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# Technical Regulations and Standards under the WTO Agreement on Technical Barriers to Trade

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*When applying the WTO Agreement on Technical Barriers to Trade (TBT), an initial issue is whether the challenged instrument should be classified as a technical regulation, or as a standard. Under the relevant Treaty language, both instruments can set product characteristics such as marking or labelling requirements with the distinction turning on the phrase ‘with which compliance is mandatory’. The meaning of this phrase was contested in US-Tuna II, with the matter eventually being resolved in Mexico’s favour. A rare panel dissent classified the dolphin-safe labelling scheme as a voluntary standard based on a clear test leading to definite outcomes. However, the panel majority and Appellate Body preferred a more flexible and less predictable approach under which the measure was classified as a mandatory technical regulation. This article questions whether this is an area in which flexibility plays a useful role, or one in which clarity and predictability can be preferred. The article is informed by an obvious consideration which is nevertheless almost absent from the case law and academic debate. The classification of the measure at issue is important to the extent that the TBT adopts a differentiated approach towards technical regulations and standards in terms of the applicable substantive obligations and the manner of their enforcement.*

## 1. INTRODUCTION

This article focuses on the distinction between technical regulations and standards under the WTO Agreement on Technical Barriers to Trade (TBT). The two instruments are defined and distinguished in TBT Annex 1.<sup>1</sup> The second sentence of both definitions provides the same non-exhaustive list of product characteristics which may therefore be either technical regulations or standards. Under the first sentence of each definition, it is clear that the distinction depends on the phrase ‘with which compliance is

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<sup>1</sup> 1. *Technical regulation* 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.

2. *Standard* Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not 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.

mandatory'. The distinction between the two instruments is conventionally explained on the basis that that compliance is mandated when the product characteristic in question must be satisfied in order to market the product. Such measures are technical regulations. In contrast, compliance is voluntary, and the measure is a standard, when the product can be marketed without satisfying the product characteristic.<sup>2</sup>

The second proposition was however rejected in *US-Tuna II*.<sup>3</sup> The US argued here that its measure did not mandate compliance and could not be reviewed as a technical regulation. Under this measure, importers wishing to use a dolphin safe label had to use the US label, and none other. They had to comply with all the strictures of that label subject to stringent enforcement mechanisms specific to and embodied in the measure itself. In this sense, the measure incorporated a strong compulsory element. On the other hand, tuna could also be marketed without a dolphin safe label. This permissive aspect of the scheme motivated a rare dissent within the panel reflecting the conventional understanding of the distinction between the two instruments. As importers retained the option of marketing tuna without making any claim about dolphin safety, the labelling requirement did not mandate compliance. In contrast, for the panel majority and the Appellate Body, the permissive aspect was not dispositive. Their alternative approach focused on a number of elements, which can be termed provenance, exclusivity and enforceability, with no clear identification of any weighting which was applied to the different elements. This was a case by case approach in which adjudicators appear to retain discretion on the significance to be attached to the presence of one element, or the absence of another.

At the time of writing, it is clear that the panel dissent on the issue of mandatory compliance has been preferred over the panel majority and Appellate Body approach.<sup>4</sup> However, the nature of the distinction between technical regulations and standards has not been subject to a sustained critique. This article is intended to fill this gap and proceeds as follows.

The most obvious question is surprisingly one which has not been addressed in the case law. Why, if at all, does it matter whether the instrument is a technical regulation or a standard? The US failed to establish that its dolphin safe label was a standard. In raising this argument, did it have some advantage in mind in terms of the ease with which it could defend the dolphin-safe label if identified as a standard? Section 2 explains what is at stake when distinguishing between the two instruments. The issue here is whether the obligations which apply to central government technical regulations and standards are materially different in terms of their content or manner of enforcement. It is argued that the TBT provides for an undifferentiated approach.

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<sup>2</sup> A. Sykes, *Product Standards for Internationally Integrated Goods Markets* (The Brookings Institution, Washington; 1995) at 2.

<sup>3</sup> Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna Products (US –Tuna II)*, WT/DS381/AB/R, adopted 16 May 2012.

<sup>4</sup> See the following discussion thread, visited on 25 April 2013

<http://worldtradelaw.typepad.com/ielpblog/2011/09/technical-regulations-vs-standards-in-the-tuna-panel-report.html>  
In the published literature, Mavroidis considers that the Appellate Body's approach to the issue of mandatory compliance 'cannot be right'. Howse and Levy describe the Appellate Body's approach as 'very controversial'. P.C. Mavroidis, 'Driftin' too far from Shore – Why the Test for Compliance with the TBT Agreement Developed by the WTO Appellate Body is Wrong, and What Should the AB have done Instead' 12 *World Trade Review* (2013) 509 at 523; R. Howse and P.I. Levy, 'The TBT Panels: *US-Cloves*, *US-Tuna*, *US-COOL*' 12 *World Trade Review* (2013) 327 at 333.

Section 3 shifts the focus from the manner in which the TBT distinguishes between the two instruments, towards the considerations which may influence states when deciding whether to regulate via mandatory technical regulations or voluntary standards. The choice between the instruments is depicted here as depending on entirely legitimate considerations. Against this background, the role of WTO tribunals is to check whether the instrument, be it a technical regulation or a standard, has been influenced by protectionist motivations. This is achieved by assessing the measure for conformity with the TBT's substantive obligations. As WTO tribunals can engage with these substantive obligations for both instruments, the identity of the instrument is not crucial.

With this key point in mind, the remainder of the article considers the contrasting approaches in *US-Tuna II* towards distinguishing the two instruments. As noted, the panel dissent in this case reflects the conventional understanding that mandatory compliance turns on whether the products can be marketed without meeting the product characteristic. Section 4 explains the motivation for this approach as being a need to avoid a tautology in treaty interpretation between the terms 'labelling requirements' and 'with which compliance is mandatory'. Sections 5 and 6 further discuss the characteristics and operation of the test for mandatory compliance in the panel dissent. It is clearly advantageous that this test enables a tautology to be avoided. However, does this advantage come at the expense of any deficiencies? In particular, is the test as clear and simple as it seems in terms of leading to predictable outcomes on whether a measure is a technical regulations or a standard? As explored in Section 5, some doubt on this question is created by the dissent itself since it seems to distinguish the measure in *US-Tuna II* from that at issue in *EC-Sardines*.<sup>5</sup> Section 5 explains how the measures in these cases did not mandate compliance and were therefore not technical regulations upon the proper application of the test in the dissent.

An interesting observation emerges from the process of establishing that these cases should not be distinguished. The test for mandatory compliance in the *US-Tuna II* dissent operates independently of the relationship between the measure and the market place. As it was possible to market tuna without a dolphin safe label, the measure did not mandate compliance. This conclusion was not influenced by the difficulties in practice of accessing the larger part of the market without the dolphin safe label, as a result of the interplay between the preferences of consumers and the business decisions of retailers. The relationship between the measure and the market place is a relevant consideration when determining whether the TBT's substantive obligations have been breached. In turn, it can be regarded as an indicator of protectionist motivations. The question is then whether it matters that the test in the dissent operates independently of this indicator. Put differently, does it matter that the test contains no discretionary elements capable of accommodating the impressions of adjudicators on the merits of the claim based on

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<sup>5</sup> Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002.

Hudec's well-known 'smell test'<sup>6</sup> This could only be regarded as a deficiency of the dissent test if the TBT embodied a differentiated approach towards central government instruments. However, as the TBT provides for an undifferentiated approach, it is not a matter of concern to classify the instrument as a voluntary standard and defer a review of how the standard operates in the market place to the TBT's substantive obligations.

Section 6 discusses the treatment of *de facto* mandatory compliance in the *US-Tuna II* dissent and the *United States – Certain Country of Origin Labelling Requirements (US-COOL)*<sup>7</sup> panel. Based again on the argument that the TBT adopts the undifferentiated approach to central government technical regulations and standards noted above, the section defends the narrow interpretation of this concept in the dissent. Section 7 considers the Appellate Body's approach in *US-Tuna II* towards distinguishing between technical regulations and standards. As indicated, the Appellate Body preferred a case by case approach based on three criteria. The analysis confirms that these criteria share the same advantage as the dissent of enabling a tautology in treaty interpretation to be avoided. Also considered is whether three overlapping criteria are required to reveal when a product characteristic mandates compliance, or whether one or other of the criteria would suffice. Through these questions, it is possible to express a view on how the Appellate Body's approach towards mandatory compliance will develop in future cases, or what it might be reduced to. Section 8 concludes.

## 2. THE IMPORTANCE OF THE TECHNICAL REGULATIONS / STANDARDS DISTINCTION

The obligations under which technical regulations can be reviewed are among the most sensitive in the WTO agreements. TBT Article 2.1 requires that technical regulations must not discriminate between domestic and imported products and between imported products of different origin. This is a relatively uncontroversial provision, albeit that it is not clearly accompanied by an exceptions provision similar to GATT Article XX. The question is therefore whether regulatory purpose can be considered as part of the process of deciding on a possible Article 2.1 infringement, as opposed to under an exceptions provision. Article 2.2 requires Members to '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'. Article 2.4 requires that Members use international standards 'as a basis for their technical regulations except when such international standards ... would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued'. These provisions are described by Horn and Weiler as giving rise to a paradigm shift in international economic law 'from local discretion to an internationally determined standard [Article 2.4] and, even more importantly from a regime of non-discrimination to one of non-

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<sup>6</sup> Robert E. Hudec, 'Science and "Post-Discriminatory" WTO Law' 26 *Boston College International and Comparative Law Review* (2003) 185 at 193-194; Robert E. Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test', 32 *International Lawyer* (1998) 619 at 634. Hudec would perhaps have been uncomfortable with an association between his 'smell test' and provisions of the TBT Agreement going beyond a prohibition on discrimination. In the first piece above, Hudec expressed concern about the emergence of a new type of 'post-discriminatory' legal standard such as TBT Article 2.2, before discussing the smell test as an aspect of how adjudicators respond to accusations of discrimination under the long-standing anti-discrimination norms. As indicated below (note 9), much depends here on how the sensitive 'post-discriminatory' provisions are interpreted by the Appellate Body. There are indications that concerns expressed by Hudec and other commentators have been internalized.

<sup>7</sup> Panel Report, WT/DS384, 386/R, adopted 23 July 2012

justified obstacles [Article 2.2]’.<sup>8</sup> Howse similarly expresses the concern that Article 2.4 has the potential to turn ‘a mass of normative material that *never before* had the status of international law into international legal obligation’.<sup>9</sup> Whether these concerns are realized depends on how these provisions are interpreted by panels and the Appellate Body.<sup>10</sup> However, the provisions are among those which have the potential to expand the WTO from a regime of non-discrimination, into a regime of non-restriction with attendant questions about the nature and extent of economic integration envisaged by WTO Members.

The sensitivity of these obligations does not in itself provide the reason for distinguishing between technical regulations and standards. While Articles 2.2 and 2.4 apply only to technical regulations, Annex 3 establishes the Code of Good Practice for the Preparation, Adoption and Application of Standards. Its opening Substantive Provisions (paragraphs D, E, and F.) are closely comparable, although not identical, to Articles 2.1, 2.2 and 2.4. The question is then whether the TBT materially distinguishes between central government technical regulations and standards either in terms of the content of the applicable obligations or the manner of review and enforcement.

On the content of the applicable obligations, it is notable that paragraph E of the Code does not reproduce the whole of Article 2.2. The need to avoid ‘unnecessary obstacles to international trade’ is common to both provisions. However, paragraph E goes no further than this. Unlike Article 2.2, it does not refer to technical regulations being no ‘more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create’. It follows that paragraph E, does not offer an indicative list of these legitimate objectives which, in Article 2.2, appears as, ‘national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment’. It is doubtful whether this difference should lead to a reduction in the rigour of review, or increased deference, for central government standards as opposed to technical regulations. The difference can probably be explained by the broad potential coverage of the Annex 3 Code in that it is open to acceptance by non-governmental standardizing bodies. The list of public policy objectives in Article 2.2 are a good fit for bodies which are rooted in the public sphere, but are not always

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<sup>8</sup> H. Horn and J.H.H. Weiler, ‘*European Communities – Trade Description of Sardines: Textualism and its Discontent*’ in H. Horn and P.C. Mavroidis (eds.) *The WTO Case Law of 2002* (2005, American Law Institute) available at <http://www.ali.org/doc/wto/wto2002/Sardines.pdf> visited March 30 2013 at 6.

<sup>9</sup> R. Howse, *Constitutionalism, Multilevel Trade Governance and International Economic Law*, 384 (C. Joerges, E.U. Petersmann eds., Hart Publ. 2011). Other commentators are more sanguine even to the extent of arguing that Article 2.4 should be strengthened. A. Sykes, above n 2 at 125.

<sup>10</sup> A possible trend in the recent case law under the TBT Agreement is that the Appellate Body has heeded the advice of commentators about the sensitive nature of Articles 2.2 and 2.4. It seems to the present author that every effort has been made by the Appellate Body to resolve these cases under Article 2.1 (discrimination) rather than under Article 2.2 (unnecessary restriction), and that Article 2.4 is being interpreted in a cautious manner. Contributions to the literature in light of the new case law have not reiterated the concerns expressed in the main text. Indeed, Flett sees TBT Articles 2.1 and 2.2 as recasting, and therefore not going beyond, GATT Articles I, III and XX. J. Flett, ‘WTO Space for National Regulation: Requiem for a Diagonal Vector Test’ (2013) 16 *Journal of International Economic Law* 37 at 51 and 59. See also, E. Partiti, ‘The Appellate Body Report in *US – Tuna II* and Its Impact on Eco-Labeling and Standardization’ 40 *Legal Issues of Economic Integration* (2013) 73. In the related context of the SPS Agreement, Rigod considers that ‘requirements such as necessity, risk assessment, and scientific evidence are rightly understood as proxies for filtering out ‘protectionist’ policies’. B. Rigod, ‘The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)’ (2013) 24 *European Journal of International Law* 503 at 527.

as directly relevant for non-governmental bodies.<sup>11</sup> Therefore, the noted textual difference is more relevant to a possible differentiation between the review of governmental and non-governmental standards, than it is to a possible differentiation between the review of central government technical regulations and standards. Panels can at least have the full text of Article 2.2 in mind when reviewing central government standards under paragraph E. This is assuming, of course, that compliance with the Annex 3 Code can be raised in DSU proceedings.

The title ‘Code of Good Practice’ indicates that its provisions are not formally enforceable. This is reinforced by paragraph Q which refers to ‘sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code’. The responding standardizing body ‘shall make an objective effort to solve any complaints’. Clearly, this is the language of soft law with complaints being handled through consultation between standardizing bodies. Left here, the position would be that a standard could not be reviewed under the DSU for compliance with the Annex 3 Code.

However, this position is supplemented by Article 4.1 which requires Members to ‘ensure that their central government standardizing bodies accept and comply with’ the Annex 3 Code. This provision surely converts the Annex 3 Code into a fully enforceable instrument in respect of central government standards. This view is confirmed when the Tokyo Round Standards Code and the proposals which led to TBT Annex 3 are considered. Article 2 of the Standards Code was entitled *Preparation, adoption and application of technical regulations and standards by central government bodies*. As such, there was no differentiation in the obligations to which the two instruments were subject. In the TBT, Article 2 has the same title other than that standards are removed from its scope of coverage. However, the TBT Committee proposals which reflect the TBT in its current form indicate that this change was not motivated by any desire to dilute the TBT’s application to central government standards. Rather, the change was motivated by the desire to strengthen the TBT’s application to non-governmental standardizing bodies, while preserving the already strong coverage of central government standards. Of

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<sup>11</sup> This point is reflected in the manner in which the International Organization for Standardization (ISO) describes its work: ‘Public policies are established by governmental authorities and, in a number of cases, ISO standards support or relate to such public policy initiatives. ISO, and its sister organization, the International Electrotechnical Commission (IEC), have agreed on four principles to guide the development of such standards. The first principle is to provide market-driven international standards, based on objective information and knowledge. The second principle is to meet the needs and concerns of all relevant stakeholders, including public authorities where appropriate, without seeking to establish, drive or motivate public policy, regulations, or social and political agendas. The third principle is recognition that the development of regulation, public policy or the development and interpretation of international treaties are the role of governments or treaty organizations. Finally, such ISO and IEC standards supporting public policy are best developed within proven structures, operational approaches and participation models detailed in ISO/IEC’s existing directives and development procedures.’ *International standards and “private standards”* available at [http://www.iso.org/iso/private\\_standards.pdf](http://www.iso.org/iso/private_standards.pdf) last visited September 2013.

particular note, in terms of explaining Article 4.1, is the statement in a 1990 proposal that ‘Parties would continue to have an obligation to ensure the behaviour of central governmental standardizing bodies’.<sup>12</sup>

The TBT therefore adopts an undifferentiated approach towards central government technical regulations and standards. This differs from its treatment of technical regulations emanating from central government and those emanating from local government bodies and non-governmental bodies. In this comparison, the TBT does incorporate a hard law / soft law distinction.<sup>13</sup> However, this is on the basis that the coverage of WTO obligations generally diminish as we move away from the central government level towards regional and local government and still further towards non-governmental bodies. This is due to the political organization of states in terms of central government securing the consent of devolved government to be bound by international obligations.<sup>14</sup> This consideration does not apply when the comparison is between different central government instruments.

The TBT’s text does not therefore offer an explanation for why the US argued that its dolphin safe label could not be reviewed as a technical regulation. Conceivably, respondent states may consider that voluntary standards are easier to defend, and less likely to breach the applicable rules, than the same rules which apply mandatory technical regulations. As voluntary standards permit the existence of competing standards, and as products may be marketed without meeting any of these standards, these instruments are arguably less likely than mandatory technical regulations to be discriminatory or cause unnecessary obstacles to international trade. This idea should be treated with caution. Again, the proposals submitted during the Uruguay Round are notable here. In 1988, the EC considered that, ‘Standards (and Technical regulations) drawn up by non-governmental bodies can, when used on a nation-wide basis, in practice create barriers to trade as serious as if they were technical regulations drawn up by central government bodies’.<sup>15</sup> If non-governmental standards can be just as problematic as central government technical regulations, the same observation is surely just as applicable to central government technical regulations and standards. In sum, the TBT does not formally differentiate between central government technical regulations and standards and there is no reason for panels to have any informal differentiation in mind.

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<sup>12</sup> TBT/W/137, 15 February 1990, Code of Good Practice for the Preparation, Adoption and Application of Standards, Revised Proposal by European Economic Community. Also of relevance here are TBT/W/110, 7 July 1988 and TBT/W/124, 27 July 1989.

<sup>13</sup> TBT Article 2 sets out the obligations applicable to central government technical regulations in binding terms. It is specified that ‘Members shall ensure ...’. In contrast, Article 3.1 provides that with respect to technical regulations emanating from local government and non-governmental bodies, ‘Members shall take such reasonable measure as may be available to them to ensure compliance by such bodies with the provisions of Article 2’.

<sup>14</sup> In the TBT context, this is indicated by the proposals by the European Economic Community in the late 1980’s for a Code of Good Practice for Non-Governmental Standardizing Bodies. One of the documents indicates that the proposals, ‘...faced the problem that Parties cannot always, legally or factually, “ensure” the behaviour of local government bodies and regional bodies’. TBT/W/124, 27 July 1989.

<sup>15</sup> TBT/W/110, 7 July 1988. Similar comments are a recurring feature of the TBT Triennial Reviews. The most recent Review notes that, ‘several Members raised concerns regarding "private standards" and the trade impact thereof, while other Members considered that the term lacked clarity and that its relevance to the implementation of the TBT Agreement had not been established’. G/TBT/32, Sixth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4, para. 7.



### 3. THE CHOICE BETWEEN MANDATORY TECHNICAL REGULATIONS AND VOLUNTARY STANDARDS

This section discusses the considerations which may influence states when choosing between technical regulations and standards. It then turns to how these considerations should influence WTO tribunals when reviewing these instruments.

It is uncontroversial to state that all labelling requirements are concerned with consumer information. Labels vary however with respect to the importance which is attached to consumers receiving the information. If the regulator requires the label to be used in order for the product to be marketed, this is because the regulator has attached a high priority to consumers receiving the information in a uniform manner. In this situation, a mandatory technical regulation will be preferred. On the other hand, a voluntary standard becomes an option as it becomes less important for consumers to receive the information in a uniform manner.

Put differently, the choice between the two instruments can be depicted as depending on the balance between two considerations, being the importance of the policy objective at issue, and the extent to which this objective can be achieved via co-operation with industry. Two examples can be contrasted here. In many states, tobacco products cannot be lawfully marketed without the appropriate labels.<sup>16</sup> The policy objective of protecting human life and health is of the utmost importance, while the extent to which compliance can be left to the voluntary discretion of industry is low. Health warnings do not enhance tobacco sales which creates a high degree of information asymmetry between producers and consumers. The preference is therefore for mandatory technical regulations. The balance shifts for energy efficiency appliance labelling. The environmental objectives here are of a different nature than human health concerns, and there is likely to be higher confidence in harnessing industry co-operation. Non-use of the voluntary government administered labelling scheme may harm sales so that the information asymmetry is not as intense as for tobacco products. Governments are more likely here to perceive that they have the option of using voluntary standards especially if a very high industry adoption rate is predicted.

Of course, states can reach different conclusions on which instrument to use with respect to the same subject areas. Energy efficiency labelling is a case in point here. In the EU, electrical appliances such as fridge freezers and washing machines cannot be lawfully marketed without energy efficiency labels.<sup>17</sup> The same position now applies to the more recently introduced EU labelling scheme which require information on the fuel consumption, wet weather grip and external noise level of tyres.<sup>18</sup> In contrast, the US equivalent of the compulsory EU scheme for appliance labelling is the voluntary

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<sup>16</sup> In the EU, the relevant instrument is Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products.

<sup>17</sup> The main instrument here is Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products. Recital 12 explains the preference for the mandatory nature of the scheme: 'A completely voluntary scheme would lead to only some products being labelled, or supplied with standard product information, with the risk that this might result in confusion or even misinformation for some end-users. The present scheme should therefore ensure that for all the products concerned, the consumption of energy and other essential resources is indicated by labelling and standard product fiches.'

<sup>18</sup> Regulation (EC) No 1222/2009 of the European Parliament and of the Council of 25 November 2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters.

Environmental Protection Agency Energy Star programme.<sup>19</sup> There may well be a difference in regulatory philosophy at work here under which the US leaves more to the private sector and the purchasing preferences of consumers in terms of achieving the objectives of the voluntary label, whereas the EU depends more on compulsion in order to quickly achieve uniformity and minimize consumer confusion.<sup>20</sup> However, the key point for present purposes is that the decision making process resulting in the choice of instrument has been informed by entirely legitimate considerations.

Against this background, the role of WTO tribunals should be to review whether the chosen instrument, be it a technical regulation or standard, has been tainted by illegitimate considerations, most obviously by protectionist impulses. Naturally, this is achieved by assessing the measure for conformity with the TBT's substantive obligations. As it is possible for WTO tribunals to engage in this exercise for both central government technical regulations and standards, it does not matter a great deal how the instrument in question is classified. This has implications for the type of test which should be used to classify the instrument at issue. A flexible and nuanced test would be essential if something significant turned on the classification. If, for example, the review of central government standards was shifted to a soft-law regime, panels would need the flexibility to prevent states from avoiding the formal review of their measures by qualifying them as voluntary. However, by reason of the TBT's undifferentiated approach, the main priorities for the mandatory compliance test are clarity and predictability as opposed to flexibility. This is the main point which informs the further analysis.

#### 4. LABELLING REQUIREMENTS AND MANDATORY COMPLIANCE IN *US-TUNA II*

The meaning of mandatory compliance has been most contentious in cases involving product characteristics in the form of labelling requirements. There is an interpretive problem here which came to a head in *US-Tuna II*. The problem arises from the need for interpretation to 'give meaning and effect to all the terms of a treaty'.<sup>21</sup> In other words, if the text embodies two terms which appear to be independent and cumulative, a distinct meaning must be attributed to each term. There is a strong presumption that the treaty drafters neither intended to, nor inadvertently, set out a tautology.

Evidently, the phrase 'with which compliance is mandatory' envisages some kind of binding and compulsory character in order for 'labelling requirements' to amount to technical regulations. The problem is that the phrase 'labelling requirements' already suggests a binding and compulsory character.

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<sup>19</sup> This is described as 'a voluntary program to identify and promote energy-efficient products and buildings in order to reduce energy consumption, improve energy security, and reduce pollution through voluntary labeling of or other forms of communication about products and buildings that meet the highest energy efficiency standards'  
<http://www.energystar.gov/>

<sup>20</sup> The picture is rather different in the context of dolphin safe labelling in that there is only one state administered dolphin safe label in the US, whereas a number of labels are used in the EU, none of which are administered by the EU institutions. However, this does not really contradict the generally greater preference for compulsory schemes in the EU. The need for a state administered dolphin safe programme in the EU is much less than for the US because the association between yellow fin tuna and dolphins is observed predominantly in the Eastern Tropical Pacific. This tuna is not sold significantly in the EU.

<sup>21</sup> Appellate Body Report, *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996 at p. 23.

The agreed definition of this phrase in *US-Tuna II* was ‘a set of criteria or conditions that must be met before a label can be used’.<sup>22</sup> Indeed, this is the only meaningful interpretation, both of this phrase, and alternative phrases which the draftsmen could have used. If the term ‘requirement’ is interpreted as extending to something which is merely preferred or desired as opposed to compulsory, this would permit a label to be used even if the criteria for use of the label have not been met. The label would then be rendered meaningless<sup>23</sup> as it would not convey any consistent and accurate information to consumers. Had the draftsmen referred, for example, to ‘labelling parameters’, the parameters of the label would need to be ascertained and the label could only be used when these parameters are satisfied. The essential quality of ‘labelling requirements’, and alternative phrases, is therefore that the label may only be used when specified criteria have been met. The definition must itself embody a compulsory character, which creates the difficulty when interpreting the separate test of whether compliance with the labelling requirement is ‘mandatory’.

The need to avoid a tautology in treaty interpretation was clearly identified by the panel majority<sup>24</sup> and the dissent in *US-Tuna II*. The passage below from the dissent echoes the panel majority concern about the need for distinct meanings for the key terms. It then proposes a solution:

In order to give any sense to the term ‘labelling requirement’ as used both in Annex 1.1. and 1.2, the requirement that compliance is mandatory cannot relate to the obligation to meet certain requirements to be allowed to use the label, but to the question whether a labelling scheme is compulsory – i.e. whether products must use a label in order to be marketed – or voluntary – i.e. products may be marketed with or without the label.<sup>25</sup>

As a working hypothesis, it can be suggested that this approach has the benefit of clarity and simplicity, and is therefore capable of producing predictable and definite outcomes in individual cases. Labelling requirements, whether standards or technical regulations, set out conditions which must be adhered to in order to use the label. Labelling requirements mandate compliance, and are therefore technical regulations, when use of the label is required in order for the product to gain access to the market. On the other hand, if the product can be marketed without the label, the labelling requirement is a standard.

## 5. TESTING THE CLARITY AND SIMPLICITY HYPOTHESIS

The test for mandatory compliance in the *US-Tuna II* dissent enables a tautology to be avoided, but is the test as clear and simple as it seems in terms of leading to predictable outcomes on whether a measure is a technical regulations or a standard? Some doubt on this question is created by the dissent itself since it seems to distinguish the measure in *US-Tuna II* from that at issue in *EC-Sardines*. This section explains how the measures in these cases did not mandate compliance and were therefore voluntary standards upon the proper application of the test in the dissent. As indicated in the introduction, the process of reconciling these cases reveals that the test operates independently of the relationship between the measure and the market place. This relationship is a relevant consideration when deciding whether the TBT’s substantive

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<sup>22</sup> Panel Report, *US-Tuna II*, para. 7.74.

<sup>23</sup> *Ibid.*, para. 7.150.

<sup>24</sup> *Ibid.*, paras. 7.116 – 7.117.

<sup>25</sup> *Ibid.*, para. 7.151.

obligations have been breached. Therefore, the identity of the measure as a technical regulation or a standard is decided independently of the impressions of adjudicators on the overall merits of the complainant's case. The section explains why this is not a cause for concern.

a) To what product must the test be applied?

The first issue is the correct identification of the relevant product. If, in *US-Tuna II*, the relevant product is tuna, then, yes, this product can be marketed without the label, so that compliance is not mandated. However, if the relevant product is dolphin safe tuna, this cannot be marketed without the label, so that compliance would be mandated. It is clear from the dissent that the test is applied to tuna. Indeed, this is the only possible application since, if the relevant product was dolphin safe tuna, the tautology which the test seeks to avoid would be reintroduced. The test would effectively be whether compliance with the label is required in order to use the label or, in other words, whether there is a labelling requirement. While this point might seem self-evident, it is relevant to solving the second issue considered below.

b) Applying the dissent in *EC-Sardines*

The second issue is how the approach in the dissent would have applied in *EC-Sardines*. The dissent preferred to distinguish this case, but arguably did so in an unpersuasive or at least unclear manner. It would have been more persuasive had it found the two cases to be indistinguishable (in the sense that both involved voluntary standards), and proceeded to find that the EU need not have conceded that its product characteristic mandated compliance.<sup>26</sup>

The content of the EC regulation at issue in *Sardines* is identified in the passage from the dissent below which also seems to argue that this case and *Tuna* must be distinguished.

In *EC – Sardines*, the mandatory nature of the measures challenged in that case was not in question. In that case, the Appellate Body was therefore not called upon to make a determination concerning 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 Appellate Body 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'" ... *EC – Sardines* did thus not involve a labelling requirement but a naming requirement. And by not allowing to market certain preserved sardines as sardines, these products were prohibited to enter the sardine market at all. However, in difference to *EC – Sardines*, Mexico is not prohibited from selling its tuna as tuna to the United States. It is a fundamental difference between the facts of that case and those of the present dispute that in this case the measures lay down labelling requirements, which allow the operator to make claims reflecting compliance with a particular standard.<sup>27</sup>

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<sup>26</sup> The EU conceded this point on the basis that the product characteristic was contained in a regulation 'binding in its entirety and directly applicable in all Member States' (Appellate Body Report, *EC-Sardines*, above n 5, para. 194 fn 111).

<sup>27</sup> *US-Tuna II* para. 7.164.

This is an opaque passage. It is not clear whether there is any intention to express a view on whether the product characteristic at issue in *Sardines* mandated compliance. The initial impression is that there is no such intention. It is noted that the matter was not contested – the EU having conceded this point.

However, the passage also seems to apply the mandatory compliance test expressed earlier in the dissent. The basic test here is whether the product can be marketed without the label. This test is applied in the statement that, ‘...by not allowing to market certain preserved sardines as sardines, these products were prohibited to enter the sardine market at all’. This is contrasted with Mexico’s position in *US-Tuna II* as ‘not prohibited from selling its tuna as tuna to the United States’. As Mexico’s position resulted in the absence of mandatory compliance, the impression is that the dissent viewed *EC-Sardines* in a different light, so that compliance was mandated. The further reference to ‘a fundamental difference between the facts’ of the cases reinforces an apparent intention to distinguish the cases in some significant way. To clarify, the dissent appeared to contemplate the following distinction:

- Sardines cannot be marketed as sardines resulting in mandatory compliance
- Tuna can be marketed as tuna resulting in the absence of mandatory compliance

It is difficult to see how the cases are materially different. The majority in *US-Tuna II* saw the cases as bearing a ‘close resemblance’. In particular, the legal possibility of selling ‘*sardinops sagax* on the EC market, as long as it was not sold under the appellation ‘preserved sardines’’, was noted.<sup>28</sup> Thus, *sardinops sagax* not bearing the name ‘sardines’, and tuna products not bearing the dolphin safe label could be lawfully sold. This does indeed appear to be a close resemblance. It is true that demand for both products might be limited by the product characteristics set out in the measures at issue, but this a further commonality between the cases.

Put differently, the cases are closely analogous when the measures at issue are considered with reference to their relationship with the market place and the perceptions of consumers – these being indicators of whether the measure was motivated by protectionist impulses.<sup>29</sup> According to the dissent, *Sardines* was about not being able to market certain sardines as sardines, whereas, in *Tuna*, it was possible to market tuna as tuna. Neither statement is wrong in isolation from the other, but the statement as a whole is arguably a false equivalence. The statement about *Sardines* is informed by the relationship between the measure and the market place, while the statement about *Tuna* ignores this relationship. If this relationship is taken into account, both cases were about not being able to use the commercially optimum name or label without complying with the product characteristic. The inability to sell sardines as sardines is only significant because other names for the product in question are commercially less

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<sup>28</sup> *Ibid.*, para. 7.134.

<sup>29</sup> Analysis of the relationship between challenged measures and the market place is an indispensable feature of WTO law. In the context of the TBT Agreement, the AB has noted in relation to Article 2.4 that ‘the capacity of a measure to accomplish the stated objectives -- its *effectiveness* -- and the suitability of a measure for the fulfilment of the stated objectives -- its *appropriateness* -- are *both* decisively influenced by the perceptions and expectations of consumers in the European Communities relating to preserved sardine products.’ (Appellate Body Report, *EC-Sardines* para. 289) More recently, the Appellate Body noted in relation to TBT Article 2.1 that, ‘...the opportunity for a technical regulation to discriminate may well derive from its operation within a given market that exhibits particular characteristics’. (WT/DS384, 386/AB/R *United States – Certain Country of Origin Labelling (COOL) Requirements*, adopted 23 July 2012 para. 290).

attractive and apt to reduce sale volumes or the sale price.<sup>30</sup> If this is accepted, the ability to sell tuna as tuna is immaterial to any attempt to distinguish the cases. There is no commercial advantage in being able to sell tuna as tuna because of the sharp distinction drawn by consumers between tuna bearing and not bearing the dolphin safe label. Indeed, the marketing of tuna as tuna, but without the dolphin safe label, is possibly a greater disadvantage than not being able to sell sardines as sardines. This would be the position if consumers are more averse to buying tuna without the dolphin safe label, than they are averse to purchasing *sardinops sagax* sold as pilchards or sprats.

The need, therefore, is to consider both cases from the same angle when comparing them. The measures at issue can either be considered in light of, or in isolation from their relationship with the market place. The cases are respectively either about not being able to use the commercially optimum name or label without complying with the product characteristic, or about the ability to sell the products without complying with the product characteristics.

From which equivalent perspective should both cases be viewed? The answer here is provided by referring back to the first point of clarification. The approach in the dissent breaks down and becomes a tautology if the measure is viewed in light of its relationship with the market place. If the test is whether tuna can be marketed as dolphin safe tuna without complying with the label, the measure would mandate compliance by reason of a labelling requirement specifying when tuna can be described as dolphin safe. In other words, once it is known that there is a labelling requirement, it is also known that compliance is mandated. In order to avoid this, the test must be whether tuna can be sold without the dolphin safe label. Therefore, in order for the dissent as a whole to be consistent, the measures in *US-Tuna II* and *EC-Sardines* must be viewed in isolation from their relationship with the market place. Both cases were about the possibility of selling the products without complying with the product characteristics. In neither case was compliance mandated, so that both cases were about voluntary standards under a consistent application of the approach in the dissent.

It is now possible to describe the test in the dissent as flawed. It only succeeds in avoiding the tautology if the measure is considered in isolation from its relationship to the market place. To what extent should this be of concern? This depends on the importance of the distinction between technical regulations and standards as discussed in Section 2. It was argued here that the correct view of the relevant TBT provisions is that both instruments can be reviewed under closely comparable provisions which are enforceable under the DSU. Therefore, it does not matter if the test for whether a measure is a technical regulation operates without considering the relationship between the measure and the market

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<sup>30</sup> It is not possible to corroborate this claim with reference to the case itself and associated documents, especially because Peru's written submissions are not readily available. However, it is reasonably clear that Peru's concern was that names other than 'sardines' such as 'pilchards' and 'sprats' were less appealing to consumers. This is indicated by the following extract from an article based on a telephone interview with an Official of Peru's delegation in Geneva: 'The Peruvian official described the European position: "It was clear during the consultations that we must go forward with our complaint. They offered to use only the scientific name without allowing the use of sardines in the label, and they were not moving on this point." Peruvian exporters said the scientific name was not marketable.' Christina L Davies 'Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam' at 16, available at [http://www.princeton.edu/~cldavis/files/davis\\_WTO\\_and\\_developing\\_countries.pdf](http://www.princeton.edu/~cldavis/files/davis_WTO_and_developing_countries.pdf) visited on 30 January 2013. Also of anecdotal interest is that landings of pilchards in Cornwall, UK, increased from 7 tonnes to around 7000 tonnes a year since their re-branding as Cornish Sardines in 1997. <http://www.cornishsardines.org.uk/historical-background.html> visited on 30 January 2013.

place. This aspect will feature within the application of the substantive provisions in the Annex 3 Code of Good Practice.<sup>31</sup> This review can occur in the context of proceedings under the DSU.

The discussion now turns to the concept of *de facto* mandatory compliance.

## 6. DE FACTO MANDATORY COMPLIANCE

There has been some speculation in the literature on the concept of *de facto* mandatory compliance.<sup>32</sup> Significant guidance has now been provided by the dissent in *US-Tuna II* and the panel in *United States – Certain Country of Origin Labelling Requirements (US-COOL)*.<sup>33</sup> The appraisal of this guidance is informed by the view that the TBT does not differentiate between central government technical regulations and standards. Under this position, an overly broad understanding of the concept could curtail the legitimate scope for states to choose between technical regulations and standards. Indeed, when the proper test is understood, it becomes clear that a finding of *de facto* mandatory compliance will be rare - more so than a finding of *de facto* discrimination.

The test was formulated in the *US-Tuna II* panel dissent as ‘whether, despite the absence of a *de jure* requirement in the measures at issue to use the “dolphin-safe” label in order to market tuna products in the United States, tuna products are nonetheless *compelled* to carry that label as a result of some other action attributable to the United States’.<sup>34</sup> This was then recast as a two-fold enquiry: ‘First, the impossibility of marketing tuna products in the United States without the “dolphin-safe” label must be established. Second, such impossibility must arise from facts sufficiently connected to the US dolphin-safe provisions or to another governmental action of the United States.’<sup>35</sup> A helpful example of *de facto* mandatory compliance was also provided: ‘It would be conceivable, for example, that if a Member in fact grants certification in relation to one particular standard as a means of complying with a regulatory requirement, but not in relation to other standards, its actions may turn that formally voluntary standard, into a *de facto* technical regulation.’<sup>36</sup>

These passages clarify that the same high threshold applies to both *de jure* and *de facto* mandatory compliance. It must be shown that it is not possible to market the product without the label.

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<sup>31</sup> In other words, the Appellate Body statements in n 29 above on the operation of the obligations which apply to technical regulations are equally applicable to the equivalent obligations which apply to standards under the Annex 3 Code of Good Practice.

<sup>32</sup> The following extract is effectively about the circumstances in which *de facto* mandatory compliance should be recognized: ‘It seems relatively clear that whenever a government refers to a private voluntary specification partly or fully into its legislation, the specification loses its nature as a (voluntary) standard and turns into a (mandatory) technical regulation. Far more complicated are instances in which technical specification appear *prima facie* to be voluntary, but the government exercises a certain degree of pressure to ensure conformity with its terms. In future cases, the real question will then be what degree of governmental pressure for the implementation of a standard is necessary to transform a standard into a technical regulation.’ Rüdiger Wolfrum, Peter-Tobias Stoll, Anja Seibert-Fohr (eds.) *Technical Barriers and SPS Measures*, Max Plank Institute for Comparative Public Law and International Law, Martinus Nijhoff Publishers (2007) Leiden, The Netherlands at 190.

<sup>33</sup> WT/DS384,386/R, adopted 23 July 2012.

<sup>34</sup> Panel Report, *US-Tuna II*, para. 7.174.

<sup>35</sup> *Ibid.*, para. 7.175.

<sup>36</sup> *Ibid.*, note 333.

This is a crucial point. There is a danger of relaxing the test for *de facto* mandatory compliance to whether the measure creates a barrier to trade or segments the market even though it is formally voluntary. This shift would result in a different and lower threshold for *de facto* mandatory compliance, when the only matter that should change is the source and nature of the evidence adduced in order to establish the impossibility of marketing without compliance. Mandatory compliance is established *de jure* based on an explicit requirement to use the label in the measure itself. The *de facto* impossibility of marketing without the label can be established with reference to *any* evidence,<sup>37</sup> provided there is a sufficient connection to governmental action. In the example provided, this connection is clear. The certification procedure is plainly attributable to the government and results in the factual impossibility of marketing without meeting a formally voluntary standard.

A different source of evidence is provided by considering the relationship between the measure and the market place. Mexico argued that the labelling requirement was *de facto* mandatory because US market conditions were such as to make it ‘impossible to effectively market and sell tuna products without a dolphin-safe designation’.<sup>38</sup> This argument raises two issues. The first is whether the private conduct of avoiding the whole-sale and retail purchase of tuna not bearing the label can be sufficiently connected to a government measure or action. The second question is whether Mexico’s argument is an impermissible reformulation of the test for mandatory compliance. There is a difference between the impossibility of marketing a product, and the impossibility of *effectively* marketing a product - the latter being a lower threshold.

On the first question, the starting point is that purely private conduct cannot be attributed to governments in WTO proceedings. However, there is substantial scope for establishing a connection between private conduct and a government measure or action.<sup>39</sup> Despite this scope, the dissent did not detect a sufficient connection between the limited market opportunities for unlabelled tuna, and the US dolphin safe measure. It was noted that the major processors of tuna had ‘adopted as their own commercial policies not to use tuna that had been obtained by setting on dolphins’.<sup>40</sup> These policies were ‘prompted by the lobbying exerted by environmentalists rather than the enactment of the DPCIA itself.’ There was also evidence that a ‘nationwide boycott of tuna supported by schoolchildren, celebrities and business leaders was due to a “dolphin campaign video”’.<sup>41</sup> In sum, the dissent seemed to consider that the limited market opportunities for tuna caught by setting on dolphins was explained by purely private conduct.

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<sup>37</sup> I am inclined to agree with Flett’s view here even though he is not writing in the specific context of *de facto* mandatory compliance: ‘...in a *de facto* case there are no facts that are per se excluded from the analysis. That is the whole point of a *de facto* case. It is up to the litigants to persuade the adjudicator of their relevance.’ J. Flett, ‘WTO Space for National Regulation: Requiem for a Diagonal Vector Test’ 16(1) *Journal of International Economic Law* (2013) 37 at 49.

<sup>38</sup> Panel Report, *US-Tuna II*, para. 7.166.

<sup>39</sup> Appellate Body Report, *Korea – Measures Affecting Imports of Fresh Chilled and Frozen Beef*, WT/DS161/AB/R, adopted 10 January 2001, para. 146.

<sup>40</sup> Panel Report, *US-Tuna II*, para. 7.180.

<sup>41</sup> *Ibid.*, para. 7.182.



For the Appellate Body, however, there was a sufficient connection between the measure and the depressed commercial opportunities. It should be pointed out that the Appellate Body did not consider this matter in connection with the possibility of *de facto* mandatory compliance, but in connection with the alleged Article 2.1 violation. However, as part of its Article 2.1 analysis, the Appellate Body considered ‘whether any detrimental impact on Mexican tuna products results from the measure itself rather than from the actions of private parties’.<sup>42</sup> This is a comparable question as that considered in the dissent in connection with mandatory compliance. The Appellate Body noted that ‘the measure at issue establishes the requirements under which a product can be labelled “dolphin-safe” in the United States’. It agreed with the panel that any advantage brought about by access to the label ‘is provided by the measures themselves’.<sup>43</sup> This conclusion was not disturbed by the presence of ‘some element of private choice’. The position may now be that a sufficient connection is established between a government measure and private conduct when the measure reflects, responds to and reinforces this conduct.

In response to this apparent difference of approach, there is little need to decide whether the Appellate Body adopted an overly expansive view of when private conduct can be sufficiently linked to a government measure, or whether the dissent adopted an overly restrictive view. In the Article 2.1 analysis, this is just the initial threshold matter with the decisive next step being whether any detrimental impact reflects discrimination. Similarly, when looking at the two stage test for *de facto* mandatory compliance, the second stage is more important than deciding on the connection between private conduct and government regulation. Even if this connection is present, the exact test for *de facto* mandatory compliance must be decided upon.

As noted, Mexico called for this test to be relaxed relative to the test for *de jure* mandatory compliance. The dissent dismissed this suggestion:

To the extent that Mexico’s argument is based on an impossibility of “effectively” marketing and selling tuna products without a dolphin-safe designation, this would not, in my view, provide a sufficient basis for a determination that compliance with the US dolphin-safe labelling requirements is “mandatory” within the meaning of Annex 1.1. Compliance with a voluntary technical document such as a standard may substantially increase the chances of a product being effectively sold in a given market. Conversely, failure to comply with such standard may have negative consequences for the competitiveness of a product in that market. However, this fact alone would not alter the voluntary or “not mandatory” nature of that standard, within the meaning of the TBT Agreement.<sup>44</sup>

The idea here is that the ability to effectively market a product may be significantly impeded by the decision not to conform with a voluntary standard. Therefore, to find that such an impediment amounts to *de facto* mandatory compliance blurs the boundary between technical regulations and standards and limits the ability of states to choose between these instruments. This ability to choose, and its implications for the reach of *de facto* mandatory compliance, can be further explored with reference to *US-COOL*.

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<sup>42</sup> Appellate Body Report, *US-Tuna II*, para. 236.

<sup>43</sup> *Ibid.*, para. 237

<sup>44</sup> Panel Report, *US-Tuna II*, para. 7.177.

The country of origin labelling requirements for certain meat products were set out in statutory provisions and regulations promulgated by the Secretary of Agriculture. It was not contested that these aspects of the scheme mandated compliance. Also at issue, however, was a letter sent to industry representatives by Secretary of Agriculture, Thomas J. Vilsack. This letter suggested that industry should voluntarily adopt a number of practices in addition to, and more onerous than those required by the statutory and regulatory scheme. For example, it was suggested that producers should voluntarily provide information on what production steps occurred in each country when (as per the statute and regulations) multiple countries appear on the label. Like the *US-Tuna II* panel dissent, the *US-COOL* panel recognized the possibility of a measure mandating compliance on a *de facto* basis,<sup>45</sup> but went on to find that the Vilsack letter did not mandate compliance. This was mainly because the limited evidence failed ‘...to demonstrate industry’s actual compliance’ with the letter.<sup>46</sup>

It can be questioned whether the evidence would ever demonstrate *de facto* mandatory compliance, at least based on the test in the *Tuna* dissent. It would be necessary to demonstrate the impossibility of marketing without the additional information envisaged in the Vilsack letter. It is difficult to envisage a sufficiently high level of compliance to satisfy this test. After all, no lawful enforcement action could be brought against firms choosing not to provide the additional information. Even supposing that industry had overwhelmingly changed its practices in order to meet the Vilsack recommendations, it is submitted that the panel ought to have been extremely cautious about finding *de facto* mandatory compliance. This view can be explained with reference to this passage:

Adopting a formalistic interpretation of the phrase ‘with which compliance is mandatory’ would allow Members to escape the coverage of large portions of the TBT Agreement merely by qualifying their own measures as non-mandatory, or compliance with such measures as voluntary. This would strip Annex 1.1 and ultimately large portions of the TBT Agreement of their *effet utile*.<sup>47</sup>

This passage arguably depicts in a pejorative light the choices which governments can legitimately make between regulating via technical regulations and via standards. It is submitted that this choice is unlikely to be directly or significantly influenced by the possibility of avoiding the review of measures as technical regulations. As suggested in Section 3, the choice is more likely to depend on the balance between two considerations being the importance of the policy objective at issue, and the extent to which this objective can be achieved via co-operation with industry. Applied to health warnings on tobacco products, the preference is generally for enforceable mandatory measures and the prospect of review as technical regulations at the WTO is unlikely to give much cause for hesitation. In other words, it is implausible that the decision makers here would have considered the possibility of a formally voluntary scheme, coupled with written or unwritten mechanisms to create pressure towards compliance, in order to ‘escape the coverage of large portions of the TBT Agreement’. There is too much at stake in terms of protecting public health, and the decision makers would be confident of defending the mandatory technical regulation in the event of a legal challenge. In contrast, governments are more likely, for energy efficiency appliance labelling, to perceive that they have the option of using voluntary standards especially if a very high industry adoption rate is predicted. Indeed, government incentives towards

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<sup>45</sup> Panel Report, *US-COOL*, para. 7.176.

<sup>46</sup> *Ibid.*, para. 7.188

<sup>47</sup> *Ibid.*, para. 7.175.

compliance might be an observable feature of such schemes, but it difficult to see how any such incentive or pressure could compel compliance such as to render a formally voluntary scheme *de facto* mandatory. The fact that a resulting standard cannot be reviewed as a technical regulation is an incidental by-product of a legitimate decision making process.

Nevertheless, WTO tribunals must have scope to review whether the preferred instrument has been influenced by protectionist motivations. The test for *de facto* mandatory compliance in the dissent is really an echo of the standard test. The impossibility of marketing without the label must be established. As such, it is not enough if the measure severely limits the possibility of selling tuna without the label. The measure will still be a standard despite this initial positive indicator of protectionism. This does not matter provided this indicator, and others, can be explored under the TBT's substantive obligations in DSU proceedings. The central argument of this article is that this is possible by reason of the TBT's undifferentiated approach towards central government technical regulations and standards.

## 7. MANDATORY COMPLIANCE ACCORDING TO THE *US-TUNA II* PANEL MAJORITY AND THE APPELLATE BODY

The interpretation of mandatory compliance preferred by the panel and upheld by the Appellate Body consists of three inter-dependent elements which can be termed provenance, exclusivity and enforceability, with no clear identification of any weighting, if any, applied to the different elements. In other words, this is a 'case by case' approach in which adjudicators appear to retain discretion on the significance attached to the presence of one element, or the absence of another.

In *US-Tuna II* itself, all the elements considered were satisfied leading to the conclusion that compliance was mandated. However, a mere statement of the elements and how they were satisfied provides only a deficient understanding of when labelling requirements are technical regulations. A fuller understanding is gained by asking how, if at all, the determination would have differed if one or more of the elements had *not* been satisfied. Are some of the elements in fact necessary conditions for mandatory compliance even though not presented by the Appellate Body as such? Alternatively, could just one of the elements operate on its own as the test for mandatory compliance? Through these questions, it is possible to express a view on how the test for mandatory compliance will develop in future cases, or what it might be reduced to.

### a) Provenance

On provenance, it was noted that it may be appropriate to consider 'whether the measure consists of a law or regulation enacted by a WTO Member'.<sup>48</sup> Upon application, it was noted that 'the Dolphin Protection Consumer Information Act and the implementing regulations constitute legislative or regulatory acts of the US federal authorities'.<sup>49</sup> This cautious formulation raises the question of whether an instrument which is not a government measure of any description can mandate compliance. The answer to this question is indicated by the title of TBT Article 3, *Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies*. This title arguably indicates that an instrument of a non-governmental body can be a technical regulation which mandates compliance. It is submitted, however, that this is incorrect. The intention was probably to signal that non-

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<sup>48</sup> Appellate Body Report, *US-Tuna II*, para. 188.

<sup>49</sup> *Ibid.*, para. 191.

governmental bodies can be involved in the preparation and perhaps application of technical regulations, without having any capacity to adopt such instruments; this function being the exclusive preserve of government bodies. On this basis, instruments of non-governmental bodies can only be voluntary standards other than to the extent that they are adopted by government bodies as mandatory technical regulations.

## b) Exclusivity

The exclusivity criterion was described as ‘whether it [the law or regulation] sets out specific requirements that constitute the sole means of addressing a particular matter’.<sup>50</sup> If the view on provenance expressed above is accepted, it would not be possible to apply the exclusivity criterion to an instrument of a non-governmental body with a view to determining whether this instrument mandates compliance. Therefore, even if a non-governmental instrument is the only means of addressing a particular matter, the point is that this instrument is already disqualified from mandating compliance and from being a technical regulation. This disqualification is not redeemed through exclusivity. If this is not accepted, the further argument is that a non-governmental instrument cannot be exclusive in the relevant sense. Even if such an instrument is the sole means of addressing a matter at a particular point in time, this is subject to the possible future adoption of a government measure which would take priority.

Upon application in *US-Tuna II*, it was found that the measure ‘establishes a single and legally mandated set of requirements for making any statement with respect to the broad subject of “dolphin-safety” of tuna products in the United States’.<sup>51</sup> How does test for mandatory compliance as exclusivity fare when subjected to the same critique as the simple and clear test in the dissent?

As with the test in the dissent, the exclusivity criterion avoids the tautology between ‘labelling requirements’ and mandatory compliance. This can be illustrated by changing the facts of *US-Tuna II* and supposing that the measure had been in the form of a preference for the use of a particular dolphin safe label and permitted the use of other dolphin safe labels. This measure would still establish a labelling requirement by setting out conditions to be fulfilled in order to use the preferred label. However, it would not any more mandate compliance because of its non-exclusive nature through the permissibility of other dolphin safe labels. Voluntary labelling schemes along these lines emanating from legislative measures are not just hypothetical possibilities with the US Energy Star programme and EU Ecolabel being examples.<sup>52</sup>

Could ‘exclusivity’ operate on its own as the test for mandatory compliance? This would be problematic because TBT Article 2.7 envisages the possibility of technical regulations which eventually become non-exclusive. This provision requires Members to ‘...give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own,

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<sup>50</sup> *Ibid.*, para. 188.

<sup>51</sup> *Ibid.*, para. 193.

<sup>52</sup> The Energy Star web-site describes this initiative as ‘a U.S. Environmental Protection Agency (EPA) voluntary program that helps businesses and individuals save money and protect our climate through superior energy efficiency’. It was ‘established by EPA in 1992, under the authority of the Clean Air Act Section 103(g)’. <http://www.energystar.gov/> (last visited June 2013). The EU initiative is under Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel. <http://ec.europa.eu/environment/ecolabel/> (last visited June 2013).

provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations'. Therefore, a labelling requirement can be a technical regulation, even if other labelling requirements, which are also technical regulations, are recognized as valid. A distinction can however be drawn to preserve exclusivity as a useful criterion indicative of mandatory compliance. There are labelling requirements such as the EU Ecolabel which, from the outset, permit the use of alternative labels relating to the same type of information as that covered by the Ecolabel. Such labelling schemes have a strongly non-exclusive character independently of Article 2.7 and are therefore standards. In contrast, there are labelling requirements such as the measure at issue in *US-Tuna II*, which from the outset have a strongly exclusive character. When exclusivity is the very essence of the measure, this quality is arguably not lost by reason of the soft obligation to give positive consideration to mutual recognition. Even if the technical regulations of other states are accepted as equivalent, the labelling requirement remains essentially exclusive in character subject to recognized extensions. In other words, it would be an exaggeration to claim that Article 2.7 renders meaningless the concept of an exclusive labelling requirement. Nevertheless, this is enough of a wrinkle to prevent mandatory compliance from being equated solely with exclusivity. It should continue as an indicative criterion.

### c) Enforceability

The Appellate Body's third criterion for mandatory compliance was enforceability. It initially gave the impression that it would not attribute much weight to this criterion, noting that both technical regulations and standards 'could be "compulsory" or "binding" and "enforceable"'. It followed that 'such characteristics, taken alone [could not] therefore be dispositive of the proper legal characterization of the measure' and it was necessary to consider the 'additional characteristics' which I have termed provenance and exclusivity.<sup>53</sup>

The required clarification relates to the sense in which all labelling requirements are capable of being enforced. Regardless of provenance, an instrument which sets out criteria or conditions to be fulfilled in order to use a label will usually be enforceable via general laws against deceptive practices. Hence, as the Appellate Body states, the possibility of enforcement cannot be dispositive of whether the instrument is a technical regulation or a standard. Nevertheless, it is possible to draw distinctions based on the nature and extent of the enforcement. At one end of the spectrum, there are labelling requirements which are merely enforceable via general laws against deceptive practices. In contrast, the Appellate Body seemed to locate the measure in *US-Tuna II* at the opposite end of the spectrum. It noted that 'the US measure provides for specific enforcement mechanisms' setting out 'active surveillance mechanisms to guarantee compliance with its norms and ... sanctions in case of wrongful labelling'.<sup>54</sup> This level of enforcement operated independently of any general laws against deceptive practices.

There is much to commend enforceability as an indicative criterion for mandatory compliance. First, enforceability can be closely linked to the ordinary meaning of the phrase 'with which compliance is mandated'. This phrase invites enquiry into the extent to which the measure itself mandates compliance. This seems to have been recognized by the Appellate Body when it observed in *EC – Asbestos* that 'compliance with the prohibition against products containing asbestos is mandatory and is,

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<sup>53</sup> Appellate Body Report, *US-Tuna II*, para.188

<sup>54</sup> *Ibid.*, para. 194.

indeed, enforceable through criminal sanctions' referred to in the measure itself.<sup>55</sup> Secondly, the idea of a continuum of enforceability enables the tautology to be avoided. Labelling requirements are not automatically technical regulations because they are capable of being enforced through general laws against deceptive practices. Thirdly, the decision on how much more by way of enforcement is required to indicate mandatory compliance obviously involves the exercise of discretion and therefore provides some flexibility and room for maneuver when deciding on the identity of the instrument.<sup>56</sup> Fourthly, enforceability works well as an indicative criterion in tandem with exclusivity. These criteria are connected in the sense that, as the level of enforceability increases, so does the likelihood that the measure sets out the sole means for addressing a particular matter. High levels of investment in enforcement may reflect a preference for a particular label to the exclusion of others.

As noted, these advantages relate to enforceability as an indicative criterion. It would potentially produce the wrong result in at least two situations if used as the sole criterion. Suppose that the labelling requirement is non-exclusive in the sense that a number of different labels can permissibly be used to convey much the same information. Suppose further that this labelling requirement is highly enforceable in the sense that unauthorized use of the label is subject to the kinds of enforcement mechanisms seen in *US-Tuna II*. The first element here is indicative of a standard, whereas the second indicates a technical regulation. It would be wrong to categorize this measure based on the extent of enforcement alone, albeit that this consideration should probably bear more weight than the measure's non-exclusive character. As a second example, suppose that, in *Tuna*, enforcement had been left to general laws against deceptive practices, and suppose further that the marketing of tuna products without the dolphin safe label was prohibited. This measure is essentially a mandatory technical regulation by reason of the prohibition on marketing without the label. The low level of enforcement should not affect this position.

## 8. CONCLUSION

What is at stake when adjudicators need to decide whether the instrument before them is a central government technical regulation which mandates compliance, or a central government voluntary standard? Very probably, the correct answer is not very much. Technical regulations can undoubtedly be reviewed for conformity with the substantive obligations in Article 2, while the Annex 3 Code subjects voluntary standards to the same obligations. When standards emanate from central government bodies, the Annex 3 Code obligations are hard law by reason of TBT Article 4.1. This requires Members to 'ensure that their central government standardizing bodies accept and comply with' the Annex 3 Code. In sum, central government technical regulations and standards are subject to parallel sets of obligations which do not materially differ in content, and which are enforceable in DSU proceedings.

Under this understanding, should the panel dissent in *US-Tuna II* be preferred over the panel majority and Appellate Body on the issue of how the instruments should be distinguished? Both interpretations of mandatory compliance allow a tautology between this treaty term and 'labelling requirements' to be avoided. This is a shared advantage. The main distinguishing feature is that the test in the dissent lacks any discretionary elements, whereas the Appellate Body's tests provide room for

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<sup>55</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, para. 72.

<sup>56</sup> Whether this is a context in which flexibility is desirable or useful is considered in the Conclusion.

maneuver. Under the dissent, it is either possible to market the product without complying with the labelling requirement, or it is not. In contrast, the extent to which misuse of the label is monitored and enforced, as an indicator of mandatory compliance, provides some flexibility. Of course, flexibility sometimes comes at the expense of uncertainty. This was not the position in *US-Tuna II*. The three elements of the Appellate Body's test for mandatory compliance were clearly satisfied. However, the outcome of future cases might not be so easy to predict. Therefore, the question is whether this is an area in which flexibility is useful, or whether the more straightforward test in the dissent suffices. Flexibility would be essential if the TBT materially distinguished between central government technical regulations and standards. It would protect the possibility of reviewing the measure as a technical regulation in DSU proceedings when adjudicators form the impression that protectionist motivations have been at work. As noted however, the better view is that the TBT does not incorporate a hard law / soft law distinction for these instruments. Therefore protectionist motivations can be explored in DSU proceedings through the proxy of the TBT's substantive obligations for both instruments. The flexibility in the Appellate Body's interpretation of mandatory compliance does not have a strong role to play. As such, the clear, simple and certain test in the dissent can be preferred.