

The Jurisprudence of the TBT Agreement: An Analysis of the Interpretations in the US – Clove Cigarettes, US – Tuna II, and US – COOL cases

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Summary

Until recently, there have been few cases involving the WTO Agreement on Technical Barriers to Trade (TBT) that sets the rules for technical regulations and standards. However, in 2012, the WTO Appellate Body (AB) issued, almost simultaneously, three reports involving the US – Clove Cigarettes, US – Tuna II, and US – COOL cases that dealt with the issues relating to the TBT Agreement. In this paper, the interpretations of Articles 2.1 and 2.2 of the TBT Agreement will be examined.

In reviewing Article 2.1, the AB found that the interpretation of “like products” in the TBT Agreement should be approached in a manner similar to that of GATT Article III:4 that includes the same words “like products.” As for the interpretation of the term “less favourable treatment,” the AB decided that the term “should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions,” which is a new concept that was introduced for the first time in the US – Clove Cigarettes case. This decision shows that the AB has been attempting to preserve the balance between the reduction of unnecessary obstacles to trade and the right to regulate the member countries. As for Article 2.2, the AB first identified the legitimacy of the objectives of the measure and then reviewed the alternative measures. As a result of the AB’s decision, it can be concluded that the AB shows a deferential attitude to the regulation of the member countries.

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