

Talking Disputes | *AB Report on the US – Tuna II (Mexico) (Art. 21.5) Dispute*

talkingdisputes

The debate around the decisions

Join the discussion on Twitter

 @ICTSDTradeLaw | @WTIAdvisors

#TalkingDisputes

www.ictsd.org | www.wtiadvisors.com





29 January 2016 | Geneva, Switzerland

Tuna II 21.5: Aim, Effects, and Regulatory Autonomy

Joel P. TRACHTMAN, *The Fletcher School of Law and Diplomacy, Tufts University*

What is de facto discrimination?

- a. Different outcomes for comparable products: less market access
 - What if Mexican dairy producers declined to pasteurize milk, and were therefore excluded from the US market?
- b. Different opportunities: different requirements for market access, de jure or de facto
 - What if different requirements are fully explained by different conditions, e.g., different presence of diseases?
- c. Protectionist aim—determined objectively or subjectively
- d. Non-protectionist benefit that fails to justify the reduced market access
- e. A combination of the above? Hudec's “aim and effects”

Preliminary notes

- Original AB says these types of labeling requirements are mandatory and are therefore technical regulations
- Labels relating to PPMs are covered as technical regulations
- Legitimate regulatory goal may include extraterritorial goal
- Parties did not argue whether the differently treated tuna constituted “like products”
- Therefore, under 2.1, the main action is “less favourable treatment”

Comparing TBT 2.1 to GATT III:4/XX

TBT 2.1	GATT III:4/XX
Like products determined by competition	Same
Competitive detriment	Same
Legitimate objective	Related to conservation
SELRD/even-handed/calibrated/not arbitrary or unjustifiable	Not arbitrary or unjustifiable

Determining discrimination under TBT 2.1

- “treatment no less favorable than like products” of national or other foreign origin—jurisprudence:
- 2 components:
 - Competitive detriment, interpreted simply as effects
 - Aim, using multiple terms, none of which appear in TBT 2.1:
 - “stems exclusively from a legitimate regulatory distinction”
 - = “even-handed”
 - = Calibrated to risk (appropriately tailored to risk?)
 - \supseteq Not arbitrary or unjustifiable
 - \supseteq Rationally related to risk
 - These aim tests call for evaluation of regulatory rationality

Tribunals and regulatory rationality

- What level of precision in national regulatory rationality is required?
- Do panels have appropriate skills to calibrate regulation?
- In other jurisprudence, AB has been deferential to national regulatory rationality:
 - Brazil—Tyres (Art. XX GATT)—Brazil’s measures met “arbitrary or unjustifiable” test
 - Hormones II (SPS)
- Judicial modesty?

A critique of the AB decision

- Good to solidify aim and effects analysis in 2.1
- But excessive intrusion into national regulatory autonomy
- Slight lack of rationality of categories-perfection versus reasonableness
 - Even-handedness as evaluation of nexus between regulatory distinctions and policy objectives, plus proportionality, 7.153-157
 - Is imperfection evidence of protectionist aim?

Critique, continued

- Lack of even-handedness is largely hypothetical in connection with determination provisions: hypothetical possibility that
 - there is association, leading to unobserved harms, in non-ETP purse seine fisheries, or
 - In other fisheries, there is observed mortality but no determination of association relevant to unobserved mortality leading to identification of possible greater harm
 - US: no evidence of these phenomena
- Thus, hypothetical modest lack of even-handedness is basis for finding of violation

Critique, continued

- Appellate Body analysis de-linked from competitive detriment
 - How to measure competitive detriment? Is it that caused by the overall measure, or by its lack of even-handedness?
 - The latter has minor causal implications
 - Original AB: does not matter that Mexico could have complied
 - Most Mexican tuna is caught by setting on dolphins
 - AB: panel never resolved question of *overall* risk in different fisheries
 - Is minor adverse effects with modest structural evidence of protectionist aim enough?
- Somewhat de-linked from imported versus domestic or other foreign goods

Conclusion

- TBT 2.1 analysis must focus on implicit protectionist motivation with significant protective effects, not small logical gaps in regulation that are not themselves the cause of protective effects
- The core task of the tribunal is **judgment** about protectionist motivation/ insincere non-protectionist motivation, and magnitude of competitive detriment
- AB avoids judgment: sometimes errs on side of deference, and sometimes errs on side of discipline, but could avoid some errors by embracing its task more clearly

Talking Disputes | *AB Report on the US – Tuna II (Mexico) (Art. 21.5) Dispute*

talkingdisputes

The debate around the decisions

Join the discussion on Twitter

 @ICTSDTradeLaw | @WTIAdvisors

#TalkingDisputes

www.ictsd.org | www.wtiadvisors.com