

Litigating Environmental Protection and Public Health at the WTO: The *Brazil–Retreaded Tyres Case*

ICTSD Project on WTO Jurisprudence and Sustainable Development

Introduction

In late 2007 the Appellate Body report on the landmark case *Brazil - Measures Affecting Imports of Retreaded Tyres (DS332)*¹ between the EC as Complainant and Brazil as Respondent was circulated. In response to the EC's challenges, Brazil had argued that its measures were justified under GATT Article XX (b) which allows measures "necessary to protect human, animal or plant life or health".

Even though the Appellate Body eventually ruled that the measures were WTO inconsistent, the case constitutes a major landmark ruling and is often considered as a great success for environmental policies. In response to the ruling, experts such as Professor Joost Pauwelyn found that "the WTO has truly become an environmental treaty with Art. XX as a catch-all obligation to engage in sound and reasonable environmental policies".²

Moreover, the case has clarified several aspects of the Article XX necessity test that are of crucial importance for developing countries. First and foremost the case clarified that the decision regarding the meaning of and ruling on "undue burden" needs to be determined based on a country's capabilities, i.e. the degree of development within a country needs to be considered.

Background: Global Trade in Used and Retreaded Tyres

Retreading tyres is a way of recycling used tyres in which the life of the original tyre is extended by 30-100%. In that process, used tyres are reconditioned for further use by stripping the worn tread from the skeleton and replacing it with new material in the form of a new tread.

Although recycling used tyres through retreading is generally environmentally friendly because it expands the overall life-span of a tyre, international trade in already retreaded tyres can negatively impact the environment and public health in the importing country. Under most circumstances tyres can only be retreaded once and the life span of a retreaded tyre is generally

¹ *Brazil - Measures Affecting Imports of Retreaded Tyres [Brazil - Tyres]*, Panel Report WT/DS332/R 12 June 2007 [Panel]; Appellate Body Report, WT/DS332/AB/R 3 December 2007 [Appellate Body].

² Joost Pauwelyn in the *International Economic Law and Policy Blog*, 04.07.2007, accessible at: <http://worldtradelaw.typepad.com/ielpblog/2007/07/brazil-tyres-th.html>.



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considerably shorter than that of a new tyre which can still be retreaded after use. The import of retreaded tyres hence results in a higher number of waste tyres in the country of destination. This poses significant challenges to all countries since tyres are generally non-biodegradable and special technology is required for their disposal since the process of burning tyres releases organic and inorganic pollutants.

Tropical regions, especially developing countries, face additional problems. Due to limited disposal capacities, tyres are often stored in landfills or disposed of in illegal dumps. These tyres tend to accumulate water and easily become vectors for diseases such as yellow fever, malaria and dengue. The storage and disposal of used tyres, which increases with importation of used and retreaded tyres, is thus likely to have adverse effects on human health and the environment. A number of developing countries have reacted to these difficulties with a general import ban on used and retreaded tyres.³ Although significantly less challenged by the difficulties of tyre disposal, developed countries have also undertaken various measures to address the problem of tyre disposal.

Domestic Measures within the EC and Brazil

Since 1993 the EC has adopted several directives regulating tyre disposal. While the *Landfill Directive*⁴ prohibits the disposal of used tyres in EC landfills, the *End of Life Vehicle Directive*⁵ requires Member countries to have raised the rate for reusing waste tyres to 85% in 2006 and to 95% by 2015 respectively. Lastly, as a result of the *Waste Incineration Directive*,⁶ EC Member States are encouraged to explore alternative ways of dealing with tyre disposal.

Brazil, on the other hand, has reacted to the increasing problem of waste tyres disposal with measures including an import ban for used tyres;

an import ban on retreaded tyres; a prohibition on dumping used tyres or disposing of them in landfills; a set of responsibilities concerning the collection and disposal of tyres for producers and importers; and various measures directed at the use of best technologies for controlling emissions in the process of tyre disposal. Presidential Decree 3.919, as amended, furthermore established specific sanctions on the importation, marketing, transportation, storage, and keeping or warehousing of imported used tyres. These sanctions took the form of a fine imposed on a unit basis. The import ban took effect by means of the regulation *Portaria SECEX 14/2004* adopted by the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry and International Commerce (SECEX). Importantly, it provides for one broad exemption, namely for those retreaded tyres coming from Mercosur countries.

Notwithstanding the import ban on used tyres contained in *Portaria SECEX 14/2004*, a number of Brazilian retreaders sought, and obtained, injunctions allowing them to import used tyre casings in order to manufacture retreaded tyres. Although the Brazilian government had opposed these injunctions, it was only partially successful in its efforts to prevent the grant, or to reverse the court injunctions for the importation of used tyres.

In addition to these federal measures, Brazilian states also enacted measures that aim at reducing the risks arising from the accumulation of waste tyres. A law adopted by the state of Rio Grande do Sul, for instance, prohibits the commercialization of imported used tyres within its territory, including retreaded tyres made in Brazil from imported casings. Later, importation and marketing of used tyres and/or retreaded tyres made from imported casings were authorized provided that the importer could prove to have destroyed a number of used tyres in Brazil for each tyre or casing imported.

³ This includes Albania, Algeria, Argentina, Bangladesh, Bahrain, Cambodia, Colombia, Ecuador, The Philippines, Jordan, Macedonia, Morocco, Mexico, Nigeria, New Zealand, Pakistan, Peru, Thailand, Sri Lanka, Uganda and Venezuela. Compare CIEL Background Paper March 2006, 'The Brazil Retreaded Tyres Case', Centre for International Environmental Law, 2006, available at http://www.ciel.org/Publications/Brazil_Tires_3Apr06.pdf.

⁴ 1993/31/EC

⁵ 2005/53/EC

⁶ 2000/76/EC

Challenges

The EC challenged several of these measures taken at the federal and state level that affect the importation and internal sale of used and retreaded tyres. While the primary challenge was directed at the import ban, i.e. *Portaria SECEX 14/2004*, fines on importation, marketing, transportation, storage, keeping or warehousing of retreaded tyres, as introduced by Presidential Decree 3.919, were also challenged by the EC. Lastly, the court injunctions added another component to the scope of discrimination reviewed by the Panel and Appellate Body.

Considering these measures, the EC requested the Panel to issue three main findings:

- i. Brazil had violated GATT Article XI:1 that provides for the general elimination of quantitative restrictions, by maintaining an import ban and fines on importation of used and retreaded European tyres;
- ii. Brazil had violated the national treatment provision established in GATT Article III:4 by according to used European tyres and casings a treatment less favorable than that accorded to domestic like products with respect of laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use; and
- iii. Brazil had acted inconsistently with GATT Article I:1, which establishes the most favored nation treatment obligation, by eliminating the import ban and the abovementioned financial penalties for used tyres imported from Mercosur countries. The EC further claimed that the exemption granted to products imported from Mercosur countries violated GATT Article XIII:1 that requires the non-discriminatory administration of quantitative restrictions.

Brazil, however, did not deny that the import ban was an import prohibition inconsistent with the quoted GATT rules. Instead it argued that the measure was justified under GATT Article XX(b) which authorizes trade law violations if the measures applied are necessary to protect human, animal or plant life or health.

Brazil argued that the accumulation of waste tyres poses two main risks to human life or health: (1) mosquito-borne diseases, such as dengue and yellow fever; and (2) tyre fires and toxic leaching, both of which adversely affect human health and the environment.

Interestingly, in the WTO Committee on Trade and Environment, during the consultation phase, Brazil furthermore commented on the EC's Directives and possible links with the case. On 6 July 2005 it stated that "*another obvious consequence of the implementation [of the EC's Directives] will be an increasing pressure for new markets for the EC's used and retreaded tyres*". It noted that, by exporting used and retreaded tyres to foreign markets, the responsibility for the tyre disposal was also transferred to the foreign territories, hence reducing the hazardous waste and respective adverse effects within the EC's territory.

Ruling

A Panel report was circulated in June 2007, over a year after the composition of the Panel in March 2006. Irrespective of a ruling in its favour, the EC decided to appeal the decision. The respective Appellate Body report was circulated six months later in December 2007 and was followed by an Article 21.3(c) Arbitration Report in August 2008. On 7 January 2009, the European Communities and Brazil notified the DSB of a procedural agreement regarding Article 22 of the DSU that was concluded on 5 January 2009.

On the Subject Matter

In a first step the Panel considered the Brazilian measures challenged by the EC as an import prohibition on retreaded tyres. It found that the prohibition on granting import licenses violated GATT Article XI:1 because it had the effect of prohibiting the importation of retreaded tyres. This finding was not rebutted by Brazil. Instead Brazil's argumentation and the appeal proceedings initiated by the EC concentrated entirely on the availability of the exception provided for in GATT Article XX. In this regard the Appellate Body reversed several legal argumentations of the panel.

With regard to GATT Article XX, Brazil argued that the import prohibition was justified as a necessary measure to protect human, animal, or plant life or health, as provided for in paragraph (b). In line with earlier rulings, both the Panel and Appellate Body applied the “two-tiered test” to Article XX (b), i.e. first they tested whether the measure was provisionally justified under one of the exemptions listed, before testing whether the measures satisfied the requirements of the preamble, which requires the non-discriminatory application of the measures challenged.

When applying the necessity test, the Appellate Body noted that in order to justify an import ban under GATT Article XX(b), a panel must be satisfied that it brings about a *material contribution to the achievement of its objective*.⁷ At the same time it rejected the EC’s argumentation that such contribution needed to be quantified and that any import ban or other trade-restrictive measure justified under Article XX (b) always needed to be immediately observable. This discussion significantly clarifies the scope of the necessity test under Article XX (b), while introducing a new dimension to the analysis.

Eventually the Appellate Body agreed with the Panel’s finding that fewer waste tyres will be generated with the import ban in place. Furthermore it found that Brazil had developed and implemented a comprehensive strategy to deal with waste tyres, with the import ban as a key element of this strategy. In sum, the Appellate Body hence upheld the Panel finding that the import ban contributes to the achievement of its objective.

However, the Appellate Body also confirmed its earlier findings that a panel still needed to consider “possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued”⁸ once it found a measure to be provisionally justified under Article XX (b).

Importantly, the Appellate Body considered Brazil’s “capacity [...] to implement remedial measures that would be particularly costly, or would require advanced technologies” and stated that alternative measure may certainly not involve “prohibitive costs or substantial technical difficulties”.⁹

In that regard the Appellate Body agreed with the Panel that the alternatives proposed by the EC such as “waste management and disposal measures that are remedial in character”¹⁰ are “mutually supportive elements of a comprehensive policy to deal with waste tyres [rather than] real alternatives”.¹¹

The Appellate Body also agreed with the Panel’s finding that the measure enacted by Brazil failed to meet the requirements of the chapeau of Article XX, i.e. the requirement to implement the measure in a non-discriminatory way. Yet, in this discussion the Appellate Body reversed some important findings of the Panel.

While the Panel found that the exemption for Mercosur was consistent with the requirements of the chapeau since the “volumes of imports of retreaded tyres under the exemption appear not to have been significant”¹² the Appellate Body noted that, no matter how small the impacts of the exemption, a discrimination cannot be justified if there is no rational connection to the objective or when the exemption even goes against the objective. Therefore, Brazil’s reference to a Mercosur ruling obligating Brazil to allow imports of retreaded tyres from Mercosur countries was not found to be a sound justification within the meaning of the Article XX chapeau.

Moreover, the Appellate Body reversed the Panel’s findings with regard to the issue of court injunctions. While the Panel had found those court injunctions to constitute a discriminatory measure inconsistent with Article XX due to the significant amount of imports allowed on the basis of these

⁷ Appellate Body, para 150

⁸ Appellate Body, para 156

⁹ Appellate Body, para 171

¹⁰ Appellate Body, para 211

¹¹ Appellate Body, para 211

¹² Panel, para 7.288

injunctions, the Appellate Body again rejected this “trade effects” argument, instead ruling that court injunctions resulted in a discriminatory application of the measures per se rather than due to the economic effect.

Despite the reversed finding and the different argumentation employed, the Appellate Body thus affirmed the Panel’s ruling that the ban was WTO inconsistent, since it failed to meet the requirement of the Article XX chapeau.

Systemic issues

Three lines of argumentation deployed by the Appellate Body have significant systemic implications. Specifically, these are the introduction of a material contribution test; the ruling on the trade affects test; and the ruling on the consideration of alternative measures.

Firstly, by introducing the *material contribution* aspect as an element of the necessity test under Article XX (b), the Appellate Body has significantly clarified the first step of the two-tiered test under Article XX. It stated that:

“Another key element of the analysis of the necessity test of a measure under Article XX b) is the contribution it brings to the achievement of its objective. A contribution exists when there is genuine relationship of ends and means between the objective pursued and the measure at issue. To be characterised as necessary, a measure does not have to be indispensable. However, its 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. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interest or the values underlying the objective pursued by it.”¹³

While this test imposes new disciplines on member States seeking to invoke Article XX, the Appellate Body also ensured considerable flexibilities, rejecting the EC’s argumentation that a quantification of the material contribution would have to be undertaken. Rather, the Appellate Body found that a measure can be assessed both quantitatively and qualitatively and that also those results “not immediately observable”¹⁴ need to be taken into account. In that regard it stated that the material contribution requirement could be met by presenting “evidence or data pertaining to the past or the present”,¹⁵ “quantitative projections in the future”¹⁶ or “qualitative reasoning based on hypotheses that are tested and supported by sufficient evidence”.¹⁷

This might also prove to have substantial impact on future WTO cases relating to global warming and climate change. This is mainly due to a statement made by the Appellate Body. In response to the EC’s claim that “a measure, the contribution of which is not immediately observable, cannot be justified under Article XX (b)” the Appellate Body noted that:

“In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, 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—can only be evaluated with the benefit of time.”²¹

This statement, being the first related specifically to measures on climate change, is likely to influence future cases arising in the climate change context, including biofuel subsidies, border carbon adjustments or deforestation measures.

¹³ Appellate Body, para 210

¹⁴ Appellate Body, para 151

¹⁵ Appellate Body, para 151

¹⁶ Appellate Body, para 151

¹⁷ Appellate Body, para 151

¹⁸ Appellate Body, para 151

Secondly, the Appellate Body rejected the trade effects test deployed by the Panel for determining the discriminatory nature of certain exemptions to the measures taken by Brazil, i.e. the domestic court injunctions and the exemption for Mercosur.

Thirdly, the Appellate Body ruling included some findings crucial for the test of “possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued”.¹⁹ In this regard it had found that such a test also needed to consider the capacity of a country so as to ensure that measures do not impose “an undue burden”²⁰ such as “prohibitive costs or substantial technical difficulties”.²¹ In that regard, the ruling acknowledges that the meaning of “an undue burden” must be determined with reference to the degree of the development of a country.

Certainly this has considerable importance for developing countries. At the same time it is likely that the ruling will also impact the discussion on, for instance, the enforceability of intellectual property rights since the Appellate Body found that alternatives may not impose “substantial technical difficulties”.

Policy Implications

Besides these important systemic implications on the application of Article XX, this landmark ruling also directly impacts policies directed at the protection of the environment and public health. This is true for Brazil’s domestic policies as well as for wider global policies.

Compliance

The most striking aspect of the ruling is certainly the Appellate Body’s finding that Brazil’s measures were inconsistent with Article XX since the ban was not applied vigorously enough. In turn this means that the ruling requires Brazil to implement its policies in a *more trade restrictive way*. Even though commentators have subsequently argued that the ruling was a victory for Brazil, it also

posed significant challenges for Brazil. This is mainly due to the complexity of the case of the Mercosur exemption.

In 2002 a regional Mercosur Ad Hoc Arbitral Tribunal decided on a case brought by Uruguay against Argentina and Brazil regarding a ban on retreaded (in this case remolded) tyres. While Argentina had invoked public health and environmental concerns as a defence, Brazil had narrowed its defence to the argument that Mercosur allowed its members to restrict trade in used goods, such as retreaded tyres, and that its ban only clarified the legal status of retreaded tyres under the respective tariff lines. However, since Brazil had distinguished used and retreaded tyres for several years before adopting the new legislation, the tribunal found the measure to constitute an impermissible obstacle to free trade.

In the case of Argentina, however, the tribunal indeed agreed with the argumentation that a ban on retreaded tyres was significantly promoting Argentina’s objectives regarding the protection of the environment and public health. Yet, Mercosur’s Permanent Review Court reversed this finding concluding that the ban could not be justified under the public health and environment exception due to a lack of legal authority establishing clear criteria for the invocation of the exemption. In fact the Court found that the Argentinean measures had been adopted exclusively for protection of the domestic industry.

In sum the WTO Appellate Body requested Brazil to apply the import ban to all imports, including those from Mercosur countries, but, at the same time, the Mercosur tribunal found such a ban to be inconsistent with its free trade rules. Likewise, the reasoning successfully deployed within the WTO system had been rejected by the Mercosur Review Court in the case of Argentina. Yet, it can be argued that in the case of Brazil the Court had decided differently which then allows a certain criticism for Brazil not pleading this justification before the Mercosur Review Court. This discrepancy on a regional and

¹⁹ Appellate Body, para 156

²⁰ Appellate Body, para 156

²¹ Appellate Body, para 156

multilateral level certainly complicates the task of compliance, whereas the coordination of efforts on regional and multilateral level requires a substantial amount of human resources and an effective intergovernmental network linking the different authorities.

Irrespective of the difficulties with the Mercosur ruling outlined above, SECEX issued a new ruling on August 26, 2009, *Portaria SECEX N. 24/09*, prohibiting the granting of any import licenses on retreaded and used tyres. The decision, in force since the ruling, covers all products falling under the Mercosur Common Nomenclature tariff line 4012 (used tyres and rubber).

A second major challenge arose from the division of federal and state authorities and the role of the court injunctions that permitted the import of retreaded tyres. The latter aspect has been addressed in a recent Supreme Court decision ruling that the ban on importing used tyres into Brazil is constitutionally valid, while those court decisions that allowed the importation of used tyres violate the Federal Constitution and should thus lose any legal effects, considered both retroactively and prospectively.

Consequentially, Brazil considers its new domestic measure to be in compliance with the Appellate Body's ruling and hence WTO law.

Information Note by Marie Wilke (ICTSD). The views expressed in this Information Note are those of the author alone, and do not necessarily represent the views of the International Centre for Trade and Sustainable Development.

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