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Sultans of Swing?

The Emerging WTO case law on TBT

by

Carlo M. Cantore & Petros C. Mavroidis*

*Both EUI. For helpful comments we thank Alessandra Arcuri and Enrico Bonadio

I. Introduction

Following years of silence after *EC-Sardines*¹, three cases were adjudicated by Panels under the WTO Agreement on Technical Barriers to Trade (TBT) in 2011: *US-Clove Cigarettes*, *US-Tuna II (Mexico)*, and *US-COOL*. These three cases dealt with key provisions of the Agreement, but the Panels adopted irreconcilable approaches. All three decisions were appealed before the Appellate Body (AB), but even the latter failed to apply a coherent methodology to adjudicate similar.

In Section II, we provide a brief account of the facts and the outcomes of the cases, whereas, in Section III we discuss the methodology applied by the WTO judiciary in the three cases.

II. The Cases

*US-Clove Cigarettes*²

In 2009, the US adopted a new regulation according to which it was prohibited to sell cigarettes containing artificial or natural flavors as constituents or additives, with the notable exception of tobacco and menthol cigarettes. According to scientific studies, juveniles are particularly addicted to flavored cigarettes, since additives somehow mask the unpleasant taste of tobacco and are more attractive to young people. Indonesia was, between 2007 and 2009, the main exporter of clove cigarettes to the US. It lamented that the domestic measure was inconsistent with Art. 2.1 TBT since it accorded imported clove cigarettes less favorable treatment than that accorded to like domestic goods (menthol cigarettes). The panel understood “likeness” under Art. 2.1 TBT as related to the objectives pursued by the regulator, and found the US regulation to be inconsistent with Art. 2.1 TBT. The AB, upheld the panel’s view on the issue of

¹ *European Communities – Trade Description of Sardines* DS231 [*EC-Sardines*]

² *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, DS406 [*US- Clove Cigarettes*].

likeness and, hence outlawed the measure. However, it dismissed the argument related to “policy-likeness” and focused on the competitive relationship between menthol and clove cigarettes.

*US-Tuna II (Mexico)*³

The US adopted in 2009 a regulation according to which only tuna fished with certain techniques that respect the life of dolphins could be sold with a special label on the packaging (“dolphin-safe” label); tuna products not meeting these requirements could be sold, although without the above mentioned label. Mexico argued that the regulation accorded less favorable treatment to Mexican companies by excluding the techniques adopted by them not to kill dolphins from those eligible to receive the ‘dolphin-safe’ label. Both the Panel and the AB classified the relevant measure as a ‘technical regulation’ and judged it as inconsistent with Art. 2.1 TBT by according Mexican companies less favourable treatment when compared to their US counterparts.

*US-COOL*⁴

US legislation introduced in 2009 a system of labeling meat products according to their origin. The regulation distinguished between meat products wholly obtained in the US (A), born raised or slaughtered in the US (B), imported for immediate slaughter (C) or wholly originating abroad (D). Mexico and Canada challenged the measure before the WTO judiciary and the AB, although dismissing the finding by the Panel that the objective pursued by the US regulation was not legitimate, upheld the view of the judges of first instance according to whom the measure was inconsistent with Art. 2.1 TBT by providing less favourable treatment to meat products originating outside the US.

³ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna Products*, DS381 [*US-Tuna II (Mexico)*].

⁴ *United States – Certain Country of Origin Labelling (COOL) Requirements*, DS386 [*US-COOL*]

III. A critique

Although occasionally wrong tests can lead to right outcomes, and this was indeed the case in at least one of the judgments (*US – Clove Cigarettes*, as it will be explained later), the AB added little to the understanding of the TBT Agreement and the predictability of future case-law.

An analysis of the cases reveals that the judges, instead of analyzing the issues in light of the object and purpose of the TBT Agreement, relied heavily on pre-existent GATT case law. This is the original sin behind the unsatisfactory outcomes of the decisions under analysis for two main sets of reasons: “likeness” in the TBT refers to policy-likeness and not market-likeness; furthermore, unlike GATT, TBT deals with a default scenario where governments are unhappy with the market outcome. It is the exercise of their ‘unhappiness’ that needs to be evaluated, and not consumers’ reactions.

The AB approach in the TBT trio

Schematically one can describe the approach adopted by the AB in the three reports as follows: first, the AB asks how consumers define like products; second, if in presence on like-products, it will ask whether less favourable treatment was afforded to foreign products; finally, it will review whether the standard or technical regulation constitutes the least restrictive option available to achieve the objective pursued.

The suggested approach

The case law in question reveals some confusion on the interpretation of the key-terms of the TBT Agreement and, more in general, on the understanding of the function that the Agreement is supposed to perform. In particular, it seems that the AB ignored the TBT and decided on the issues at stake according to previous GATT case law. However, the TBT is about the policies the Members adopt when they are unsatisfied with market outcomes. In other words, the TBT aims to

prevent that standards and technical regulations are not used in unnecessary and discriminatory manner *vis-à-vis* foreign suppliers. The TBT Agreement is not about market-likeness. Instead, it is about policy-likeness, hence the test adopted by the AB is not satisfactory.

A more TBT-consistent approach should respect the following pattern:

- (a) First, the judges should ask whether the measure under review is the least restrictive option to achieve a unilaterally defined policy objective. For the sake of this assessment, the burden of proof should be allocated as it was the case in the *US-Gambling*⁵ dispute, i. e. the complainant should point at a less restrictive option and the defendant should demonstrate why it was not available in that situation. If the response to this question is positive, then there is no reason to go any further; on the contrary, in case of a negative answer, the second step would be that of understanding whether the measure was discriminatory towards foreign suppliers.
- (b) With respect to “non-discrimination”, the role of WTO judges should be that of assessing whether imported and domestic goods are “policy-like”. If the two products are not policy-like, there is no need to proceed further. If the two products are like from a policy perspective, then the same discipline should apply to both of them.

As it was said before, the AB adopted an unsatisfactory methodology. This could have led, on occasion, to the right outcome, but the case law under review is not useful for the sake of certainty of law and predictability of the system. We side with the following evaluation⁶.

⁵ *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, DS 285 [*US-Gambling*]

⁶ Petros C. Mavroidis (2013), *Driftin’ too far from shore – Why the test for compliance with the TBT Agreement Developed by the Appellate Body is wrong and what should the AB have done instead*, *The World Trade Review*, *Forthcoming*.

	Methodology	Outcome
<i>US-Clove Cigarettes</i>	Incorrect	Correct
<i>US-Tuna II (Mexico)</i>	Incorrect	Partially Correct
<i>US-COOL</i>	Incorrect	Incorrect

In *US-Clove Cigarettes*, the AB asked whether consumers would treat menthol cigarettes and clove cigarettes as substitutes. The judges, instead, should have asked whether the two goods were policy-like and, hence, it could have been even easier to find that a violation occurred in this case. Eventually, however, the AB ended up with a correct outcome.

The main problem with the *US-Tuna II (Mexico)* case lies in the identification of the measure as a “technical regulation”. Since compliance with the requirements for the adoption of the “dolphin-safe” label was not compulsory for selling tuna in the US, the measure should have been identified as a “standard”. The question, therefore, should have been whether the “dolphin-safe” label was available to all the tuna producers meeting the requirements irrespective of the particular fishing technique adopted. Thus the “dolphin-safe” standard, although necessary to achieve the objective, was applied in a discriminatory fashion, and therefore it should have been judged as TBT inconsistent.

In *US-COOL*, finally, the AB completely misinterpreted the regulation under review. The AB considered the US labeling requirements for meat products unnecessary and discriminatory. Both conclusions are incorrect: a labeling requirement cannot be considered unnecessary just because not all the information required is revealed to consumers. What instead mattered in this case was whether providing such information was necessary for the achievement of the statutory objectives. Moreover, contrary to what the AB decided, the measure was not discriminatory either, since the burden was the same for US and foreign producers alike either on goods produced in a single country or on good produced in more than one country.

IV. Concluding Remarks

The analysis reveals some confusion by the WTO judges in the interpretation of key provisions of the TBT Agreement. WTO judges need to take into deeper account the rationale for enacting the TBT agreement before adjudicating the next dispute coming under its aegis. It seems that the judges have not followed the right methodology in any of the cases under analysis, hence the current approach does not serve legal security.