AB reversed the Panel’s conclusion, stating that the measure had to be taken as an “integrated whole”.\textsuperscript{24} The AB then instructed the Panel to, when deciding such matters, determine whether (i) the measure applies to an identifiable product or group of products and if the product(s) do not have to be \textit{expressly} identified in the measure; (ii) the measure lays down one or more characteristics intrinsic or related to the product; and (iii) compliance with the characteristics is mandatory.\textsuperscript{25} In determining whether the measure, taken as an integrated whole, constituted a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, the AB concluded that since the measure established (i) the “characteristics” for all products that might contain asbestos; and (ii) the applicable administrative provisions with which (iii) compliance was mandatory for sale in the EC market, it constituted a technical regulation.\textsuperscript{26}

\textsuperscript{22} See Panel Report, \textit{EC-Asbestos}, para. 8.58.
\textsuperscript{23} See Panel Report, \textit{EC-Asbestos}, para. 8.72. However, the Panel did not conclude on this exception part because, it said that Canada had not made a claim concerning the compatibility of that part of the Decree with the TBT Agreement, Panel Report, \textit{EC-Asbestos}, para. 9.1.
\textsuperscript{24} See Appellate Body Report, \textit{EC-Asbestos}, para. 64.
\textsuperscript{25} See Appellate Body Report, \textit{EC-Asbestos}, paras. 66–70.
\textsuperscript{26} Appellate Body Report, \textit{EC-Asbestos}, para.. 75.
In *EC – Sardines*, Peru complained that the EC Regulation,\(^{27}\) defining the standards governing the marketing of preserved sardines in the EC,\(^{28}\) constituted a technical regulation and was inconsistent with Article 2 of the TBT Agreement. The EC conceded that the measure was indeed a technical regulation for the category of preserved sardines regulated, *Sardina pilchardus*, but that for the purpose of the dispute and the type of sardines invoked, *Sardinops sagax*, the measure did not ‘fulfill two of the criteria that a document must meet to be considered a technical regulation under the TBT Agreement.’\(^{29}\) Indeed, according to the EC, *Sardina pilchardus* and *Sardinops sagax* are not like products,\(^{30}\) and the regulation cannot be said to be laying out product characteristics but, naming rules, which is different from labeling requirements.\(^{31}\) The Panel rejected this argument,\(^{32}\) a decision upheld by the AB, albeit through a different analysis; the AB stated that since ‘*[s]ardinops sagax* are, by virtue of the EC Regulation, *prohibited* from being identified and marketed under an appellation including the term "sardines"’\(^{33}\) they can be seen as an identifiable product under the EC Regulation\(^{34}\) because, quoting *EC – Asbestos*,

…the requirement that a “technical regulation” be applicable to *identifiable* products relates to aspects of compliance and enforcement, because it would be impossible to


\(^{28}\) Panel Report, *EC–Sardines*, para. 2.5.

\(^{29}\) Appellate Body Report, *EC–Sardines*, para. 177.


\(^{31}\) Appellate Body Report, *EC–Sardines*, paras.187 - 188

\(^{32}\) Panel Report, *EC–Sardines*, para. 7.44.


\(^{34}\) Appellate Body Report, *EC–Sardines*, para.186.
comply with or enforce a “technical regulation” without knowing to what the regulation applied.”

Second, the AB held that with regard to the second element of the technical regulation, by requiring that preserved sardines be prepared exclusively from fish of the species *Sardina pilchardus*, the EC regulation did lay down a characteristic “intrinsic to” preserved sardines. Further, the AB did not find it necessary to decide whether the definition of "technical regulation" in the TBT Agreement made a distinction between "naming" and labeling. In light of the above, the AB concluded that the EC regulation fulfilled all the requirements to be a technical regulation for the purposes of the TBT Agreement.

One noticeable observation in these two cases is that the contested measures established the requirements that products must meet in order to enter the EC market. In other words, non-compliance with the measure means violation of the law and, therefore, no sale of the products in the EC market. For example, in order for Peru to sell Peruvian Sardines in the EC market, Peru must show that its products are preserved sardines prepared from fish of the species *Sardina pilchardus*. Further, Canada cannot export or sell products containing asbestos in the EC market.

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37 *Id.*
39 The AB recognizing this, based its analysis on the finding that ‘*[s]ardinops sagax* are, by virtue of the EC Regulation, prohibited from being identified and marketed under an appellation including the term “sardines” and are therefore identifiable under EC Regulation.’ See AB Report para. 184.
40 Panel Report, *EC–Sardines*, para. 2.6
41 Panel Report, *EC–Sardines*, para. 7.27.
42 See *EC–Asbestos*. 

This paper does not endorse the holding, in *EC - Sardines*, that “naming requirements” and “labeling requirements” both come within the scope of the definition of technical regulation because they are considered to be essential “means of identification”.

 Instead, the paper supports the EC’s argument that its regulation contains ‘a substantive naming requirement for preserved *Sardina pilchardus* and does not contain any labeling requirements for preserved *Sardinops sagax*.’ This position is based on the principle that, *a priori*, a “name” is different from a “label” and that a name becomes a “label” only when it is the only means of identification affixed to a product and does not include any other description, photo, or characteristic of the said product. For example, the name of the product in the can below is Tuna, and it is also the product’s only means of identification.

![](image)

To better understand the difference between *name* and *label*, it is important to understand the impact of each consumers. To understand the different impacts, one must ask consumers the following questions:

Q. What do you want to buy?
A. I want to buy sardines. **“Name” of the product.**

Q. Any type of sardines?
A. No. I want spiced, sweet, and low-fat sardines in tomato sauce. **“Label on the product”**

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In principle, a label commonly refers to printed information that is presented to consumers in immediate connection with their view and purchase of the product.\(^{45}\) This is because “[e]very labeling is in a sense an advertisement.”\(^{46}\)

**III- US – TUNA and its Implications for the Definition of Technical Regulation**

The U.S. had adopted a series of measures that established the conditions for use of “dolphin-safe” label. For example, to obtain the US Department of Commerce official dolphin-safe label, one had to bring documentary evidence to show the area where the tuna contained in the product was harvested and the fishing method used.\(^{47}\) Mexico requested that the Panel finds these measures inconsistent with Articles I:1 and III:4 of the GATT 1994 and Articles 2.1, 2.2, and 2.4 of the TBT Agreement; the United States objected\(^{48}\), arguing, *inter alia*, that its measures did not constitute a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.\(^{49}\) The Panel cited the three-tier test developed in *EC – Asbestos* and submitted that to be a technical regulation, a measure must be applicable to at least one identifiable product; it must lay down one or more characteristics of that product; and compliance with those product characteristics must be mandatory.\(^{50}\) After finding that all of these requirements were met, the Panel concluded that the measures established ‘*de jure* mandatory labeling requirements’ and therefore constituted a technical regulation.\(^{51}\)

\(^{49}\) Panel Report, *US–Tuna*, para 7.57. In Appeal, the US contended that its measures did not meet all the requirement of a technical regulation. The US argued that the panel erred in finding that its measures establish “labeling requirements, compliance with which is mandatory.” AB Report para 179.
\(^{50}\) Panel Report, *US–Tuna*, para. 7.53.
\(^{51}\) Panel Report, *US–Tuna*, para. 7.145
One panelist dissented, arguing that Mexico failed to demonstrate that the United States “dolphin-safe” provisions established both *de jure* and *de facto* mandatory labeling requirements.\(^{52}\) According to that panelist, the U.S. measure did not meet the third condition of the three-tier test (mandatory requirement).\(^{53}\) The panelist submitted that a labeling scheme is compulsory when the use of a label is necessary to access the market of one country and voluntary when a product is marketed with or without that specific label.\(^{54}\)

The United States appealed the Panel’s holding, but the AB upheld the decision.

**A. AB Analysis**

In its analysis, the AB held that determining whether a measure is a technical regulation is not, *per se*, a straightforward analysis and that the Panel, in deciding whether a measure is a technical regulation, needs to consider both the principal features of the measure at issue and the circumstances of the case.\(^{55}\) This, the AB submitted, is because in some cases, “[c]ertain features exhibited by a measure may be common to both technical regulations falling within the scope of article 2 of the *TBT agreement* and … standards falling under article 4 of that agreement.”\(^{56}\) Further, the AB stressed that:

> The fact that "labeling requirements" may consist of criteria or conditions that must be complied with in order to use a particular label does not imply therefore that the measure is for that reason alone a "technical regulation" within the meaning of Annex 1.1.\(^{57}\)

\(^{52}\) Panel Report, *US–Tuna*, para. 7.186.

\(^{53}\) *Id.*

\(^{54}\) Panel Report, *US – Tuna*, para. 7.150.


\(^{56}\) Appellate Body Report, *US – Tuna*, para. 188.

The question now is, how does the Panel determine the features of the measure at issue and the circumstances of the case?

1. **Determining the Features of the Measure and the Circumstances of the Case**

The AB said that in determining the features of the measure at issue, the Panel must answer a number of important questions, including, among others:

- What is the nature of the measure at issue? Is it a law or regulation enacted by a WTO member? - **Answered**
- Does it prescribe or prohibit a particular conduct? - **Answered**
- Does it set some specific requirements to be fulfilled and are those requirements set as the sole means of addressing the particular matter? - **Answered**
- What is the nature of the matter addressed by the measure? 58
- Does it provide for a specific enforcement mechanism? - **Answered**
- Does it set out an active surveillance mechanism to guarantee compliance with its norms and impose sanctions in the case of wrongful labeling? 194

Upon careful examination, these questions and the answers thereof reflect the three-tier test developed in *EC–Asbestos* and cited by the Panel in this case. 59 Indeed, the answers provided by the AB show that they are measures taken by the U.S. Congress to: (i) establish the condition for the use of dolphin-safe labels on tuna products, (ii) lay down one or more characteristics of the tuna products, and (iii) provide for specific enforcement mechanisms, compliance with which is mandatory. 60

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59 This paper submits that those questions should instead be used when determining the element of the three-tier test.
60 Appellate Body Report, *US – Tuna*, paras. 190 - 195
It appears that the AB used the same analysis and approach employed by the Panel used to reach the same conclusion. This conclusion can be drawn since the AB failed to complete its analysis that the Panel must determine the features of the measure and the circumstances of the case.\textsuperscript{61} In \textit{US–Tuna}, the AB only shows the Panel how to determine the features of the measure at issue and fails to direct it on how to analyze the circumstances of the case or which circumstances to consider. The question that arises, therefore, is: did the AB apply a form of judicial economy? In other words, is the AB telling the Panel that when the features of the measures meet the requirements of a technical regulation, the Panel does not have to proceed to determine the circumstances of the case? This argument cannot be easily made; the AB must clarify its analysis in future cases.

2. Labeling Requirement and Access to Market

The United States follows the analysis of the dissenting panelist and argues that for compliance with a labeling requirement to be mandatory, there must be a requirement that one has to use a particular label in order to enter the market of a territory.\textsuperscript{62} The AB rejects this argument because the words “market” and “territory” are not mentioned in the text of Annex 1.1 and because this Annex does not ‘indicate that a labeling requirement is “mandatory” only if there is a requirement to use a particular label in order to place a product for sale on the market.’\textsuperscript{63} The AB focuses only on the condition that in order to use any “dolphin-safe” label, any distributor, importer, exporter, or seller have to comply with the U.S. measures.\textsuperscript{64}

\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.}
This paper disagrees with the AB’s analysis and conclusion for three reasons: first, the analysis changes and enlarges the scope of the definition of a technical regulation,\(^\text{65}\) and this is not good for developing countries because many developing countries’ trade representatives rely heavily on training by the United Nations Conference on Trade and Development (UNCTAD) and on WTO online. The materials that many representatives used defined technical regulation as shown in the examples that follow:

**Example A:** UNCTAD, in its training *Course on Dispute Settlement in International Trade, Investment and Intellectual Property*,\(^\text{66}\) gives examples of a technical regulation and standards:

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**Technical Regulation**

**Example 1:** A law stating that only refrigerators that are one meter high can be sold in State X is a technical regulation.

**Example 2:** A law stating that all product packaging must be recyclable is an example of a technical regulation.

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**Standards**

**Example 1:** A government guideline saying that all eggs weighing 62 grams or more are entitled to be labeled “Grade A” is a standard (provided that eggs weighing less may still be sold).

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\(^{65}\) It means the scope of Annex 1.1 of the TBT Agreement and the interpretation of a technical regulation in *EC–Asbestos*.

**Example 2:** A guideline defining what products can display a “recyclable symbol” is a standard (provided that products that do not bear the symbol may still be sold).  

**Example B:** The WTO, in its *Technical Barriers to Trade in the WTO*, gives examples of a technical regulation and standards as follows:

**Technical Regulation**

**Example:** A Washing Machine. A WTO Member may issue a regulation with which compliance is mandatory for the industry ..., which states that no washing machine commercialized within the territory shall have a consumption over XXX Kilowatts a year. This is a typical technical regulation on a product's characteristics, based on performance. In order to make sure that a certain product complies with the regulation, the government may require a label to be placed on the product.

These examples from the UNCTAD and the WTO learning materials clearly replicate the analysis and definition of a technical regulation by the AB in *EC-Asbestos*; the U.S. measures in *US–Tuna*, and they also support the dissenting panelist’s analysis and conclusion in *US–Tuna*. The AB has enlarged this definition of a technical regulation and it now classifies certain standards as technical regulations without showing how the Panel and developing countries should make that distinction.

The second reason why this paper disagrees with the AB’s analysis is because the latter complicates the work of the Panel by obfuscating the definition of standards; the AB does not establish clear limits between a standard and a technical regulation, nor does it explain how to distinguish one from the other. Third, the paper disagrees with the AB because, as the AB

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67 See UNCTAD Dispute Settlement WTO 3.10 Technical Barriers to Trade 7-8, (2003).
69 See section III supra.
rightly pointed out, ‘[c]ertain features exhibited by a measure may be common to both technical regulations falling within the scope of article 2 of the TBT agreement and … standards falling under article 4 of that agreement.”70 The paper submits that in US-Tuna, the features exhibited are common to standards and fall under article 4 of the TBT Agreement.

B. The Panel and AB’s Interpretation of Precedents? Asbestos and Sardines

Precedents play an important role in a legal system by helping to establish a certain degree of certainty.71 A court must be able to identify and limit a precedent by stating from the outset whether the cases or the facts are different or by explicitly indicating whether earlier cases do not apply to the case at hand.72 The distinction and limitation help to prevent cases where the judge or arbitrator may be tempted to focus only on the conclusion stated in a precedent and to forget about the context.

In US–Tuna, the AB’s interpretation of the precedents was not convincing leading to a conclusion that this paper does not support. In EC–Sardines, frequently cited in the case, the issue was he “denomination” of a product, not about to market the product. As the paper argued earlier, a label is, per se, a form of publicity.73 A product is given a name, produced, and then labeled for the market. Hypothetically, consider three non-transparent cans containing the same product:

The first can has nothing written on it:

70 Appellate Body Report, US – Tuna, para. 188.
The second can has the word “tuna” affixed to it:

The third can has the word “dolphinsafe Tuna”, together with a picture of a dolphin.

It would be difficult for a consumer to buy the first can because s/he does not know what it contains; the name of the product is unknown. A customer would buy the second can because s/he wants to eat tuna but does not care where it comes from and how it was caught. A customer would purchase the third can because s/he is not very happy with Mexican fishers who sell the second can because they allegedly kill dolphins in the Pacific Ocean. This scenario illustrates the argument made in this paper that identification is different from denomination. First, something must be denominated, given a formal name, and second, it must be identified (differentiated from others). According to the Oxford English Dictionary, a denomination is *formal* name or designation.\(^74\) “Identification” is the ‘the association or linking of one thing

\(^74\) [http://oxforddictionaries.com/definition/english/denomination?q=denomination](http://oxforddictionaries.com/definition/english/denomination?q=denomination)
with another’ or ‘the action or process of identifying someone or something or the fact of being identified: [example] each child was tagged with a number for identification.’ 75

Thus, this paper submits that a “labeling requirement” and a “naming requirement” are two completely different mechanisms. A product is given a name at its origin and is labeled for sale. The inventor chooses the name of his/her product according to the norms of the industry, and the product is labeled for sale according to the market law. The process of labeling a product is designed to target a specific market or to give the consumer specific information about the product. In other words, the process of labelling is part of the product’s publicity.

Given this interpretation, the paper at hand argues that the AB and the Panel made the same mistake observed in EC-Sardines when they said that a labeling requirement and a naming requirement are equally modes of identification. 76

One might argue that a “naming requirement” is regulated by the TBT Agreement and that it falls under the word “terminology” in the definition of a technical regulation, according to Annex 1.1. This paper submits that this argument cannot be easily made because the word “terminology” refers to ‘a statement of the exact meaning of a word’ or to ‘the degree of distinctness in outline of an object, image, or sound’. 77 This definition makes it clear that a “naming requirement” does not fall under the word “terminology” and that this word is closer to a labeling requirement because, in short, it means definition, as its origin shows. 78

75 http://oxforddictionaries.com/definition/english/identification

76 The AB further concluded, ‘[t]he fact that the Appellate Body characterized the measure at issue in EC-Sardines as a “technical regulation” appears to support the notion that the mere fact that it is legally permissible to sell a product on the market without using a particular label is not determinative when examining whether a measure is a “technical regulation” within the meaning of Annex 1.1.’ See para. 198.

77 http://oxforddictionaries.com/definition/english/definition

78 The Oxford English Dictionary says that the word “terminology comes from the Latin word “definition(n-)” from the verb “definire” ‘set bounds to’ (see define) http://oxforddictionaries.com/definition/english/definition
C. **EC-Sardine vs. US-Tuna**

The difference between *US-Tuna* and *EC-Sardines* is that in the former, both American and Mexican businesses can access the U.S. market. In *EC-Sardines*, not all businesses could sell “sardines” or “preserved sardines” in the European market. Peruvian exporters had to call their products differently. In *US-Tuna*, any company can sell tuna, but not all companies can sell tuna with the “dolphin-safe” label. The two cases are different because the measure in *EC-Sardines* met the prohibitive requirement of technical regulations, whereas the measures in *US-Tuna* were voluntary.\(^{79}\)

| In *EC-Sardines*, the mandatory nature of the measures challenged in that case was not in question. In that case, the AB was therefore not called upon to determine the interaction between mandatory and voluntary requirements. The measures in that case required the use of only the species *Sardina pilchardus* in products marketed as "preserved sardines". The AB found that "preserved products made, for example, of *Sardinops sagax* [were], by virtue of the EC Regulation, prohibited from being identified and marketed under an appellation including the term 'sardines'" (emphasis in the original). In other words, the exporters of preserved sardines containing any species of sardines other than *Sardina pilchardus* were not allowed to market their products as "sardines". *EC-Sardines* did not involve a labeling requirement but rather a naming requirement. And by not allowing producers to market certain preserved sardines as sardines, these products were prohibited from entering the sardine market at all. However, in contrast to *EC-Sardines*, Mexico is not prohibited from selling its tuna as tuna to the United States. It is a fundamental difference |

\(^{79}\) Panel Report, *US – Tuna*, para. 7.164.
between the facts of that case and those of the present dispute that in this case the measures lay down labeling requirements, which allow the operator to make claims reflecting compliance with a particular standard. The U.S. dolphin-safe provisions are intrinsically linked to a voluntary labeling scheme, which, in turn, is intended to reflect compliance with a particular standard (a "dolphin-safe" standard). This is a factual circumstance with which neither the panel nor the AB in EC–Sardines was confronted. They could, therefore, conclude that the measures in question laid down product characteristics in a negative form without affecting the conceptual differences between technical regulations and standards. For these reasons, the AB's decision in EC–Sardines does not offer conclusive guidance on whether legally enforceable provisions imposing compliance with particular requirements in order to claim compliance with a standard through the use of a label, or prohibiting the use of deceptive labels relating to the same matter, have the effect of turning a voluntary standard into a technical regulation.

**Dissenting Opinion**

**Conclusion**

This aims of this paper were to analyze the conclusion of the AB in US-Tuna that the measures taken by the United States constituted a technical regulation and to show how this conclusion will affect future Panel decisions. The paper first explained why it is important, in a WTO case,

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80 Panel Report, *US – Tuna*, para. 7.164
to determine the nature of the measure at issue. After that, the paper explored how the AB analyzed Annex 1.1 of the TBT Agreement in previous cases noting that in both EC–Asbestos and EC–Sardines, the measures were indeed technical regulations. With regard to US–Tuna, the paper submitted that the measures taken by the United States did not meet all three requirements of a technical regulation presented by the AB in EC–Asbestos,\(^\text{81}\) the measure is voluntary and it constitutes a standard. The analysis showed that the AB relied on an incomplete analysis and on incorrect precedents.\(^\text{82}\) Moreover, the paper noted that the AB’s decision will further confuse the Panel in future cases and will not favor developing countries that rely on training by the UNCTAD and WTO online materials to interpret the TBT Agreement.\(^\text{83}\) This negative effect on the definition of technical regulation and standard will create room for protectionist policies and controversial decisions and therefore, further undermine the reputation of the WTO and that of its court.

**Reference**

Peter Van Den Bossche, Denise Prevot and Marielle Matthe WTO Rules on Technical Barriers to Trade, Maastricht Faculty of Law working (2005)

\(^{81}\) Those are: (i) the measure applies to an identifiable product or group of products and the product (s) does not have to be expressly identified in the measure; (ii) the measure lays down one or more characteristics of, intrinsic or related to, the product; and whether (iii) compliance with the characteristics is mandatory. Appellate Body Report, *EC-Asbestos*, paras. 66–70.

\(^{82}\) See analysis in section III B above, page 15.

\(^{83}\) See section III A 2 supra, page 13.


Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012


Panel Report, EC-Asbestos, para 8.72. However, the Panel did not conclude on this exception part because, it said that Canada had not made a claim concerning the compatibility of that part of the Decree with the TBT Agreement, Panel Report, EC-Asbestos, para 9.1.

