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(PANEL REPORT, BRAZIL - MEASURES AFFECTING IMPORTS OF RETREADED TYRES, WT/DS332/R, 12 JUNE 2007)

WTO Panel decision in Brazil - Tyres supports safeguarding environmental values

[By Julia Qin](#)

The recent decision of the World Trade Organization's Panel in the *Brazil - Tyres*^[1] case has the potential to become a milestone in WTO jurisprudence on trade and the environment. At issue was Brazil's ban on imports of retreaded tyres. The European Communities (EC) challenged the ban as a violation of WTO rules, whereas Brazil defended the measure as necessary to protect health and the environment. The Panel held that, although the ban was necessary to protect health and the environment, it was applied in a WTO-inconsistent manner because Brazil failed to enforce a similar ban on used tyre imports. Thus, the Panel decision effectively directed Brazil to impose further trade restrictions so as to advance its environmental objective. Previous WTO decisions have not gone this far in safeguarding environmental values.

Brazil has indicated that it will accept the Panel's ruling and implement the additional ban on used tyres. The European Communities, however, has decided to appeal. It remains to be seen, therefore, whether the WTO Appellate Body will uphold the Panel's "green" decision.

Background

Retreaded tyres are produced by reconditioning used tyres; they have a shorter lifespan than new tyres and are sold at a cheaper price. Brazil imposed the ban on retread imports in 2000, claiming such imports led to a faster accumulation of waste tyres, which create health and environmental hazards by providing breeding grounds for mosquito-borne diseases such as dengue fever, yellow fever, and malaria, and by causing tyre fires that are difficult to control. Furthermore, Brazil claimed, it is not only costly to collect waste tyres scattered in its vast territory, but also technologically impossible to dispose of waste tyres without negative environmental consequences.

There is an exemption for retreaded tyres produced in members of MERCOSUR - the free trade arrangement among Brazil, Argentina, Uruguay, and Paraguay. Brazil established this exception after it lost to Uruguay in a MERCOSUR arbitration, which ruled that its ban violated MERCOSUR obligations.

Brazil originally also imposed a ban on used tyre imports, but that ban has been suspended through domestic court injunctions obtained by Brazilian retread producers. It is cheaper for the Brazilian producers to import used tyres than to collect them domestically.

The EC is a net exporter of retreaded tyres, for which there is only a limited demand in European markets. Its retread exports declined substantially after Brazil imposed the ban. The EC claimed that the ban was not designed to protect the environment, but rather to protect Brazil's domestic retread industry from foreign competition.

Major Legal Issues

An import ban violates the General Agreement on Tariffs and Trade (GATT) Article XI:1, which prohibits quantitative restrictions on imports or exports. The question, however, is whether the ban can be

justified by one of the GATT exceptions. In this case, Brazil invoked GATT Article XX(b) that excepts measures "necessary to protect human, animal or plant life or health."

Is the ban "necessary" to protect human health and the environment?

- The link between retreaded tyres and health/environmental risks

A threshold issue was to determine whether retreaded tyres could cause health and environmental concerns. (The Panel accepted the use of the term "environment" in this case as shorthand for "animal or plant life or health" within the meaning of Article XX(b).) According to the EC, retreaded tyres are not waste tyres and do not in themselves cause health concerns. Since all products eventually turn into waste, and since many low- quality products have short lives, the EC argued, if Brazil's ban were allowed, there would be no reason why other members could not restrict imports of any product having a shorter life than competing domestic products. The Panel dismissed the EC's argument by noting that there had been other WTO cases in which the risk being addressed through a measure did not involve the exact product at issue. For example, the Panel pointed out, the health risk addressed in *U.S.-Gasoline*^[2] related to air pollution caused by the consumption of gasoline rather than to gasoline itself. "While retreaded tyres are distinct from waste tyres," the Panel stated, "waste tyres are nothing other than tyres that have reached the end of their lifecycle as tyres."^[3]

The Panel then examined whether the accumulation of waste tyres creates health and environmental risks. It accepted the evidence presented by Brazil that numerous waste tyres scattered in its territory provide perfect breeding grounds for mosquito-borne diseases, and can cause tyre fires that harm humans, animals and plants alike. As for the EC's argument that the risks posed by waste tyres are due to Brazil's poor management of waste tyres, the Panel stated that, even if proper management of waste tyres may significantly reduce such risks, "that does not negate the reality that waste tyres get abandoned and accumulated and that risks associated with accumulated waste tyres exist in Brazil."^[4]

- The "necessity" test

In deciding whether the ban was "necessary" to achieve Brazil's stated objective, the Panel followed the established approach in Article XX cases. It engaged in weighing and balancing several factors: the relative importance of the policy objective pursued by the measure; the contribution of the measure to the realization of the policy objective; and the restrictive impact of the measure on international commerce. While recognizing that an import ban is as trade-restrictive as a measure can be, the Panel believed that "the objective of protecting human health and life against life-threatening diseases, such as dengue fever and malaria, is both vital and important in the highest degree."^[5] In evaluating the ban's contribution to this objective, the Panel decided it was unnecessary to examine the actual impact of the ban on the reduction of waste tyres; instead, it would suffice to know whether the ban is capable of contributing to such objective. Since all retreaded tyres have a shorter lifespan than new tyres, the Panel logically concluded that the ban can contribute to the reduction of waste tyre accumulation in Brazil.

Under Article XX jurisprudence, a measure is "necessary" only if there is no less trade-restrictive alternative reasonably available. The Panel examined a number of alternatives identified by the EC, which ranged from preventive measures, such as promotion of public transportation, to various disposal methods, such as landfill, stockpiling, energy recovery and recycling. It found that while these measures could each contribute to the reduction of waste tyres or address some aspects of the health/environmental risks involved, none of them, either individually or collectively, would safely eliminate the risks arising from waste tyres, as intended by the import ban. Hence, the Panel concluded, they were not reasonably available alternatives to the ban.

Is the ban applied consistently with the requirement of the chapeau?

A measure justifiable under Article XX(b) must also meet the requirement of the chapeau of Article XX that it is "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

1. Arbitrary or unjustifiable discrimination

The EC argued that the manner in which Brazil applied the ban constituted arbitrary and unjustifiable discrimination because (i) the ban did not apply to MERCOSUR countries, and (ii) Brazilian producers were allowed to import used tyres, even though such imports produce the same environmental externalities as imports of retreaded tyres. The Panel agreed that the ban was implemented in a manner that resulted in discrimination between MERCOSUR and non-MERCOSUR countries and between Brazil and other WTO members. The question then is whether such discrimination is "arbitrary or unjustifiable" within the meaning of the chapeau.

- The MERCOSUR exemption

The Panel found the discrimination arising from the MERCOSUR exemption was neither "arbitrary" nor "unjustifiable." According to the Panel, this discrimination was not arbitrary because Brazil adopted the exemption to comply with the ruling of a MERCOSUR tribunal rather than as a result of its own capricious or unpredictable decision. The Panel then examined the volumes of retreaded tyres imported from MERCOSUR countries and found that such imports had not been significant enough to undermine Brazil's ability to fulfill its objective. Based on this "effect" test, the Panel concluded that, as of the time of its ruling, the discrimination arising from the MERCOSUR exemption was not unjustifiable.

It should be noted that, while allowing the MERCOSUR exemption, the Panel did not exclude the regional trade arrangement categorically from the application of Article XX. On the contrary, it indicated that "the fact that we give due consideration to the existence of Brazil's commitments under MERCOSUR ... does not imply that the exemption must necessarily be justified."^[6] Indeed, the Panel's ruling suggests that should the imports from MERCOSUR countries increase significantly in the future, the exemption may become "unjustifiable."

- Imports of used tyres

As for the discrimination arising from used tyre imports, the Panel found it not "arbitrary" but "unjustifiable." The discrimination was not arbitrary because the imports were made through injunctions granted by Brazilian courts, which the Panel believed were not capricious or unpredictable. However, the Panel also found the granting of injunctions directly contradicted the rationale of the ban on retreads since "it effectively allows the very used tyres that are prevented from entering into Brazil after retreading to be imported *before* retreading."^[7] In this regard, the Panel again employed an effect test. It found that used tyre imports had been taking place in such a large amount that the achievement of Brazil's declared objective was being "significantly undermined."^[8] Consequently, it found the discrimination arising from used tyre imports "unjustifiable."

Since Brazil did not claim the conditions prevailing in Brazil were different from those in other WTO members, the Panel held that the ban was being applied in a manner that "constitutes a means of unjustifiable discrimination between countries where the same conditions prevail."^[9]

2. Disguised restriction on international trade

Based on the same rationale as that underlying its finding on unjustifiable discrimination, the Panel found that the ban was applied in a manner that constituted a disguised restriction on international trade, "since imports of used tyres are taking place to the benefit of the Brazilian retreading industry in

such quantities as to seriously undermine the achievement of the stated objective of avoiding the further accumulation of waste tyres in Brazil."[\[10\]](#)

Implications

If Brazil restores its ban on used tyre imports, as it is expected to do under the Panel's ruling, Brazilian retread producers will have to rely on domestically-generated used tyres for production. Consequently, more used tyres can be collected domestically, contributing to a reduction of waste tyre accumulation in Brazil.

Tyre retreading is an environmentally-friendly measure; free trade in retreaded tyres may well lead to a more efficient allocation of resources for retreading and for disposing of tyre waste on a *global* basis. However, insofar as the importing country is concerned, such trade can also worsen its environment, as Brazil has demonstrated in this case. Trade in waste or recycled products, therefore, may present a different set of issues from trade in new products.

This case is the first in GATT/WTO history that involves a recycled waste product. Significantly, the Panel decision is consistent with the principles of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*,[\[11\]](#) the most comprehensive international agreement to date concerning waste trade. The Basel principles include minimization of waste generation (the reduction principle) and local disposal of wastes to the extent possible (the proximity principle). Furthermore, the Convention recognizes the sovereign right of a State to ban imports of hazardous and other wastes, and prohibits the export of such wastes to developing countries without their prior consent. Thus, the Basel norms endorse restrictions on trade in waste products and advocate the right of a sovereign nation to discriminate against foreign-generated waste.

The Panel did not invoke the Basel Convention explicitly, evidently because the Convention does not cover tyre waste directly. But the Panel adopted the Basel norms implicitly in its interpretation of the "necessity" test under Article XX(b). For instance, when noting the EC's argument that the reduction principle of the Basel Convention applies to hazardous waste only, the Panel commented: "[p]olicies to address "waste" by non-generation of additional waste are a generally recognized means of addressing waste management issues."[\[12\]](#) In assessing the health/environmental risks posed by waste tyres and in evaluating alternative methods of tyre disposal, the Panel made numerous references to the *Basel Technical Guidelines on the Identification and Management of Used Tyres*,[\[13\]](#) which were adopted by the Parties to the Convention in recognition of "the serious health and environmental problems" used tyres may cause.

Conceptually, the most difficult barrier in integrating the Basel norms into WTO law lies in the apparent conflict between the WTO principle of nondiscrimination and the Basel principle of differential treatment of wastes generated in different countries. In the context of GATT Article XX, the nondiscrimination requirement of the chapeau presents the challenge. Previous WTO cases do not provide much guidance in this regard, as they concern either generally polluting products (such as gasoline and asbestos) or endangered species (such as sea-turtles), in which nondiscrimination between the importing and exporting countries is inherently consistent with the objective of protecting health and the environment. In light of the specific facts of this case, the Panel was able to interpret the chapeau as requiring consistent application of the policy objective within the importing country's domestic system. This interpretation resolved the potential conflict of norms in a way that is consistent with the purpose of the policy exceptions of Article XX.

About the Author

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Footnotes

- [1] Panel Report, Brazil - Measures Affecting Imports of Retreaded Tyres, WT/DS332/R (12 June 2007) available at [http://www.worldtradelaw.net/reports/wtopanelsfull/brazil-tyres\(panel\)\(full\).pdf](http://www.worldtradelaw.net/reports/wtopanelsfull/brazil-tyres(panel)(full).pdf).
- [2] Appellate Body Report, United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AD/R, adopted 20 May 1996 available at [http://www.worldtradelaw.net/reports/wtoab/us-gasoline\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/us-gasoline(ab).pdf).
- [3] Panel Report, paras. 7.49-7.50.
- [4] Id., para. 7.67.
- [5] Id., para. 7.111.
- [6] Id., para. 7.285.
- [7] Id., para. 7.295.
- [8] Id., paras. 7.306.
- [9] Id., paras. 7.307-7.309.
- [10] Id., para. 7.355.
- [11] 28 ILM 649 (1989), available at <http://www.basel.int/>. The Convention has 170 parties, including most of the WTO members.
- [12] Panel Report, para. 7.100; fn. 1170.
- See <http://www.basel.int/meetings/sbc/workdoc/old%20docs/tech-usedtyres.pdf>.

QIN JULIA, UPDATE: THE MERCOSUR EXEMPTION REVERSED – CONFLICT BETWEEN WTO AND MERCOSUR RULINGS AND ITS IMPLICATIONS FOR ENVIRONMENTAL VALUES, ASIL INSIGHTS, DECEMBER 31, 2008
 ([HTTP://WWW.ASIL.ORG/INSIGHTS070905_UPDATE.CFM](http://www.asil.org/insights070905_update.cfm), ACCESSED FEB. 05, 2010)
 (REPORT OF THE APPELLATE BODY, BRAZIL – MEASURES AFFECTING IMPORTS OF RETREADED TYRES, WT/DS332/AB/R, ADOPTED DECEMBER 17, 2007)

Update: The Mercosur Exemption Reversed – Conflict between WTO and Mercosur Rulings and Its Implications for Environmental Values

By Julia Qin

Since the Panel issued its decision in June 2007, there have been two major developments in this case. First, on appeal of the Panel’s decision by the European Communities, the Appellate Body issued its decision in December 2007.^[1] The Appellate Body upheld the Panel’s finding that Brazil’s import ban on retreaded tyres was “necessary” to protect public health and the environment within the meaning of Article XX(b), but reversed the Panel’s findings concerning the Mercosur exemption under the chapeau of Article XX. Subsequently, a WTO arbitral award was issued in August 2008, giving Brazil until December 17, 2008 to implement the WTO rulings.^[2] This deadline has now arrived, with no announcement by either Brazil or the EC regarding the status of compliance.

The Appellate Body decision, together with the subsequent arbitral award, has given rise to a conflict between the rulings of the WTO and Mercosur. This conflict can have further implications for the environmental values at issue.

The Appellate Body’s Decision Article XX(b) of the GATT permits the implementation by a WTO Member of measures “necessary to protect human, animal or plant life or health,” but the chapeau of Article XX requires that such measures not be “applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a

disguised restriction on international trade.” The key differences between the Appellate Body’s decision and the Panel’s lie in their interpretation of the chapeau language.

The Panel had focused on the trade effect in its interpretation of the term “unjustifiable” discrimination. The Panel found that the Mercosur exemption discriminated between Mercosur countries and other WTO Members, but such discrimination was not “unjustifiable” within the meaning of the chapeau because, at the time, the volume of retreaded tyres imported from Mercosur countries was not significant enough to undermine the objective of the import ban. Applying the same “effect” test, the Panel found that imports of used tyres through Brazilian court injunctions resulted in “unjustifiable” discrimination because the volume of such imports was so large that the objective of the import ban was being significantly undermined.

The Appellate Body rejected this quantitative approach, which would characterize discrimination as “unjustifiable” only if the volume of imports is large enough to significantly undermine achievement of a measure’s objective. In its view, the assessment of whether discrimination is unjustifiable “will usually involve an analysis that relates primarily to the cause or the rationale of the discrimination.”^[3] While acknowledging that the effects of the discrimination “may be a relevant factor” for determining whether the discrimination is justifiable, the Appellate Body nonetheless found that the Panel erred in focusing “exclusively” on the relationship between the effects of the discrimination and its justifiable character.^[4]

The Appellate Body also disagreed with the Panel’s interpretation of the term “arbitrary” discrimination. The Panel had found that the discrimination resulting from the Mercosur exemption was not arbitrary because Brazil enacted the exemption to comply with the ruling of a Mercosur tribunal, rather than out of its capricious or random decision. Similarly, the Panel had found the imports of used tyres did not result in arbitrary discrimination because they were made through court injunctions. While agreeing that acts implementing a decision of a judicial or quasi-judicial body can hardly be characterized as a decision that is “capricious” or “random,” the Appellate Body held that discrimination resulting from a rational decision or behavior can still be arbitrary or unjustifiable if “it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.”^[5]

For these reasons, the Appellate Body concluded that the Mercosur exemption, as well as the used tyre imports through court injunctions, resulted in Brazil’s import ban being applied in a manner that constitutes “arbitrary or unjustifiable discrimination” within the meaning of the chapeau. Accordingly, Brazil is required to bring its measure into conformity with its WTO obligations.

The Arbitral Award

Brazil may have “a reasonable period of time” to implement the WTO rulings.^[6] A WTO arbitrator was appointed to determine what constitutes the reasonable period in this case, after the EC and Brazil failed to reach agreement.

In the arbitral proceeding, Brazil requested that it have until September 2009 to achieve full compliance. According to Brazil, because the Mercosur exemption was mandated by a Mercosur ruling, it would have to negotiate an arrangement with its Mercosur partners and the earliest time for such arrangement to take effect would be September 2009. The EC opposed, arguing that a Mercosur-wide arrangement would not lead to removal of the Mercosur exemption and that Brazil should not be given time for pursuing measures that obviously would not bring about compliance.

While recognizing that Brazil may choose to negotiate with other countries as a way to implement a WTO ruling, the arbitrator found that such negotiation is an “external” process outside the law-making and regulatory system of Brazil, and is therefore not indispensable for Brazil’s implementation of the WTO decision.^[7] Accordingly, the arbitrator decided not to factor into his determination any time needed for such negotiation. Based on the time necessary for Brazil to change its domestic law con-

cerning the imports of used tyres through court injunctions, the arbitrator set December 17, 2008 as the deadline for Brazil's compliance.

Implications

Both the Panel and the Appellate Body decisions resoundingly affirm that import bans unilaterally imposed to protect health and the environment can be compatible with the WTO Agreement. In a sense, the Appellate Body's decision can be viewed as even more pro-environment than the Panel's since it requires Brazil's import ban to be complete and fully consistent with its environmental purposes.

Under current circumstances, however, Brazil cannot remove the Mercosur exemption without disobeying the ruling of the Mercosur tribunal. Thus, unless it can make an arrangement within Mercosur to overcome the effect of that ruling, the only way Brazil can comply with both its WTO and Mercosur obligations is to withdraw the import ban, which of course would defeat its environmental purposes.

This potential conflict between the rulings of the WTO and the Mercosur tribunal is only accentuated by the arbitral award. By disallowing time for Brazil to secure a negotiated solution within Mercosur, the arbitrator has forced Brazil into a legal bind between the WTO and Mercosur systems. If Brazil fails to remove the Mercosur exemption or otherwise maintains an incomplete import ban after December 17, 2008, it may face further WTO proceedings on sanctions against its noncompliance.

It should be pointed that this conflict between the WTO and Mercosur decisions is not inherent or inevitable. As the Appellate Body noted, Article 50(d) of the Treaty of Montevideo contains a provision similar to Article XX(b) of the GATT, exempting measures taken by a Mercosur member for the protection of human, animal or plant life and health.^[8] Brazil could have defended its import ban on these grounds in front of the Mercosur tribunal, but chose not to.^[9] This fact apparently complicated Brazil's position in the WTO litigation.^[10]

It should also be pointed out, however, that there was no assurance that the Mercosur tribunal would have found the import ban justifiable under Article 50(d) had Brazil invoked that provision for defense.^[11] The Mercosur tribunal is a separate international forum, whose interpretation of the same treaty language in a given case may or may not be consistent with that of the WTO. Hence, the issue raised here is one of the fragmentation of international law.^[12]

About the Author

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Footnotes

- [1] Report of the Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted December 17, 2007.
- [2] Award of the Arbitrator, *Brazil – Measures Affecting Imports of Retreaded Tyres, Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS332/16, August 29, 2008.
- [3] Report of the Appellate Body, *supra* note 1, para. 229.
- [4] *Id.* para. 230.
- [5] *Id.* para. 232.

- [6] Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU), Article 21.3.
- [7] See Award, *supra* note 2, paras. 78-80.
- [8] Report of the Appellate Body, *supra* note 1, para. 234.
- [9] *Id.* On Brazil's strategy in the Mercosur litigation, see Fabio Morosini, *The MERCOSUR and WTO Retreaded Tires Dispute: Rehabilitating Regulatory Competition in International Trade and Environmental Regulation*, http://papers.ssrn.com/col3/papers.cfm?abstract_id=1154710.
- [10] *Supra* note 8. See also Award, *supra* note 2, paras. 81-82.
- [11] In a similar dispute involving Argentina's import ban on retreaded tyres, the Mercosur tribunal rejected the defense invoked by Argentina under Article 50(d). See Award, *supra* note 2, fn. 141.
- [12] See U.N. International Law Commission, Study Group on the Fragmentation of International Law, *Report: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (2006).