The Jurisprudence of WTO Dispute Resolution (2007)

by **Matthias Oesch***

Contents

I. Introduction

This chronicle summarises the jurisprudence of WTO dispute resolution in 2007. It comments on the most relevant WTO panel and Appellate Body reports from a Swiss perspective and also discusses their impact on Swiss domestic law and policy.[1] Two cases have attracted particular attention. The dispute in *Turkey – Importation of Rice* turned on one of the more controversial obligations stipulated in the Agreement on Agriculture, namely the issue of *tariffication* and the prohibition against adopting any new trade-restrictive measures other than tariffs. The *Brazil – Retreaded Tyres* case concerned the right of WTO Members to justify deviations from the prohibition of quantitative restrictions in order to protect human and animal life and health pursuant to Article XX(b) of the GATT 1994. These two cases will be dealt with in turn. Furthermore, a series of 'compliance' panel and Appellate Body reports on the correct implementation of recommendations as set out in previous reports (Article 21:5 DSU cases)[2]

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1 Switzerland did not actively participate in any dispute in 2007, neither as complainant, nor as defendant nor as third party. All WTO panel and Appellate Body reports are accessible online at www.wto.org (click the link for disputes).

2 Appellate Body Report in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (21:5),* adopted on 11 May 2007 (WT/DS268/AB/RW); Appellate Body Report in *Chile – Price Band System and Safeguard Measure Relating to Certain Agricultural Products (21:5)*, adopted on 22 May 2007 (WT/DS207/AB/RW); Panel Report in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (21:5)*, adopted on 22 May 2007 (WT/DS285/RW); Panel Report in *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia (21:5)*, adopted on 22 October 2007 (WT(DS312/RW).

were issued as well as some reports on trade remedy matters.[3] These are not discussed in this chronicle.

II. Trade in Agricultural Products and *Tariffication*

Introduction and Facts

Trade in agricultural products has been, and remains, one of the most contentious issues in the GATT/WTO negotiating history.[4] The GATT 1947 was characterised by high levels of protectionism and ineffective enforcement of rights and obligations. The Uruguay Round successfully addressed these deficiencies. First, enforcement of existing rules is strongly reinforced by the dispute settlement system under the Dispute Settlement Understanding (DSU), a unified and compulsory dispute settlement mechanism for all covered agreements adopted under the umbrella of the WTO. It is no coincidence that some of the most contentious cases in WTO jurisprudence so far have been concerned with agricultural products.[5] Second, the Uruguay Round prepared the ground for long-term trade liberalisation with the Agreement on Agriculture by converting non-tariff barriers (in particular quantitative restrictions and subsidisation) into ordinary customs duties. This process has become known as *tariffication* and represents a key achievement of the Uruguay Round. Article 4:2 of the Agreement on Agriculture sets out the obligation to 'tarrify' non-tariff barriers and, subsequently, not to reinstate or introduce any form of trade-restrictive measures other than tariffs as follows: 'Members shall not maintain, resort to, or revert to

3 Panel Report in *United States – Anti-Dumping Measure on Shrimp from Ecuador*, adopted on 30 January 2007 (WT/DS335/R); Panel Report in Appellate Body Report in *United States – Methods Relating to Zeroing and Sunset Reviews*, adopted on 23 January 2007 (WT/DS322/AB/R); Panel Report in *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, adopted on 24 July 2007 (WT/DS331/R); Appellate Body Report in *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, adopted on 17 December 2007 (WT/DS336/AB/R); Panel Report in *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, not yet adopted (WT/DS337/R).

4 See for an overview on GATT/WTO law and trade in agricultural products Joseph McMahon, The WTO Agreement on Agriculture: A Commentary, Oxford, 2006; Thomas Cottier/Matthias Oesch, International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland, Berne/London 2005, at 712–31; Mitsuo Matsushita/Thomas J. Schoenbaum/Petros C. Mavroidis, The World Trade Organization: Law, Practice, and Policy, Oxford 2nd edition 2006, at 287–329.

5 See, e.g., Appellate Body Report in *United States – Subsidies on Upland Cotton*, adopted on 21 March 2005 (WT/DS267/AB/R), Appellate Body Report in *European Communities – Export Subsidies on Sugar*, adopted on 19 May 2005 (WT/DS265/AB/R), and the comments by Werner Zdouc/Matthias Oesch, The Jurisprudence of WTO Dispute Resolution (2005), in: SZIER 2005, at 652–58.

any measures of the kind which have been required to be converted into ordinary customs duties …' A footnote to this provision stipulates a non-exhaustive list of such prohibited measures as well as a catch-all category of 'similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947 …'.

The *Turkey – Importation of Rice* dispute mainly turned on Article 4:2 of the Agreement on Agriculture.[6] It concerned restrictions imposed by Turkey on imports of rice. When the panel was established in July 2006, the applied most-favoured-nation (MFN) tariff rate for rice amounted to 34, 36 and 45 per cent for various types of rice (45 per cent being Turkey's bound tariff rate for rice in its WTO schedule). Moreover, preferential rates were granted for limited quantities of rice imports under a tariff rate quota system. In any case, importers of rice were required to obtain a certificate of control from the Turkish Ministry of Agriculture and Rural Affairs. In order to qualify for preferential rates under the tariff rate quota system, importers needed to apply for an import licence and, in addition, purchase a designated amount of domestic rice.

The United States challenged Turkey's import regime for rice.[7] It contended that, since September 2003, the Turkish authorities had not issued certificates of control for imports at the bound tariff rates on various occasions, 'thereby effectively preventing out-of-quota imports' (para. 7.15). According to the United States, this denial of, or failure to grant, such licences was inconsistent with Article 4:2 of the Agreement on Agriculture. Furthermore, it claimed that the requirement that importers purchase specified quantities of domestic rice in order to be eligible for imports of rice at reduced tariff levels under the tariff rate quota system, violated Article III:4 of the GATT 1994. Lastly, the United States alleged a series of other violations of WTO law which the panel did not, however, examine on the grounds of judicial economy (Articles X and XI:1 of the GATT 1994, Article 2:1 of the TRIMs Agreement, Articles 1, 3 and 5 of the Agreement on Import Licensing Procedures).

Findings

The panel first turned to the alleged violation of Article 4:2 of the Agreement on Agriculture. The United States presented various rejected applications for certificates of control for rice imports and argued that they 'are evidence that

6 Panel Report in *Turkey – Measures Affecting the Importation of Rice*, adopted on 22 October 2007 (WT/DS334/R).

7 Argentina, Australia, China, Egypt, the European Communities, Korea, Pakistan and Thailand participated as third parties.

Turkey has maintained in place a legal prohibition and a restriction on the importation of rice' and 'that the granting of Control Certificates is discretionary' (para. 7.64). Turkey contested the implications of this evidence. While admitting that some individual import shipments of rice were rejected, it argued that the United States did not soundly demonstrate that there was 'a pattern of systematic rejection' of requests for approval (para. 2.67). Rather, it asserted that it had systematically and regularly approved certificates of control. The panel repeatedly asked Turkey to substantiate this assertion. Turkey, however, declined to do so. It responded that, due to the strict confidentiality requirements of Turkish law, it could not submit the requested evidence. It offered to provide copies of the relevant documents to the panel and the WTO secretariat, on the condition that they would not be presented to the United States. The panel rejected this offer, citing Article 18:1 of the DSU which explicitly prohibits '*ex parte* communications' between the panel and a party without giving notice to the other parties to the dispute. As a result, the panel noted, as a factual matter, that it 'was not able to obtain evidence that Turkey had been, as it stated, "systematically and regularly" approving Certificates of Control allowing the importation of rice outside the tariff rate quota' (para. 7.49). Therefore, the panel found that, in the absence of any rebutting evidence provided by Turkey, 'it is appropriate for this Panel to draw appropriate inferences' (para. 7.106), and it concluded that 'Turkey has failed to rebut the presumption that … it has adopted a decision to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota' (para. 7.107).

The panel then considered whether the failure of the Turkish government regularly to grant certificates of control to import rice at the applied MFN tariff rate could be considered a measure of the kind which has been required to be converted into an ordinary customs duty pursuant to Article 4:2 of the Agreement on Agriculture. The United States argued that the Turkish measure was both a 'quantitative import restriction' and a 'discretionary import license', two of the measures identified in footnote 1 to Article 4:2 of the Agreement on Agriculture. The panel reiterated consistent case law concerning the interpretation of Article 4:2 of the Agreement on Agriculture, citing in particular the Appellate Body report in *Chile – Price Band System*.[8] Turning to the term 'quantitative import restriction', the panel concurred with the argumentation put forward by the United States that 'the factual determination that … Turkey has decided to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota in order to ensure the absorption of local production, is enough in itself to conclude that this conduct constitutes a quantitative import restric-

[8] Appellate Body Report in *Chile – Price Band System and Safeguard Measure Relating to Certain Agricultural Products*, adopted on 23 October 2002 (WT/DS207/AB/R).

tion' (para. 7.118). The panel added that the lack of transparency and predictability of Turkey's issuance of such certificates was similarly likely to restrict the volume of imports. Turning to the term 'discretionary import licensing', the panel determined that the manner in which Turkey denied, or failed to grant, certificates of control to import rice on several occasions was to be characterised 'as a discretionary practice by the Turkish authorities to decide whether or not to grant permission to import a particular good' (para. 7.134). Hence, the panel found that Turkey had violated Article 4:2 of the Agreement on Agriculture, and it requested that Turkey bring the inconsistent measure into conformity with its obligations under the WTO agreements.

Lastly, the panel examined the alleged violation of Article III:4 of the GATT 1994. This provision stipulates the principle of national treatment and requires that imported products be accorded treatment no less favourable than that accorded to like products of domestic origin. Basing its finding on established jurisprudence on the interpretation of Article III:4 of the GATT 1994, the panel concurred with the line of argument put forward by the United States. It noted that, according to Turkish law, only importers who purchased domestic rice were eligible to benefit from the tariff rate quota system. Therefore, the panel reasoned that 'the domestic purchase requirement modified the conditions of competition in the Turkish market to the detriment of imported rice' (para. 7.234) and concluded that Turkey violated Article III:4 of the GATT 1994. Nonetheless, the panel declined to request that Turkey bring this measure into conformity with WTO law. According to the panel, Turkey provided plausible assurance that the measure had expired in the meantime, i.e. after the panel had been established, and that it had no intention either to reintroduce it or to adopt new legislative instruments to the same effect. Invoking the principle that WTO Members perform their treaty obligations in good faith, the panel concluded that it 'must not lightly assume that Turkey will not abide by its declaration that it will not longer have recourse to the TRQ [tariff rate quota] system' (para. 7.268).

The panel report was not appealed by either party and accordingly was adopted by the Dispute Settlement Body (DSB).

Commentary

The panel's reasoning and overall conclusions are accurate. Two aspects are particularly noteworthy. First, the panel report emphasises, in line with consistent case law, the fundamental principle of *tariffication* of existing non-tariff barriers to trade in agricultural products. It confirms the broad scope of Article 4:2 of the Agreement on Agriculture which prohibits resorting to *any* trade-restrictive measures other than ordinary customs duties as inscribed in the WTO

Members' schedules of commitments. Thus, under the Agreement on Agriculture (as under the GATT 1994 in general), tariffs remain the basic trade policy instruments at the disposal of governments. They are more transparent and easier to negotiate than non-tariff barriers. Irrespective of these 'advantages', tariffs still play a significant role in the sector of agriculture as levels of protection remain generally high. This holds true, to mention but two prominent examples, for the European Communities and for Switzerland: the average EC tariff for agricultural products amounts to 18.6 per cent, and that of Switzerland to 36.2 per cent.[9] Moreover, the process of *tariffication* during the Uruguay Round, as reflected in the Members' schedules, provided numerous opportunities for Members to schedule tariff ceilings whose protective effect was substantially higher than that of the non-tariff barriers they replaced, e.g., by exaggerating domestic market prices and understating world market prices in the reference period of 1986 to 1988.[10] This *dirty tariffication*, as it came to be known, was largely responsible for the failure of the Uruguay Round to bring about any material improvement in market access for agricultural products. Thus, while the Agreement on Agriculture provides a new foundation, the process of reducing levels of trade restrictions and domestic support is supposed to take place in subsequent multilateral trade rounds. The Doha Development Agenda, adopted in 2001 but currently deadlocked, essentially depends on progress in this field and will be successful only if industrialised countries are prepared to agree on commitments considered adequate by the main agricultural producers.

Second, it is notable that the panel's overall conclusion is mainly based on Turkey's refusal to submit allegedly confidential evidence which would have demonstrated, in Turkey's view, that it had systematically and regularly approved certificates of control for rice imports. Turkey asserted that 95 per cent of all applications lodged by importers for approval of certificates of control were actually granted (para. 7.95). As the panel could not accept Turkey's proposal to submit *ex parte* communications, which would have violated Article 18:1 of the DSU, it determined that 'it was appropriate for this Panel to draw the appropriate inferences' against Turkey (para. 7.106). The panel's reasoning on this issue is sound, and it reached the correct conclusion based upon the available facts of the case. Any other outcome would have undeservedly 'rewarded' Turkey for its

[9] See WTO Trade Policy Review: European Communities, Report by the Secretariat of 15 May 2007 (Revision 1), WTO Doc. WT/TPR/S/177/Rev.1, at 44; WTO Trade Policy Review: Switzerland and Liechtenstein, Report by the Secretariat of 17 November 2004, WTO Doc. WT/TPR/S/141, at 46 (the maximum rate being 1.705 per cent for out-of-quota imports of edible bovine offal!).

[10] Details of how the process of tariffication was to be undertaken are contained in Annex 3 (Market Access: Agricultural Products subject to Border Measures other than Ordinary Customs Duties) to the Modalities Agreement for the Establishment of Specific Binding Commitments under the Reform Programme, MTN.GNG/MA/W/24.

refusal duly to cooperate in the presentation of evidence to the panel. Still, the right of panels to draw appropriate inferences–or, more often, adverse inferences–about the inculpatory character of the information withheld is a most sensitive issue. Although the Appellate Body has explicitly acknowledged this right on several occasions, there are virtually no cases in which a panel has in fact invoked this right and drawn such inferences.[11] The present dispute stands out in this respect. The panel's reasoning demonstrates that panels will not hesitate, if necessary, to draw adverse inferences from a Member's refusal to provide relevant factual evidence, which is in its possession. The exact requirements and confines of the right to draw adverse inferences are, however, far from settled. This holds true for WTO law in general, as the DSU is virtually silent on the matter (cf. Article 18:2 of the DSU and para. 3 of the Working Procedures). Moreover, it holds particularly true for trade remedy cases in which national authorities often base their determinations on business information delivered by private firms under strict confidentiality rules. The proper treatment of business confidential information, while at the same time guaranteeing equal access to information and due process, needs to be resolved either through case law or through negotiations. In fact, various proposals have been tabled in the ongoing DSU Review, but have yet to gain general support.[12]

III. GATT 1994 and the Protection of Human and Animal Life and Health

Introduction and Facts

In the practice of WTO law, Article XX of the GATT 1994 is one of the most important provisions. It justifies deviations from other rules, in particular, but not exclusively, from the principle of national treatment (Article III of the GATT 1994) and from the prohibition of quantitative restrictions (Article XI of the GATT 1994). Among the legitimate policy motives for restricting trade listed in paragraphs (a) through (j) of Article XX, paragraph (b) is of prime importance. It refers to measures necessary to protect human, animal and plant life and

[11] See Appellate Body report in *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, adopted on 19 January 2001 (WT/DS166/AB/R), para. 174; Appellate Body report in *Canada – Measures Affecting the Export of Civilian Aircraft*, adopted on 20 August 1999 (WT/DS70/AB/R), paras. 202–6; for an overview on the issue of confidentiality in WTO dispute resolution Olivier Prost, Confidentiality Issues under the DSU: Fact-Finding Process versus Confidentiality, in: Rufus Yerxa/Bruce Wilson (eds.), Key Issues in WTO Dispute Settlement: The First Ten Years, Cambridge 2005, at 190–203.

[12] See, in particular, Canada's contribution (TN/DS/W/41).

health, thereby standing at the centre of the complex and often controversial relationship between international trade regulation and the protection of the environment and public health. The *Brazil – Retreaded Tyres* dispute turned on the correct interpretation and application of this provision.[13] It concerned an import ban on retreaded tyres adopted by Brazil in 2004. Retreaded tyres are produced by reconditioning used tyres, through stripping the worn tread from a used tyre's skeleton (casing) and replacing it with new material in the form of a new tread and, in some cases, new material covering part or all of the sidewalls too. Brazil took such action on the grounds that the accumulation of waste from retreaded tyres, at the end of their useful life, is associated with risks to human, animal and plant life and health (such as the transmission of dengue, yellow fever and malaria through mosquitoes, which use tyres as breeding grounds, and the exposure of human beings to toxic emissions caused by tyre fires). Brazil also banned the importation of used tyres, which are sometimes applied against imports of retreaded tyres. Moreover, Brazil imposed a fine of 400 BRL per unit on the importation, as well as on the marketing, transportation, storage or keeping in warehouses of imported, but not of domestic retreaded tyres. Lastly, Brazil exempted from these bans and financial penalties, retreaded tyres which were imported from other MERCOSUR countries. It did so in the aftermath of a ruling rendered by the MERCOSUR Arbitral Tribunal which considered the import ban not to be in conformity with Brazil's MERCOSUR obligations.

The European Communities challenged these measures.[14] It claimed that they were inconsistent with Articles I:1, III:4, XI:1 and XIII:1 of the GATT 1994. In response, Brazil did not contest that its import ban on retreaded tyres violated Article XI:1 of the GATT 1994, but argued that it was justified under Article XX(b) of the GATT 1994, because the ban amounted to a measure necessary to protect human, animal and plant life and health. Moreover, Brazil responded that the limited exemption of MERCOSUR countries from its import ban was authorised by Articles XX(d) and XXIV of the GATT 1994. The panel and the Appellate Body examined the claim under Article XI:1 of the GATT 1994, but they exercised judicial economy with regard to the claims under Articles I:1 and XIII:1, relating to the MERCOSUR exemption.

[13] Panel and Appellate Body Reports in *Brazil – Measures Affecting Imports of Retreaded Tyres*, adopted on 17 December 2007 (WT/DS332/AB/R).

[14] Argentina, Australia, China, Chinese Taipei, Cuba, Guatemala, Japan, Korea, Mexico, Paraguay, Thailand and the United States participated as third parties.

Findings

At the outset, the panel noted that the import ban violated Article XI:1 of the GATT 1994–a claim not contested by Brazil. Then, the panel turned to an examination of the alleged justification under Article XX(b) of the GATT 1994. It reiterated consistent WTO practice according to which a three-step examination is required. First, it is necessary to determine whether the policy pursued with the disputed measure falls within the range of policies and motives enumerated in subparagraphs (a) through (j). In assessing whether the Brazilian measure concerned the protection of human, animal or plant life or health within the meaning of Article XX(b), the panel noted that, while the proper management of waste tyres could reduce such risks, in reality 'waste tyres get abandoned and accumulated and that risks associated with accumulated waste tyres exist in Brazil' (para. 7.67). The panel therefore found that Brazil's policy of reducing exposure to risks such as mosquito-borne diseases and toxic smoke from fires arising from the accumulation of waste tyres falls within the range of policies covered by Article XX(b) of the GATT 1994. Second, Article XX(b) requires that the measure at issue needs to be 'necessary' for the pursuit of the specific policy. The panel observed 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' (para. 7.111) and that 'no alternative measure is reasonably available that could avoid the generation of the specific risks arising from imported retreaded tyres' (para. 7.212). Therefore, the panel established that the import ban satisfied the test under Article XX(b) and could be provisionally justified under this provision. Third, the measure needs to be applied in conformity with the chapeau of Article XX of the GATT 1994, which is intended to prevent the abuse of the limited and conditional exceptions under the subparagraphs. The chapeau is, according to consistent case law, a balancing principle to mediate between the right of a Member to invoke an exception and its obligation to respect the rights of other Members; it is an 'expression of the principle of good faith'.[15] The panel agreed with the European Communities that the application of the Brazilian import ban constituted unjustifiable discrimination and concluded that the chapeau of Article XX of the GATT 1994 was not met. However, it arrived at this conclusion on notably narrow grounds. In particular, it held that the exemption from the import ban of retreaded tyres from MERCOSUR countries was not arbitrary, as Brazil introduced this exemption in order to comply with a decision rendered by the MERCOSUR Arbitral Tribunal, nor was it unjustifiable as the 'volumes of imports of retreaded

[15] See, e.g., Appellate Body report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998 (WT/DS58/AB/R), para. 158.

tyres under the exemption appear not to have been significant' (para. 7.288). The panel determined, however, that certain court injunctions, which permitted the importation of large quantities of retreaded tyres to the economic benefit of domestic retreaders between 2000 and 2005, were granted 'in such amounts that the achievement of Brazil's declared objective is being significantly undermined' (para. 7.310). Therefore, the panel concluded that the measures at issue were being applied in a manner that constituted a means of unjustifiable discrimination and a disguised restriction on international trade.

Although Brazil formally lost the case, its Government welcomed the panel's reasoning. The panel largely concurred with Brazil's arguments, and it only objected to the way in which the import ban was in fact applied. The European Communities, albeit being satisfied with the overall finding of inconsistency, largely rejected the panel report and criticised its legal reasoning. Therefore, the European Communities–unusually for a nominal 'winner' of a dispute before a panel–appealed the panel report.

The Appellate Body upheld the panel's overall finding that the import ban was not justified under Article XX of the GATT 1994. However, it did so, partly, for markedly different reasons. At the outset, it concurred with the panel that the import ban could be considered 'necessary' within the meaning of Article XX(b) of the GATT 1994. In particular, the Appellate Body approved of the panel's analysis of the 'material contribution' (para. 151) of the import ban to the achievement of the objective of protecting the environment and public health. Moreover, it confirmed that the panel duly examined possible alternatives, which may be less trade-restrictive while providing an equivalent contribution to the achievement of the objective pursued. The Appellate Body concurred with the panel that there were no such reasonably available alternatives. Proposed alternatives such as landfilling, stockpiling or co-incineration of waste tyres and material recycling carry 'their own risks or, because of the costs involved, are capable of disposing of only a limited number of waste tyres' (para. 211). The Appellate Body confirmed, again, that this analytical process is based on 'weighing and balancing [which is] a holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement' (para. 182). Then, the Appellate Body reversed most of the reasoning which the panel had applied in examining the chapeau of Article XX of the GATT 1994. The Appellate Body reaffirmed consistent case law according to which the assessment whether a particular form of discrimination is arbitrary or unjustifiable or whether a measure results in a disguised restriction on international trade 'usually involves an analysis that relates primarily to the cause or the rationale of the discrimination' (para. 225). With respect to the MERCOSUR exemptions, the Appellate Body concluded that the ruling issued

by the MERCOSUR Arbitral Tribunal was not an acceptable rationale 'because it bears no relationship to the legitimate objective pursued by the import ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree' (para. 228). In particular, the Appellate Body reversed the panel's interpretation that such discrimination would be unjustifiable only if its quantitative impact significantly undermined the objective of the measure. With respect to the court injunctions, which granted exemptions to domestic importers of used tyres, the Appellate Body reversed the panel's finding that such imports resulted in the import ban being applied in a manner that constitutes unjustifiable discrimination and a disguised restriction on international trade only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the import ban. The Appellate Body emphasised that, in interpreting and applying the chapeau of Article XX of the GATT 1994, a quantitative approach 'is flawed' (para. 247).

The Appellate Body report and the panel report, the latter as modified by the former, were duly adopted by the Dispute Settlement Body (DSB).

Commentary

This dispute represents the first challenge brought before the WTO dispute settlement body against a trade-restrictive measure imposed by a developing country for health and environmental reasons. The panel ruling would have required Brazil to adopt only minor modifications to its laws in order to remedy the legal deficiencies and to keep the import ban in place. In fact, many observers were surprised at the extent to which the panel agreed with the arguments submitted by Brazil. The Appellate Body, however, adopted a less generous approach and set the hurdle that would enable Brazil to maintain its ban higher. Whereas it approved of the panel's interpretation and application of the necessity test under Article XX(b) of the GATT 1994, the Appellate Body report corrected some of the panel's reasoning with respect to the chapeau. Four observations are noteworthy.

First, the Appellate Body added a new facet to the already long and controversial case law on the necessity test under Article XX(b) of the GATT 1994.[16] It applied, by stating that the measure's 'contribution to the achievement of the objective must be material, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban' (para. 210), a *material contribution* test. Such a test, requiring a material, not only a marginal,

[16] See for panel and Appellate Body jurisprudence on the necessity test WorldTradeLaw.net Dispute Settlement Commentary (DSC) on *Brazil – Tyres*, at 12–4 (online at http://www.worldtradelaw.net).

contribution, imposes a certain discipline on WTO Members invoking Article XX(b) of the GATT 1994. At the same time, the Appellate Body has made it clear that a Member enjoys a certain margin of discretion in determining the necessity of a trade-restrictive measure. It rejected the argument made by the EC that Brazil was obliged to quantify the contribution of the import ban to the reduction of the identified risks, thus affirming prior case law according to which either a qualitative or a quantitative analysis is acceptable.[17] Moreover, the Appellate Body noted that the contribution of certain measures to the achievement of the objective pursued (such as 'measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time') might 'only be evaluated with the benefit of time' (para. 151). Whereas the present dispute turned on subparagraph (b) of Article XX, it seems reasonable to conclude that the Appellate Body's reasoning will equally apply to the necessity test under other subparagraphs of Article XX of the GATT or Article XIV of the GATS.

Second, the Appellate Body unequivocally rejected the panel's reading of the chapeau to the effect that the alleged discrimination was to be assessed on the *trade effects* of the challenged measure. Such a test had not been used in earlier disputes, neither under Article XX of the GATT 1994 nor under its parallel provision of Article XIV of the GATS, and deviates from consistent WTO practice.[18] Moreover, the Appellate Body pointed out, and rightly so, that the panel's approach of relying on the effects, rather than on the cause and/or the rationale, of the discrimination does not have textual support in the wording of Article XX of the GATT 1994. At least, the Appellate Body acknowledged that 'in certain cases the effects of the discrimination may be a relevant factor, among others' (para. 229). Relevantly, the quantitative impact, measured in terms of trade volumes, cannot be decisive in itself and alone in assessing whether discrimination is arbitrary or unjustifiable.

Third, the *motivation* of Brazil to adopt an import ban on retreaded tyres–although unspoken–played a prominent role. The protection of public health clearly stood at the forefront. At the same time, however, there was an underly-

[17] See, e.g., Appellate Body Report in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, adopted on 5 April 2001 (WT/DS135/AB/R), para. 167.

[18] See for Article XX of the GATT 1994, e.g., Appellate Body report in *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996 (WT/DS2/AB/R), at 22–29; *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998 (WT/DS58/AB/R), paras. 146–86; for Article XIV of the GATS, e.g., Appellate Body Report in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, adopted on 20 April 2005 (WT/DS285/AB/R), paras. 338–69, and the comments by Werner Zdouc/Matthias Oesch, The Jurisprudence of WTO Dispute Resolution (2004/2005), in: SZIER 2005, at 646–49.

ing and subliminal feeling on the part of the panel and the Appellate Body throughout the proceedings that the import ban was also based, at least partly, on disguised protectionist purposes rather than on genuine public health objectives exclusively. Proof of the point was the fact that repeated court injunctions allowed Brazil's retreaded tyre industry to import millions of otherwise-banned used tyres between 2000 and 2005, while their foreign competitors (with the exception of MERCOSUR countries) were kept out of the Brazilian market. The ban thus served not only legitimate policy aims acknowledged in Article XX(b) of the GATT 1994, but also operated to the benefit of the domestic industry. Basically, the importation of used tyres, which are then domestically retreaded, has the same adverse impact on the environment and on human health as importation of retreaded tyres – except, of course, that the retreading process takes place in Brazil.

Fourth, the Appellate Body did not accept Brazil's invocation of the MERCOSUR arbitral decision as justification for its violation of Article XI:1 of the GATT 1994. It reversed the panel finding that the MERCOSUR exemption would result in arbitrary or unjustifiable discrimination only if the imports of retreaded tyres from MERCOSUR countries were to reach such amounts that the achievement of the objective of the import ban would be significantly undermined. This reasoning is accurate. Brazil was, and continues to be, fully responsible vis-à-vis other WTO Members for decisions rendered by a dispute resolution tribunal under a free trade agreement to which it is a signatory (whether the free trade agreement at issue is compatible with Article XXIV of the GATT 1994 or not–neither the panel nor the Appellate Body examined this question in the present case on the grounds of judicial economy). Allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX of the GATT 1994 could seriously undermine the effectiveness of the chapeau. Symptomatically, Article XX(d) of the GATT 1994 entitles Members to take actions 'necessary to secure compliance with laws or regulations which are *not* inconsistent with the provisions of this Agreement.'[19] This provision does not allow the justification of measures which *are* inconsistent with, e.g., Article XI:1 of the GATT 1994. Moreover, in this case, MERCOSUR and the decision rendered by its Arbitral Tribunal by no means obliged Brazil to discriminate between its MERCOSUR partners and other WTO Members, as Brazil could easily have implemented the MERCOSUR ruling by lifting the import ban for all third countries.

[19] Italics added. – See for the controversial relationship between WTO law and obligations under regional trade agreements in general, and for the role of WTO dispute resolution in such cases in particular, Panel and Appellate Body reports in *Mexico – Tax Measures on Soft Drinks and Other Beverages*, adopted on 24 March 2006 (WT/DS308/AB/R), and the comments by Matthias Oesch, The Jurisprudence of WTO Dispute Resolution (2006), in: SZIER 2006, at 511–15.