What is a "Technical Regulation" in the TBT Agreement?

Abstract:

One important issue arising from *EC-Seal Products* is what constitutes a technical regulation in the TBT Agreement. This article argues that the Appellate Body's analytical approach to this issue has led to an arbitrary conclusion in *EC- Seal Products*. The article further examines to what extent PPMs, especially Non-product-related PPMs, are covered by the TBT Agreement. The article concludes that an important question to be answered is what special characteristics of a technical regulation distinguish it from other regulations and make it subject to more detailed obligations in the TBT Agreement.

I. Introduction

In *US – Clove Cigarettes*, the WTO Appellate Body observed that the TBT Agreement and the GATT 1994 overlap and share similar objectives.[1] At the heart, both the TBT Agreement and the GATT 1994 aim at striking a balance described by the Appellate Body as 'on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate'. Thus, the GATT 1994 is relevant context for the interpretation of the TBT Agreement.[2] That being said, the TBT Agreement is a specialized legal regime that applies solely to a limited class of measures. In *EC – Asbestos*, the Appellate Body emphasized that the TBT Agreement does not cover all internal measures covered by Article III:4 of the GATT 1994.[3]

Moreover, the TBT Agreement imposes obligations on WTO Members that 'seem to be *different from*, and *additional to*, the obligations imposed on Members under the GATT 1994.[4] The fundamental obligation under the GATT 1994 is non-discrimination. There are virtually no constraints on product standards that accord with the national treatment

[1] *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, Report of the Appellate Body, WTO Doc. WT/DS406/AB/R, 24 April 2012, at para 91.
[2] Ibid, para 100.
[3] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* , Report of the Appellate Body, WTO Doc. WT/DS135/AB/R, 5 April 2001, at para 77.
[4] Ibid,at para 80. For a detailed analysis of how the TBT Agreement is different from and additional to the GATT 1994, see Ming Du, "Domestic Regulatory Autonomy under the TBT Agreement: From Non-discrimination to Harmonization", 6 *Chinese Journal of International Law* (2007), pp. 269 *et sqq*., at p. 278.

obligation in the GATT 1994 even if the standards raise the costs of foreign suppliers disproportionately and thus have the effect of insulating domestic firms from foreign competition.[5] By comparison, the disciplines on product standards under the TBT Agreement move beyond the non-discrimination principle. This is the case, for example, with regard to Article 2.2.[6] Different from the necessity test under Article XX of the GATT 1994 which is to rescue a measure that has already been found to violate some substantive GATT obligations, Article 2.2 of the TBT Agreement imposes a positive obligation on all WTO Members. Even if a product standard at issue is not discriminatory in manner or in effect, it may still violate Article 2.2 simply because the standard unreasonably burdens international trade for the attainment of a legitimate policy objective.[7] In addition, the TBT Agreement has moved beyond the negative integration legal tools such as the national treatment obligation and incorporated positive integration tools such as harmonization, mutual recognition and equivalence. For example, Article 2.4 of the TBT Agreement requires WTO members to use relevant international standards as a basis for their municipal technical regulations unless they are inappropriate or ineffective.

Because the TBT Agreement is a specialized legal regime that imposes some special obligations on WTO Members when they adopt a special class of measures, the regulatory scope of the TBT Agreement is an important issue. If a contested measure does not fall into the sphere of the TBT Agreement, it will not be scrutinized under the TBT agreement in the first place. The TBT Agreement defines its scope of application primarily in Article 1 and Annex 1, making it clear that it applies to technical regulations, standards and conformity assessment procedures and to all products, with the exception of purchasing specifications prepared by the governmental bodies and SPS measures. Annex 1.1 defines a "technical regulation" as follows:

> Documents which lay down product characteristics or their related processes

[5] John J. Barcelo III, "Product Standards to Protect the Local Environment- the GATT and the Uruguay Round Sanitary and Phytosanitary Agreement", 27 *Cornell International Law Journal* (1995), pp. 755 *et sqq*., at p. 761; Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future* (Washington DC: Institute for International Economics, 1994), at p. 45.

[6] Article 2.2 provides: 'Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfillment would create'.

[7] Jan Neumann and Elisabeth Turk, "Necessity Revisited: Proportionality in World Trade Organization Law after *Korea – Beef*, *EC – Asbestos* and *EC – Sardines*", 37 *Journal of World Trade* (2003), pp. 199 *et sqq*., at p. 217.

> 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.

In *EC – Asbestos*, the Appellate Body set out a three-prong criterion that a measure must meet to fall within the definition of a "technical regulation". First, the measure must lay down one or more *product characteristics*. Second, the measure must apply to an identifiable product or group of products. Third, the compliance with the product characteristics laid down in the document must be mandatory.[8] Prior to the *EC – Seal Products* case, the Appellate Body sided with the panels in almost all TBT disputes that the measures at issue set out product characteristics.[9] In *EC – Seal Products*, there was no controversy about whether the measure applied to identifiable products, nor about whether it was mandatory. Instead, the major controversy centered on whether the EC seal regime has laid down one or more product characteristics. Part II of the article reflects on the Appellate Body's analytical approach to this issue. Moreover, one unsettled question concerning the regulatory scope of the TBT Agreement is the extent to which production and process methods (PPMs) fall under the purview of "technical regulation".[10] Part III reviews the Appellate Body's brief comments on this issue in *EC – Seal Products* and makes some suggestions on how this issue could be dealt with in future WTO disputes. Part IV concludes the article.

II. Has the EC Seal Regime Laid down Product Characteristics?

According to the Appellate Body in *EC – Asbestos*, the heart of the definition of a technical regulation is that a document must lay down "product characteristics". Product characteristics include not only any objectively definable features and qualities *intrinsic* to the product, such as a product's composition, size, hardness, flammability and density, but also "distinguishing marks" of a product, such as the means of identification, the presentation and the appearance of a product.[11] Terminology, symbols, packaging, marking or labeling requirements are good

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[8] *EC – Asbestos*, *supra* note 3, paras 66-70. It should be noted that in *EC – Asbestos*, the phrase 'their related processes and production methods (PPMs)' were not at issue. To what extent PPMs are covered in the definition of technical regulation is discussed in part III.

[9] Emily S. Fuller, Alan Yanovich, Sally S. Laing and Stephen S. Kho, "Refining What Qualifies as WTO Technical Regulation", 30 July 2014, available on the internet at <http://www.law360.com/articles/561813/refining-what-qualifies-as-wto-technical-regulation> (last accessed on 5 May 2015).

[10] Joost Pauwelyn, "Non-Traditional Patterns of Global Regulation: Is the WTO 'Missing the Boat'? " in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart Publishing, 2006), pp. 199 *et sqq*., at p. 210.

[11] *EC– Asbestos* , *supra* note 3, at para 67.

examples of the latter category. In addition, product characteristics may be prescribed in either a positive or a negative form.[12] The document may provide, positively, that product must possess certain characteristics, or the document may require, negatively, that products must not possess certain characteristics.

In *EC – Asbestos*, the measure at issue was a French ban prohibiting any use of asbestos and products containing asbestos. There are two distinctive features about the French ban. First, it is not only a prohibition of asbestos fibres. It also banned *products that contain asbestos fibres*. The EC argued that a measure banning a product cannot be equated with a measure that specifies that same product's characteristics. The Appellate Body agreed that the prescription of product characteristics must be distinguished from a pure product ban. If the measure consisted only of a prohibition of asbestos fibres, it might not constitute a technical regulation.[13] But the French ban at issue also banned products that *contain asbestos fibres*. Formulated negatively, the ban effectively prescribes certain objective features of all products, that is, they should not contain asbestos fibres.[14] After *EC – Asbestos*, it has been settled that if a measure strictly prohibits market access for a given product *as such*, such a measure does not constitute a technical regulation; if market access for a given class of products is made *dependent* on the existence or absence of given product characteristics, then this measure constitute a technical regulation.[15] Second, the French ban is not a total prohibition of asbestos fibres. It contains certain exceptions, permitting the use of certain products containing chrysotile asbestos fibres for a limited duration and subject to compliance with strict administrative requirements. The Panel concluded that the prohibition part of the French Decree is not a "technical regulation" but the exceptions part is. The Appellate Body reversed the panel and held that the prohibitions part and the exceptions part of the decree should be considered as a unified whole because the exceptions define the scope of the prohibitions and they would have no legal meaning unless they operated in conjunction with a general prohibition.[16] Viewing the measure at an integrated whole, the Appellate Body saw that the French measure lays down characteristics for all products that contain asbestos.[17]

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[12] Ibid, at para 69.
[13] Ibid, at para 71.
[14] Ibid, at para 72.
[15] Erich Vranes, *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford: Oxford University Press, 2009), at p. 291.
[16] *EC– Asbestos*, *supra* note 3, at para 64.
[17] Ibid, at para 75.

At first sight, the structure of the EU seal regime in *EC – Seal Products* is very similar to the French measure in *EC – Asbestos* in two aspects. First, the French measure in *EC – Asbestos* bans the importation of not only asbestos fibres but also products that contain asbestos fibres. Similarly, the EU seal regime prohibits the placing on the EU market of both pure seal products and seal – containing products. Second, both the French measure in *EC – Asbestos* and the EU seal regime in *EC – Seal Products* are not a total prohibition, but include both prohibitive and permissive elements. In essence, the EU seal regime prescribes that the placing on the EU market of seal products (including pure seal products and seal-containing products) shall be allowed only under either of the three conditions: first, the seal products result from hunts traditionally conducted by Inuit and other indigenous communities (IC hunts) and contribute to their subsistence; second, seal products are derived from marine resource management hunts (MRM hunts) and are not being placed on the market for commercial reasons; and third, the import by travelers to the extent that they are not for commercial reasons. Even though there was not an explicit general ban on seal products like the French ban on Asbestos, the EU seal regime operated to the same effects as the French ban in *EC – Asbestos*, i.e., seal and seal-containing products are prohibited unless one of the exceptions applies. Following *EC – Asbestos*, the Panel in *EC – Seal Products* highlighted the fact that "the prohibition on seal-containing products under the EU seal regime lays down a product characteristic in the negative from by requiring that all products not contain seal" and concluded that the EC seal regime falls into the ambit of the TBT Agreement.[18]

To many WTO commentators' surprise, the Appellate Body reversed the panel.[19] The Appellate Body emphasized that the determination of whether a measure constitutes a technical regulation must be made in the light of the characteristics of the measure at issue and the circumstances of the case. A Panel must carefully examine the design and operation of the measure while seeking to identify its "integral and essential" aspects. It is these features of the measure that are to be accorded the most weight for purpose of characterizing the measure. The ultimate conclusion as to the legal characterization of the measure must be made in respect of the measure as a whole.[20]

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[18] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC– Seal Products)*, Report of the Appellate Body, WTO Doc. WT/DS400/AB/R, 18 June 2014, at para 5.25.
[19] Robert Howse, "WTO Seals: What is it really that makes the AB think that TBT doesn't apply?", 25 May 2014, available on the internet at < http://worldtradelaw.typepad.com/ielpblog/2014/05/wto-sealswhat-is-it-really-that-makes-the-ab-think-that-tbt-doesnt-apply.html> (last accessed on 5 May 2015) .
[20] *EC – Seals*, *supra* note 18, at para 5.19.

Applying this overall analytical approach to the facts, the Appellate Body pointed out that the Panel's error was that its conclusion rested on its assessment of a single component of the measure, i.e., the prohibition of seal-containing products laid down a product characteristic in the negative form. The Panel, however, failed to conduct a holistic assessment of other relevant parts of the EU seal regime, particularly the permissive elements of the EU seal regime.[21] As described earlier, the prohibition of seal products is subject to conditions based on criteria relating to the identity of the hunter, or the type or purpose of the hunt from which the product is derived. Different from *EC – Asbestos*, where it is uncontested that the exceptions part of the French ban laid down product characteristics[22], the permissive elements of the EU seal regime, such as permitting Inuit killing seals, could not be viewed as product characteristics in the sense of TBT Annex 1.1.[23] Another argument against the Panel's analysis is that it makes the reference in the first sentence of TBT Annex 1.1 to "product characteristics or their related processes and production methods" pleonastic. Following the Panel's approach, *any* PPM (seals killed by Inuit in EC – Seal Products) would lay down product characteristic.[24] Moreover, it is indisputable that another aspect of the EU seal regime, the prohibition of pure seal products, does not prescribe any product characteristics.[25]

Being a multi-faceted measure, the EU seal regime contains both prohibitive and permissive elements. While some elements lay down product characteristics, others condition market access on factors not related to product characteristics. How to decide whether or not the EU seal regime is a technical regulation? The Appellate Body analyzes the weight and relevance of the "essential and integral" elements of the measure and makes and following conclusion:

> When the prohibitive aspects of the EU seal regime are considered in the light of the IC and MRM exceptions, it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such. Instead, it establishes the conditions for placing seal products on the EU market based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived. *We view this as the main feature of the measure*. That being so, we do not

[21] Ibid, at para 5.25.
[22] *EC– Asbestos*, *supra* note 3, at para 73.
[23] *EC – Seals*, *supra* note 18, at paras 5.43-5.45.
[24] Philip I. Levy and Donald H. Regan, "EC – Seal Products: Seals and Sensibilities (TBT Aspects of the Panel and Appellate Body Reports)", 14 *World Trade Review* (2015), pp. 337 *et sqq*., at p. 355
[25] *EC – Seals*, *supra* note 18, at para 5.35.

consider that the measure as a whole lays down product characteristics.[26]

It is probably only apparent to the Appellate Body why the main feature of the measure is to establish market access conditions unrelated to product characteristics, rather than lay down product characteristics in the negative form with some exceptions. The Appellate Body concluded that the prohibition on the products containing seal is *derivative* or *ancillary* of the three (IC/MRM/Travelers) market access conditions.[27] But this judgment seems to be rather arbitrary. As the Appellate Body acknowledged, the purpose of the EC ban on seal products is to prevent moral outrage at seal suffering. However, the purpose of the exceptions is to allow the preservation of Inuit culture and so on. Then, how can the purpose of public moral protection be derivative or ancillary of other purposes? Isn't it more plausible that the EU *first* conceived of the ban to address the moral concerns about inhumane killing of seals, and only then realized that it wanted the IC exception and the others? If, as the Appellate Body argued, the exceptions which established the conditions for placing seal products on the EU market are the main feature of the EU seal regime, then why should the necessity test in Article XX (a) be assessed in relation to the public moral objective of the ban, rather than directly in relation to the objectives of the exceptions such as the IC hunts?

Granted, the Appellate Body provided several reasons to support its conclusion, mainly through identifying different features of the EU seal regime and the French ban in *EC – Asbestos*. For example, in *EC – Asbestos*, asbestos-containing products were regulated because of their carcinogenic properties. By contrast, the EU seal regime does not prohibit seal-containing products because they contain seal as an input.[28] The difficulty of verifying precisely whether a particular product contains seal as an input was understood by the Appellate Body as suggesting that the regulation of the seal-containing products is not an equally important feature of the EU seal regime in operation as the case for the regulation of products containing asbestos in *EC – Asbestos*.[29] But it is difficult to see how these differences somehow concealed arguably the most important effect of the EU seal regime: seal-containing products, which constituted the majority of imported seal products, are not permitted to access the EU market unless they meet certain criteria relating to the identity of the hunter or the type or purpose of the hunt. Moreover, as the Appellate Body acknowledged

[26] Ibid, at para 5.58.
[27] Ibid, at para 5.41.
[28] Ibid, at para 5.41.
[29] Ibid, at para 5.42.

in the necessity analysis under Article XX, despite the fact that IC and MRM hunts also lead to inhumanely killed seals which contradict the asserted animal welfare purpose, the EU seal regime has made a net positive contribution to reducing EU and global demand for seal products and the incidence of inhumanely killed seals.[30] The prohibitive and permissive elements of the EU seal regime are really the two sides of the same coin and the characterization of the measure could be made either way, depending on the perspective of the beholder. It is not entirely clear to the readers why the Appellate Body emphasized the permissive element of the EU measure, whilst regarding the prohibitive elements as derivative or ancillary to the former.

The Appellate Body report of E*C – Seal Products* showed that the regulatory scope of the TBT Agreement is likely to be narrower than people previously thought.[31] According to the Appellate Body, mainly because the exceptions part of the EC seal regime (permissive elements) does not lay down product characteristics, the EU seal regime as a whole does not lay down product characteristics. This may mean that, assuming PPM issues are not implicated, the exceptions part may also have to lay down at least some product characteristics in order to fall into the ambit of the TBT Agreement in future disputes. In *EC – Seal Products*, after concluding that the EC seal regime was not a technical regulation, the Appellate Body advised:

> [In this case] we have focused on the text and the immediate context… as well as on previous jurisprudence by the Appellate Body. In future cases, depending on the nature of the measure and the circumstances of the case, a Panel may find it helpful to seek further contextual guidance in other provisions of the TBT Agreement, for example, those pertaining to standards, international standards and conformity assessment procedure, in delimiting the contours of the term 'technical regulation'. It may also be relevant for a panel to examine supplementary means of interpretation such as negotiating history of the TBT Agreement and the nature of claims that have been brought by the complainants. Indeed, a determination of whether a measure constitutes a technical regulation 'must be made in the light of the characteristics of the measure at issue and the circumstances of the case'.[32]

From this paragraph, it seems that the Appellate Body has in mind a more appropriate approach to evaluate whether or not a measure is a technical regulation. In view of the intense confusion and uncertainty on what constitutes a technical regulation, it is unfortunate that the

[30] Ibid, at para 5.254.
[31] Rob Howse, Joanna Langille and Katie Sykes, "Sealing the Deal: The WTO's Appellate Body Report in EC-Seal Products", 18 (12) *American Society of International Law Insights* (June 4, 2014).
[32] *EC – Seals*, *supra* note 18, at para 5.60.

Appellate Body did not demonstrate how to put into practice the new approach in *EC- Seal products*.

III. The Place of Processes and Production Methods (PPMs) in the TBT

One unsettled question concerning the regulatory scope of the TBT is the extent to which production and process methods (PPMs) fall under the purview of either "technical regulation" or "standard" and are thus subject to relevant TBT disciplines. Annex 1.1 provides that a technical regulation covers not only product characteristics, but also "*their related* processes and production methods". The meaning of the phrase 'their related PPMs' had not been examined in any WTO disputes prior to *EC – Seal Products*.[33] In *EC – Seal Products*, the Appellate Body interpreted "their related PPMs" to indicate that the subject matter of a technical regulation may consist of a PPM that is related to product characteristics. In order to determine whether a measure lays down "related" PPMs, a Panel will have to examine whether the PPMs at issue have *a sufficient nexus* to the characteristics of a product in order to be considered related to those characteristics.[34] In *EC – Seal Products*, Norway argued that the EC seal regime has laid down a related PPM through the IC and MRM exceptions. The Appellate Body refused to consider the issue because the Panel had made no findings on this issue. The Appellate Body also warned that "the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues".[35] Since the Appellate Body ducked the PPM issue in *EC – Seal Products*, it remains to be seen how broad this "sufficient nexus" between PPMs and product characteristics will be interpreted in future disputes.

How to interpret the phrase "their related PPMs" in Annex 1.1 of the TBT Agreement is a controversial issue. A textual reading of Annex 1.1 may indicate that both product-related PPMs (PR-PPMs) and non-product-related PPMs (NPR-PPMs) are covered by the definition of technical regulation. If product characteristics are defined broadly to include not only physical characteristics but also some non-physical characteristics, the types of PPMs are not the problem and even some NPR-PPMs could be covered by the definition of technical

[33] Ibid, at para 5.67.
[34] Ibid,at para 5.12.
[35] Ibid, at para 5.69.

regulation so long as they are *related* to product characteristics.[36] In this connection, it should be emphasized that nothing in the text of Annex 1.1 shows that product characteristics only refer to physical characteristics. Furthermore, since only "related PPMs" are covered by the definition of technical regulation, one necessary inference must be that not all NPR- PPMs are covered because they are not related to, i.e., have a sufficient nexus with, product characteristics.[37] Arguably, prescriptions of harvesting methods for tuna which do not leave physical traces can be regarded as having a sufficient nexus to the characteristics of a product so as to qualify as a "related PPM". By contrast, general policy considerations such as labor standards or human rights conditions that are not specifically related to the production of specific products would not qualify as "related PPMs" in the sense of the TBT definition.

Although a textural interpretation may indicate that the dichotomy of PR-PPMs and NPR-PPMs is not really relevant to the interpretation of "their related PPMs" in Annex 1 of the TBT Agreement. This interpretation is at odds with the prevailing view that the phrase "their related" in the definition of technical regulation intentionally qualify the scope of PPMs, i.e., only PR-PPMs are covered by the TBT Agreement. [38] NPR-PPMs which leave no physical traces in final products are not covered by the TBT Agreement. In other words, only physical product characteristics are relevant. The negotiating history of the TBT Agreement seems to support such an understanding. The Standards Code concluded at the end of Tokyo Round did not cover standards that are based on PPM criteria, regardless of whether or not they related to the product. During the Uruguay Round negotiations, Mexico proposed to insert "their related" before the processes and production methods. In introducing its proposal, Mexico made it clear that the intent was to exclude PPMs unrelated to the characteristics of a product from the coverage of the TBT Agreement, so that the TBT Agreement only addresses a narrow selection of PPMs. Mexico's proposal was adopted in the final TBT text. [39] In line with this understanding, requirements that products should be harvested in a certain way to meet environmental standards, i.e., non-product-related PPMs (NPR-PPMs) such as the

[36] Vranes, *Trade and the Environment*, *supra* note 15, at p. 342.
[37] Alexia Herwig, "Too much Zeal on Seals? Animal Welfare, Public Morals and Consumer Ethics at the Bar of the WTO", forthcoming in *World Trade Review*, at p. 7.
[38] WTO Secretariat, *Trade and Environment at the WTO* (Geneva, 2004), at p. 17; OECD Secretariat, "Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM- Based Trade Measures" (1997) OECD/GD (97) 137, at p. 11; Christiane R. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge: Cambridge University Press, 2011), at p. 381.
[39] WTO Secretariat, "Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labeling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics", WTO Doc. WT/CTE/W/10, 29 August, 1995, at para 146.

import ban at *US – Tuna I* and *US – Shrimp*, are not technical regulations since they have no impact on the physical qualities or performance or quality of the product.

Similarly, it is argued that voluntary NPR- PPMs also fall outside of the definition of "standard" in the TBT. In the final TBT text, only the word "related" is inserted before "the processes and production methods" in the definition of "standard", in contrast to "their related" in the definition of "technical regulation". The negotiating history shows that the omission of "their" in the standard definition does not imply a different meaning. Indeed, Mexico proposed to align the definition of "standard" with that of "technical regulation" towards the end of Uruguay Round. All but one of the delegations involved that expressed an opinion stated that they were prepared to accept Mexico's proposal as an improvement to the text.[40] This negotiating history strongly indicates that the word "related" in the definition of standard refers to "related to product characteristics", similar to the definition of technical regulation.

Although the negotiating history appears to support a narrow interpretation of "their related process and production methods" to refer to only PR-PPMs, it is not clear whether the Appellate Body will adhere to such an interpretation in future dispute settlement proceedings. To begin with, if NPR- PPMs are not covered by the TBT, then technical regulations and standards based on NPR-PPMs are only scrutinized under the GATT 1994. The irony of this exclusion is that concerns over the protectionist or unilateralist abuse of NPR-PPMs might actually be allayed by subjecting such measures to the TBT Agreement.[41] Second, the negotiating history of the PPMs in Annex 1 is not entirely unambiguous. In any case, the Appellate Body seldom resorts to travaux préparatoires because they are only a supplementary means of interpretation.[42] As shown above, using the strong textualist approach set forth in the VCLT, measures addressing NPR-PPMs could be regarded as being "related" to product characteristics.[43]

The second sentence of both definitions of technical regulation and standard in Annex 1 deals with terminology, symbols, packaging, marking or labeling requirements. The second

[40] Ibid, at para 150.
[41] Jan McDonald, "Domestic Regulation, International Standards, and Technical Barriers to Trade", 4 *World Trade Review* (2005), pp. 249 *et sqq*., at p. 255.
[42] Enrico Partiti, "The Appellate Body Report in US- Tuna II and Its Impact on Eco-Labelling and Standardization", 40 *Legal Issues of Economic Integration* (2013), pp. 73 *et sqq*., at p. 79.
[43] Vranes, *Trade and the Environment*, *supra* note 15, at p. 342.

sentence of each definition reads: "[a technical regulation or standard] may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method". Reading the second sentence literally, it seems that, as long as PR-PPMs and NPR-PPMs are reflected only in product packaging, marking or labelling requirements, they are covered by the TBT Agreement. However, an alternative view holds that the second sentence should be read in light of the first sentence.[44] Even though the word "related" was omitted from the phrase "…as they apply to a product, process or production methods" in the second sentence, the second sentence should be read consistently with the first sentence. In other words, the second sentence is only illustrative of the first and NPR-PPMs are excluded from both the first and the second sentences of the two definitions. This interpretation is contested by an opposite view that the TBT Agreement applies to all labeling requirements that fall within the definitions of either a technical regulation or a standard. The second sentence is "additional to the first sentence and not merely illustrative".[45] This debate also took place in discussions of Item 3(b) on the agenda of CTE working program which focuses on eco-labeling schemes and measures and their relationship to the provisions of the TBT Agreement. In CTE proceedings, divergent views were expressed but no consensus was reached.[46]

The debate on the scope of PPMs in the second sentence of the definitions on technical regulation and standard has become increasingly irrelevant in practice. In 1995, with the purpose of clarifying the coverage of the Agreement with respect to labelling requirements, the TBT Committee took the following decision:

> In conformity with Article 2.9 of the Agreement, Members are obliged to notify all mandatory labelling requirements that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Members. *That obligation is not dependent upon the kind of information which is provided on the label, whether it is in the nature of a technical specification or not.*[47]

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[44] Erik P. Bartenhagen, "The Intersection of Trade and the Environment: An Examination of the Impact of the TBT Agreement on Ecolabeling Programs", 17 *Virginia Environmental Law Journal* (1997), pp. 51 *et sqq*., at P. 74.

[45] WTO, "Labelling and Requirements of the Agreement on Technical Barriers to Trade (TBT): Framework for Informal Structured Discussions, Communication from Canada", WTO Doc. WT/CTE/W/229, 23 June 2003, at para 6.

[46] TBT Committee & CTE Committee, "Eco- Labelling Programmes", WTO Doc. WT/CTE/W/23, 19 March 1996, at p. 17.

[47] WTO, "Note by the Secretariat, Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995", WTO Doc. G/TBT/1/Rev.10, 9 June 2011, at p. 22.

Similarly, in the 1st Triennial Review of the TBT Agreement, the TBT Committee agreed that:

> …without prejudice to the view of Members concerning the coverage and application of the Agreement, the obligation to publish notices of draft standards containing voluntary labeling requirements under paragraph L of the Code is *not dependent upon the kind of information provided on the label*.'[48]

These decisions have provided some clarification on the transparency obligations for labeling schemes irrespective of the information contained, including NPR-PPMs. In practice, many WTO Members notify the WTO its eco-labeling programs containing NPR- PPMs. In the 2nd Triennial Review of the TBT Agreement's implementation in November 2000, the TBT Committee reiterated the importance of any labeling requirements being consistent with the disciplines of the TBT.[49] Nevertheless, these decisions avoided the issue of whether the TBT Agreement covers a labelling scheme based on NPR- PPMs. The prevailing view appears to be that labelling requirements, regardless of the information contained, should be scrutinized under the TBT Agreement. This interpretation is now largely confirmed in the WTO dispute settlement processes.[50] In *EC – Asbestos*, the Appellate Body stated that the second sentence "simply gives certain examples of product characteristics, which are referred to in the first sentence".[51] In other words, it is not really relevant what kind of information the marking or labelling provides or whether it is related to PR-PPMs or NPR-PPMs, the labelling scheme *as such* constitutes "product characteristics" and are covered by the definition. The Panel in *EC- Trade Marks and Geographical Indications* and *US – Tuna II* confirmed this approach.[52] In *US – Tuna II*, the US "dolphin-safe" labelling requirements for tuna products were based on NPR-PPM criteria of fishing processes. The complainant Mexico supported the applicability of the TBT Agreement to the US labeling scheme and argued that the US labeling program was in violation of Article 2.1, 2.2, 2.3 and 2.4 of the TBT Agreement. The Panel was satisfied that "the measures at issue lay down labelling requirements, as they apply to a product, process or production method and that the subject-matter of the measures therefore falls within the scope of the second sentence of Annex 1.1".[53] The Appellate Body

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[48] TBT Committee, "First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade", WTO Doc. G/TBT/5, 19 November 1997, at para12.
[49] TBT Committee, "Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade", WTO Doc. G/TBT/9, 13 November 2000, at para. 48.
[50] Conrad, *Processes and Production Methods*, *supra* note 38, at p. 386.
[51] *EC- Asbestos*, *supra* note 3, at para 67.
[52] *EC- Trade Marks and Geographical Indications*, Report of the Panel, WTO Doc. WTO/DS290/R, 20 April 2005, at para 7.451.
[53] *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Product (US –*

upheld the Panel's overall determination that the US "dolphin-safe" labelling scheme based on a NPR-PPM constituted a technical regulation within the meaning of the TBT.[54]

The prevailing view as confirmed by the WTO Appellate Body seems to be compelling for two reasons. First, the word "also" in the second sentence of both definitions clearly indicates that the second sentence is additional to the first sentence. Second, different from the first sentence where the debates on whether NPR- PPMs should be covered led to the insertion of "related" in the first sentence of the definition, the negotiators did not insert "related" before the "process and production methods" in the second sentence. Such an omission provides strong textual evidence that the second sentence covers a wide range of PPMs.

IV. Conclusion

The definition of technical regulation in Annex 1.1 of the TBT Agreement is not free from ambiguity. In *EC- Seal Products*, the Appellate Body held that in determining whether a measure is a technical regulation, a panel must seek to identify the measure's "integral and essential" aspects, and then analyze the weight and relevance of the essential and integral elements of the measure as an integrated whole. I submit that this seemingly sound analytical approach has led to an arbitrary conclusion in *EC- Seal Products.*

Despite its arbitrariness, the Appellate Body's approach in characterizing the EC seal regime shows its efforts to put some limit to what product characteristic means, especially when the term is followed by another category of measures, PPMs, which are also covered by the definition of technical regulation. In turn, the TBT Agreement will likely apply to a narrower set of measures than people previously assumed. This leads to an even deeper question: what special characteristics of a technical regulation distinguish it from other regulations and make it subject to more detailed obligations in the TBT Agreement, in addition to the GATT 1994? The answer to this question will in turn help us understand the scope of technical regulation in Annex 1.1 of the TBT Agreement. In *EC – Seal Products*, the Appellate Body has laid out the analytical approach that it will adopt to evaluate whether or not a measure is a technical

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Tuna II), Report of the Panel , WTO Doc. WT/DS381//R, 13 June 2012 as modified by the Appellate Body Report, at para 7.78.

[54] *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Product (US – Tuna II)*, Report of the Appellate Body, WTO Doc. WT/DS381/AB/R, 13 June 2012, at para 199. Elizabeth Trujillo, "The WTO Appellate Body Knocks down U.S. 'Dolphin – Safe' Tuna Labels but Leaves a Crack for PPMs", 16 American Society of International Law Insights (July 26, 2012).

regulation in future disputes.[55] It seems that we will have to wait for the next case before we have a clearer understanding of what measures constitute technical regulations in the TBT Agreement.

[55] *EC – Seals*, *supra* note 18, at para 5.60. .