**Title:** The definition of “*technical regulation*” under Annex 1.1. of the TBT Agreement and the relevant distinction between labelling and terminology requirements behind the AB’s rulings in US – Tuna II and EC – Sardines.

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**ABSTRACT** The distinction between technical regulations and standards has significant implications since the obligations applicable to technical regulations are more stringent. The *US – Tuna II* and the *EC – Sardines* cases have been essential to clarify the requirements necessary for a measure to qualify as a technical regulation. This paper highlights the distinction between terminology and labelling requirements based on the previously mentioned rulings. While terminology requirements limit market access and should always be mandatory – hence, qualify as a technical regulation –, the impact of labelling and marking on consumers will determine whether a measure limits market access or simply informs consumers of the different choices in the market. In the former case, the labelling and marking requirement will clarify as a technical regulation, whereas in the later it will constitute a standard.

**ABSTRACTO** La distinción entre regulaciones técnicas y estándares es esencial debido a que las obligaciones aplicables a las regulaciones técnicas son más restrictivas. Las decisiones en los casos *US – Tuna II* y *EC – Sardines* han resultado esenciales para determinar qué medidas adoptadas por Miembros de la OMC califican como regulaciones técnicas. Este artículo resalta la distinción entre requisitos terminológicos y requisitos de etiquetado basándose en las decisiones previamente mencionadas. Mientras que los requisitos terminológicos limitan acceso al mercado y siempre deberían ser obligatorios – y, por ende, calificar como regulación técnica –, el impacto que el etiquetado tiene en los consumidores determinará si una medida limita el acceso al mercado o simplemente informa a los consumidores de las distintas opciones en el mercado. Mientras que en el primer de los casos, el requisito de etiquetado debe ser considerado como regulación técnica, en el segundo constituirá un estándar.

**KEY WORDS** TBT Agreement, Technical Regulations, Standards, Appellate Body Report, Related and Non-Related Process and Production Methods.

**PALABRAS CLAVE** Acuerdo TBT, Regulaciones Técnicas, Estándares, Decisión del órgano de apelación de la OMC, Procesos y Métodos de Producción relacionados y no relaciones con el producto.

**LIST OF ABBREVIATIONS**

|  |  |  |  |
| --- | --- | --- | --- |
| AB | Appellate Body | PPMS | Process and Production Methods |
| ABR | Appellate Body Report | OECD | Organisation for Economic Co-operation and Development |
| Art./Arts. | Article/Articles | TBT Agreement | WTO Agreement on Technical Barriers to Trade |
| EC | European Communities |  |  |
| Para./Paras. | Paragraph/Paragraphs |  |  |
| NPR-PPMS | Non-product-related Process and Production Methods |  |  |

1. **Introduction**

 The WTO Uruguay Round Agreement on Technical Barriers to Trade (“**TBT Agreement**”)[[1]](#footnote-1) entered into force on 1 January 1995 and it is the multilateral successor to the Standards Code, signed by 32 GATT contracting parties at the Tokyo Round of Trade Negotiations in 1979. It forms part of the Uruguay Round’s “single undertaking”. The TBT Agreement aims at respecting WTO Members’ discretion to choose an adequate regulatory level to protect human, animal and plant life and health, national security, the environment, consumers and other policy interests while assuring that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to international trade.

1. **The definition of technical regulations under TBT Agreement Annex 1.1**

The TBT Agreement covers three types of measure, namely technical regulations[[2]](#footnote-2), standards[[3]](#footnote-3) and conformity assessment procedures relating to products (including industrial and agricultural products); and processes and production methods (“**PPMS**”).[[4]](#footnote-4) The distinction between two of them, technical regulations and standards, is not always clear-cut but has significant implications as more stringent obligations apply to technical regulations. Annex 1.1 of the TBT Agreement contains the definition of “technical regulation”.

Pursuant to paragraph 1 of Annex 1 of the TBT Agreement a “technical regulation” 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 labelling requirements as they apply to a product, process or production method*”.

In *EC – Sardines[[5]](#footnote-5)****,***referring to its previous report in *EC – Asbestos*, the Appellate Body (“**AB**”) developed a three-tier test to determine whether a measure qualifies as a “*technical regulation”.*This article will focus on the second and the third elements namely (i) whether the measure lays down product characteristics or their related PPMS (ii) with which compliance must be mandatory.[[6]](#footnote-6)

* 1. **Product characteristics, PPMS and NPR-RPMS**

With regard to the second element, the AB has held that “*the “characteristics” of a product include, in our view, any objectively definable features, qualities, attributes or other distinguishing mark of a product”.[[7]](#footnote-7)* It added that they *“might relate, inter alia, to a product’s composition, size, shape, (…) density, or viscosity*”.[[8]](#footnote-8) Regarding “PPMS”, the AB noted in *EC – Seal Products* that all “PPMS” do not fall under this definition and that drawing a line raises “*important systematics issues*”.[[9]](#footnote-9) To determine whether a measure lays down product related “PPMS”, panels must assess whether the “PPMS” have “*a sufficient nexus to the characteristics of a product so to be considered related to the characteristics of the product*”.[[10]](#footnote-10) Hence, according to the wording of Annex 1.1 all product-related PPMS are covered.

However, the question of whether measures that lay down non-product-related process and production methods (“**NPR-PPMS**”) – which do not affect the physical characteristics of the final product put on the market – can fall under the definition of “technical regulation” is still unclear. Despite the fact that this issue has never been addressed, it is clear that measures concerning terminology, symbols, packaging, marking or labelling requirements would cover “NPR-PPMS” as the second sentence of Annex 1.1 omits the term “product related”.[[11]](#footnote-11) However, whether “NPR-PPMS” relating to measures not covered by this sentence fall under the TBT Agreement is up for discussion.

 “NPR-PPMS” have been a contentious issue as they can have extraterritorial effects by enabling importing countries to dictate how products must be processed in exporting countries.[[12]](#footnote-12) Including “NPR-PPMS” under the TBT Agreement’s coverage has significant implications as otherwise they would only be covered by the less stringent obligations of the GATT. Nonetheless, the reasons that let the drafters of the TBT Agreement to include the word “related” in the first sentence but exclude it on the second sentence of Annex 1.1 cannot be by-passed since Art. 31.1 VCLT recognises that any “*treaty shall be interpreted (…) with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose*”. In this regard, only measures regarding NPR-PPMS through terminology, symbols, packaging, marking or labeling requirements should be covered by Annex 1.1. TBT Agreement.

* 1. **Mandatory compliance**

With regard to the third element of the three-tier test, namely, mandatory compliance, the different opinions in the panel ruling in *US – Tuna II* raise a rather interesting debate.

 In *US – Tuna II*, which concerned a measure establishing the conditions for use of a dolphin-safe label on tuna products, the key issue was the correct characterisation of the measure. While the United States argued that the measure was a “standard”, the majority of the panel disagreed and qualified it as a “technical regulation”. On appeal, the United States only challenge the panel’s findings with regard the third element of the test. The United States argued that the labelling requirement was not mandatory since tuna products could be placed in the market without the label.[[13]](#footnote-13) The AB disagreed and pointed out that the determination of whether a measure is a “technical regulation” must be conducted in light of the features of the measure and the circumstances of the case.[[14]](#footnote-14) The AB noted that consumers’ preferences in the United Stated showed that the amount of sold tuna products without the dolphin-safe label was almost inexistent.[[15]](#footnote-15)

 However, attention should be given to the difference between the majority of the Panel’s and the dissenting interpretations. While the majority of the Panel interpreted the “mandatory compliance” as meaning that a product cannot be marketed in some way (namely, with the dolphin-safe label) without meeting these requirements – even if it could be marketed in some other way –[[16]](#footnote-16), the dissenting opinion argued that the correct meaning of the term is that a product cannot be marketed at all without meeting certain requirements.[[17]](#footnote-17)

 The issue arising from the majority interpretation – which was also pointed out by the United States –[[18]](#footnote-18) is that it turns all labelling requirements into technical regulations. The Panel based its decision on the AB’s ruling in *EC – Sardines.* In this case, the measure was an EC regulation establishing a number of requirements for the sale of “preserved sardines”, including that a product sold under the name “preserved sardines” contained only one species of sardines – “*pilchardus Walbaum*” –. The AB held that the EC measure was a “*technical regulation*” since it was contained in a rule that was “*binding in its entirety and directly applicable in all Member States*”.[[19]](#footnote-19) Some argue that the AB erred in its qualification as the EC´s measure should have been qualified as a standard since the measure did not stop Peruvian fish from being marketed in the EU but, rather, stopping it from being marketed in a particular way.[[20]](#footnote-20) However, a more correct view is that in *EC – Sardines* the ability to call a product a “sardine” was, indeed, a precondition for entering the market (for sardines), while in *US – Tuna II* products could be marketed as tuna and placed in the market without the dolphin-safe label requirement. The correct interpretation of these decisions is that a distinction between labelling and terminology requirements should be made. In this regard, all “terminology” requirements should qualify as “technical regulation” since they always impact consumers inasmuch as they will not recognise the product as such – acting as a limit on market access –. With respect to determining whether a labelling requirement qualifies as “technical regulation” will depend on whether it impacts the consumer so as to limit access to the market for that product– in which case it will be considered mandatory and, therefore, a technical regulation– or simply informs the consumers of the different choices available, in which case it will qualify as a “standard”.

1. **Conclusions**

In sum, in order for a measure to qualify as a “technical regulation” under Annex 1.1 TBT Agreement the three-tier test developed by the AB in *EC – Sardines* must be met. Countries may avoid the uncertainty of whether measures concerning “NPR-PPMS” are included in the mentioned Annex by formulating them through terminology, symbols, packaging, marking or labelling requirements. Moreover, while terminology requirements limit market access and should always be mandatory – qualify as a “technical regulation” –, countries must pay due consideration to the impact of labelling and marking on consumers since it will determine whether a measure limits market access or simply informs consumers of the different choices in the market. This assessment must be performed on a case-by-case basis and it will determine whether the measure is mandatory – those that limit market access – or voluntary – those that simply inform the consumer – and, thus, a “technical regulation” or a “standard”. The same argument could be made for symbols and packaging.

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*Production Methods in the Context of Climate-Change Mitigation OECD”*, OECD Trade and Environment Working Papers 2011/04, 6, <http://www.oecd-ilibrary.org/trade/trade-related-measures->based-on-processes-and-productionmethods-in-the-context-of-climate-change-mitigation\_5kg6xssz26jg-en?crawler=true, accessed May 27, 2015.

1. See WTO Uruguay Round Agreement on Technical Barriers to Trade, 1994, in force since 1 January 1955. [↑](#footnote-ref-1)
2. See Annex 1.1 of the TBT Agreement, n 1. [↑](#footnote-ref-2)
3. See Annex 1.2 of the TBT Agreement, n 1. [↑](#footnote-ref-3)
4. See Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regards to Labelling Requirements, Voluntary Standards and Processes and Production Methods Unrelated to Product Characteristics, Committee on Trade and Environment and Committee on Technical Barriers to Trade, G/TBT/W/11, adopted 29 August 1995, available at <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=31257,28532,13465,27519,26653,3970,5515&CurrentCatalogueIdIndex=6&FullTextHash>= [last addressed: 17 June 2019]. [↑](#footnote-ref-4)
5. See ABR, *EC – Sardines*, WT/DS231/AB/R, adopted 26 September 2002, para. 176. See also, ABR, *EC – Asbestos*, WT/DS135/AB/R, adopted 12 March 2001, paras. 67-70. [↑](#footnote-ref-5)
6. See ABR, *EC – Sardines*, n 4, para 66-70. [↑](#footnote-ref-6)
7. See ABR, *EC – Seal Products*, WT/DS400/AB/R, adopted 22 May 2014, para. 5.11. [↑](#footnote-ref-7)
8. *Ibid*, n 4, para. 5.11. [↑](#footnote-ref-8)
9. *Ibid*, n 4, para. 5.69. [↑](#footnote-ref-9)
10. *Ibid*, n 4, para. 5.12 [↑](#footnote-ref-10)
11. *Ibid*, n 4, paras. 5.11-5.12 where the AB noted that the second sentence of Annex 1.1. TBT Agreement provides useful examples of product characteristics, which can guide a panel´s interpretation. [↑](#footnote-ref-11)
12. Moïsé, Edavokia and Ronald Steenblik. (2011) “*Trade-Related Measures Based on Processes and Production Methods in the Context of Climate-Change Mitigation OECD”*, OECD Trade and Environment Working Papers 2011/04, 6, <http://www.oecd-ilibrary.org/trade/trade-related-measures->based-on-processes-and-productionmethods-in-the-context-of-climate-change-mitigation\_5kg6xssz26jg-en?crawler=true, accessed May 27, 2015. [↑](#footnote-ref-12)
13. See United State’s appellant’s submission, para. 32 (as referred to in ABR, *US – Tuna II*, WT/DS381/AB/R, adopted 16 June 2012, para. 196). [↑](#footnote-ref-13)
14. This exercise may involve considering (i) whether the measure consists of a law or a regulation enacted by a WTO Member; (ii) whether it prescribes or prohibits particular conduct; (iii) whether it sets out specific requirements that constitute the sole means of addressing a particular matter; and (iv) the nature of the matter addressed by the measure. [↑](#footnote-ref-14)
15. See ABR, *US – Tuna II*, n 12, para. 233. See also Panel Report, *US – Tuna II*, WT/DS381/R, adopted 15 September 2011, para. 7.289 [↑](#footnote-ref-15)
16. See Panel Report, *US – Tuna II*, n 15, paras. 7.108-7.111. [↑](#footnote-ref-16)
17. *Ibid*, n 15, paras. 7.150-7.151 [↑](#footnote-ref-17)
18. *Ibid*, n 15, para 7.94. [↑](#footnote-ref-18)
19. See ABR, *EC – Sardines*, n 4, para. 194. See also Panel Report, *EC – Sardines*, WT/DS231/R, adopted 29 May 2002, as amended WT/DS231/Corr.1, adopted 10 June 2002, para. 7.30 [↑](#footnote-ref-19)
20. See Lorand Bartels “*there is an argument to be made that EC - Sardines called it wrong, and that the measure there at issue was actually a standard*” Entry on the 23rd September (2011) in response to the debate “Technical Regulations vs. Standards in the Tuna Panel Report” See: https://worldtradelaw.typepad.com/ielpblog/2011/09/technical-regulations-vs-standards-in-the-tuna- panel-report.html accessed February 8, 2019. [↑](#footnote-ref-20)