Appellate Body Report

Brazil - Measures Affecting Imports of Retreaded Tyres

(WT/DS332/AB/R)

Participants

Appellant: EC
Appellee: Brazil
Third Participants: Argentina, Australia, China, Chinese Taipei, Cuba, Guatemala, Japan, Korea, Mexico, Paraguay, Thailand, U.S.

Timeline of Dispute

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Appellate Body Division

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Key Findings

- Concluded that the Panel did not err in the manner it conducted its analysis under Article XX(b). Thus, upheld Panel's finding that the Import Ban is "necessary to protect human, animal or plant life or health" under this provision.

- Found that the MERCOSUR exemption "has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination" under the GATT Article XX chapeau, and thus reversed Panel's findings to the contrary. Also, reversed Panel's findings that "the MERCOSUR exemption ... has not been shown to date to result in the [Import Ban] being applied in a manner that would constitute ... a disguised restriction on international trade."

- Found that "the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination." Reversed Panel's finding that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade "only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban."

- Recalling its findings that the MERCOSUR exemption and the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent with the chapeau of Article XX, Appellate Body said it upheld "albeit for different reasons, the Panel's findings … that the Import Ban, found by the Panel to be inconsistent with Article XI:1 … , is not justified under Article XX."
BACKGROUND

This dispute concerns various measures taken by Brazil relating to the importation of retreaded tyres. 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, sometimes, new material covering parts or all of the sidewalls. More specifically, retreaded tyres can be produced through the following methods: (1) top-capping, which replaces only the tread; (2) re-capping, which replaces the tread and part of the sidewall; and (3) remoulding or "bead to bead," which replaces the tread and the sidewall, including all or part of the lower area of the tyre. Pursuant to international standards, passenger car tyres may be retreaded only once, whereas commercial vehicle and aircraft tyres may be retreaded more than once.

Under the Harmonized System nomenclature, retreaded tyres are classified under HS heading 4012, titled "Retreaded or used pneumatic tyres of rubber; solid or cushion tyres, tyre treads and tyre flaps, of rubber." There are four separate sub-headings for retreaded tyres, corresponding to different types of vehicles. Used tyres have a separate sub-heading under this heading, whereas new tyres have their own heading.

In its panel request in this dispute, the European Communities referred to a number of different Brazilian measures:

- the Import Ban on retreaded tyres, under Portaria 14 of November 17, 2004 of the Secretariat of Foreign Trade of the Brazilian Ministry of Development, Industry and International Commerce (SECEX) ("SECEX 14/2004"), which prohibits the issuance of import licenses for retreaded tyres.

- measures banning the importation of used tyres, which are sometimes applied against imports of retreaded tyres.

- the imposition, by virtue of Presidential Decree 3.919 of September 14, 2001, of a fine of 400 BRL per unit on the importation of retreaded tyres, as well as on the marketing, transportation, storage, or keeping in deposit or warehouses of imported, but not of domestic, retreaded tyres.

- measures by certain Brazilian States which restrict the sale of imported retreaded tyres and also the sale of retreaded tyres made in Brazil from imported casings.

- the exemption from the Import Ban and financial penalties described above for retreaded tyres imported from MERCOSUR countries.

As noted by the Appellate Body, "[t]his dispute concerns the Import Ban and the MERCOSUR exemption in Article 40 of Portaria SECEX 14/2004, but not the import ban on used tyres." In addition, it noted that the other measures listed above were not at issue in the appeal. (Panel report, paras. 2.1-16; AB report, paras. 1-2, 118-132)

Before the Panel, the European Communities claimed violations of GATT Articles I:1, III:4, XI:1 and XIII:1. In response, Brazil argued that the measures were justified under GATT Articles XX(b) and XX(d), and that the exemption for MERCOSUR countries was justified under GATT Article XXIV. (The Panel exercised judicial economy with regard to the claims under Articles I:1 and XIII:1.)
The Panel found, *inter alia*, that the Import Ban is inconsistent with GATT Article XI:1. In response to a Brazilian defense, the Panel then found that the Import Ban is "necessary" within the meaning of GATT Article XX(b) and is thus provisionally justified. However, the Panel found that "the importation of used tyres through court injunctions results in the import ban being applied in a manner that constitutes a means of unjustifiable discrimination and a disguised restriction to trade within the meaning of the chapeau of Article XX." Therefore, the Panel ultimately concluded that the import ban is not justified under GATT Article XX. On appeal, the European Communities challenged certain aspects of the Panel's reasoning under GATT Article XX(b) and the Article XX chapeau in relation to the Import Ban.

**SUMMARY OF APPELLATE BODY'S FINDINGS**

**PROCEDURAL AND SYSTEMIC ISSUES**

*Amicus Submissions*

The Appellate Body received two separate *amicus curiae* briefs from non-governmental organizations. However, the Appellate Body "did not find it necessary to take these *amicus curiae* briefs into account." (Para. 7)

*Panel's Use of Judicial Economy*

With regard to the Panel's decision to exercise judicial economy on the GATT Articles I:1 and XIII:1 claims related to the MERCOSUR exemption, the Appellate Body observed that it might have been appropriate for the Panel to address these claims. In view of the Panel's finding that the MERCOSUR exemption resulted in the Import Ban "being applied consistently" with the chapeau of Article XX, the Appellate Body said it had "difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:1 directed at the MERCOSUR exemption." (Para. 257)

*Admissibility of Evidence Post-Dating Establishment of Panel*

Citing paragraph 188 of *EC - Customs Matters*, the Appellate Body noted that "[i]t is well settled that a panel may consider a piece of evidence that post-dates its establishment," and thus it found that the "INMETRO Technical Note 001/2006 was clearly an admissible piece of evidence." (Para. 193)

**SUBSTANTIVE ISSUES**

*GATT Article XX(b) - "Necessity" of the Import Ban*

The Panel had found that the Import Ban is "necessary" within the meaning of GATT Article XX(b). The European Communities challenged three aspects of this finding, as follows: (1) the Panel applied an "erroneous legal standard" in "assessing the contribution of the Import Ban to the realization of the ends pursued by it, and that it did not properly weigh this contribution in its analysis of the necessity of the Import Ban"; (2) the Panel "did not define correctly the alternatives to the Import Ban and erred in excluding possible alternatives proposed by the European Communities"; and (3) in its analysis under Article XX(b), the Panel "did not carry out a proper, if any, weighing and balancing of the relevant factors." (Para. 133) The Appellate Body considered each point in turn.
Contribution of the Import Ban to the Achievement of its Objective

In analyzing whether the Import Ban "contributes to the realization of the policy pursued, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres," the Panel examined two questions. First, the Panel assessed "whether the Import Ban can contribute to the reduction in the number of waste tyres generated in Brazil." On this issue, the Panel noted Brazil's explanation that the Import Ban "would contribute to the achievement of the objective of reducing the number of waste tyres if imported retreaded tyres would be replaced either with domestically retreaded tyres made from tyres used in Brazil, or with new tyres capable of future retreading" and it concluded that the Import Ban "is capable of contributing to the reduction of the overall amount of waste tyres generated in Brazil." Second, the Panel evaluated "whether a reduction in the number of waste tyres can contribute to the reduction of the risks to human, animal, and plant life and health arising from waste tyres." On this issue, the Panel concluded that "the prohibition on the importation of retreaded tyres is capable of making a contribution to the objective pursued by Brazil, in that it can lead to a reduction in the overall number of waste tyres generated in Brazil, which in turn can reduce the potential for exposure to the specific risks to human, animal, plant life and health that Brazil seeks to address." (Paras. 134-136)

In its appeal, the European Communities argued that the Panel "referred only to the potential contribution this measure might make" and that the Panel applied an "erroneous legal standard" in so doing. It also contended that the Panel should have sought "to establish the actual contribution of the measure to its stated goals, and the importance of this contribution." (Para. 137)

In examining this issue, the Appellate Body first reviewed Article XX(b) and its past jurisprudence in this area. In this regard, it noted that Article XX(b) refers to measures "necessary to protect human, animal or plant life or health." It also explained that "necessary" involves a "weighing and balancing process," which "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure," and also involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce." (Paras. 139-143)

With this in mind, the Appellate Body examined "whether the Panel erred in assessing the contribution of the Import Ban to the realization of the objective pursued by it, and in the manner in which it weighed this contribution in its analysis of the necessity of the Import Ban." In doing so, the Appellate Body first identified "the objective pursued by the Import Ban," which the Panel had said was "the reduction of the 'exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres.'" The Panel had said that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and that protecting the environment is no less important." (Para. 144)

With regard to the Panel's analysis of "the contribution of the Import Ban to the achievement of its objective," the Appellate Body said that "[s]uch a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue." It noted that "[b]ecause the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it," although this latitude is not "boundless." Here, the Appellate Body said, the Panel "chose to conduct a qualitative analysis of the contribution of the Import Ban to the achievement of its objective," rather than a quantitative one, which the Appellate Body stated was "within the bounds" of its discretion, and it rejected the EC contention that the Panel was under an obligation to quantify the contribution. (Paras. 145-147)
Reviewing the Panel's analysis of the "contribution" of the Ban to the achievement of its objective, the Appellate Body said that the Panel's analysis was "in a coherent sequence." After describing the Panel's reasoning, the Appellate Body said it appears that the Panel's analysis "supports its conclusion that the Import Ban is capable of making a contribution and can result in a reduction of exposure to the targeted risks." The Appellate Body then said it would "determine whether this was sufficient to conclude that the Import Ban is necessary' within the meaning of Article XX(b)." (Paras. 148-149)

The Appellate Body noted that an import ban is "by design as trade-restrictive as can be," but said it agreed with the Panel that "there may be circumstances where such a measure can nevertheless be necessary, within the meaning of Article XX(b)." The Appellate Body further explained that "[i]n order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective." In this regard, it stated that "a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective," which "could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence," and it disagreed with Brazil's suggestion that "because it aims to reduce risk exposure to the maximum extent possible, an import ban that brings a marginal or insignificant contribution can nevertheless be considered necessary." (Paras. 150-151)

The Appellate Body then considered "whether the qualitative analysis provided by the Panel establishes that the Import Ban is apt to produce a material contribution to the achievement of the objective of reducing exposure to the risks arising from the accumulation of waste tyres." Examining the Panel's analysis, the Appellate Body first noted that based on the evidence, the Panel was "of the view that the Import Ban would lead to imported retreaded tyres being replaced with retreaded tyres made from local casings, or with new tyres that are retreadable." The Panel's conclusion was that, "if the domestic retreading industry retreads more domestic used tyres, the overall number of waste tyres will be reduced by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life." The Panel concluded that "a reduction of waste tyres would result from the Import Ban and that, therefore, the Import Ban would contribute to reducing exposure to the risks associated with the accumulation of waste tyres." The Appellate Body stated that it agreed with the Panel's reasoning suggesting that "fewer waste tyres will be generated with the Import Ban in place," and it noted that "Brazil has developed and implemented a comprehensive strategy to deal with waste tyres." Thus, it said, "[a]s a key element of this strategy, the Import Ban is likely to bring a material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tyres." On this basis, the Appellate Body concluded that "the Panel did not err in finding that the Import Ban contributes to the achievement of its objective." (Paras. 152-155)

Possible Alternatives to the Import Ban

The Appellate Body observed that in order to determine whether a measure is "necessary" within the meaning of GATT Article XX(b), a panel must assess "all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness, in the light of the importance of the interests or values at stake." It then stated, "[i]f this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued." (Para. 156)

Before the Panel, the European Communities had suggested "two types of possible alternative measures": "[i] measures to reduce the number of waste tyres accumulating in Brazil; and (ii) measures or practices to improve the management of waste tyres in Brazil." The Panel examined these alternative
measures and found that they "did not constitute a reasonably available alternative to the Import Ban." In this regard, the Panel noted that "the proposed alternatives were already in place, would not allow Brazil to achieve its chosen level of protection, or would carry their own risks and hazards." (Para. 157) According to the Appellate Body, "[r]egarding the measures to reduce the accumulation of waste tyres, the Panel first discussed measures to encourage domestic retreading or improve the retreadability of domestic used tyres." In addition, "[t]he Panel went on to discuss the European Communities' contention that Brazil should prevent imports of used tyres into Brazil through court injunctions." Then, "[t]urning to alternatives aiming to improve management of waste tyres, the Panel examined, first, collection and disposal schemes and, secondly, disposal methods." (Paras. 158-160)

On appeal, the European Communities contended that the Panel "erred in its analysis of the measures or practices that were presented as possible alternatives to the Import Ban." In particular, the European Communities submitted that the Panel "used in its analysis an incorrect concept of 'alternative'" and argued that the Panel "should have considered as alternatives to the Import Ban a better enforcement of the ban on imports of used tyres and of existing collection and disposal schemes." (Para. 167)

In its analysis of this issue, the Appellate Body said that "[a]mong the possible alternatives, the European Communities referred to measures to encourage domestic retreading or improve the retreadability of used tyres, as well as a better enforcement of the import ban on used tyres and of existing collection and disposal schemes." In fact, the Appellate Body stated, "like the Import Ban, these measures already figure as elements of a comprehensive strategy designed by Brazil to deal with waste tyres." Thus, substituting one element for another "would weaken the policy by reducing the synergies between its components, as well as its total effect." Therefore, the Appellate Body concluded, "the Panel did not err in rejecting as alternatives to the Import Ban components of Brazil's policy regarding waste tyres that are complementary to the Import Ban." (Para. 172)

With regard to the other measures and practices proposed by the European Communities as alternatives, the European Communities contended that the Panel erred by applying a "narrow definition of alternative," according to which an alternative to the Import Ban is "a measure that must avoid the waste tyres arising specifically from imported retreaded tyres," or one "equal to a waste non-generation measure." The Appellate Body said that it agreed with the Panel that non-generation measures "are more apt to achieve the objective of reducing the 'exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres' to the maximum extent possible" because "they prevent the accumulation of waste tyres, while waste management measures dispose of waste tyres only once they have accumulated." Furthermore, the Appellate Body said that the Panel did not err in taking into account specific risks attached to the proposed alternative. It also observed that in this case, the Panel examined as proposed alternatives "landfilling, stockpiling, and waste tyre incineration, and considered that, even if these disposal methods were performed under controlled conditions, they nevertheless pose risks to human health similar or additional to those Brazil seeks to reduce through the Import Ban." The Appellate Body agreed with the Panel that "[b]ecause these practices carry their own risks, and these risks do not arise from non-generation measures such as the Import Ban, we believe, like the Panel, that these practices are not reasonably available alternatives." Finally, with respect to material recycling, the Appellate Body agreed with the Panel that "this practice is not as effective as the Import Ban in reducing the exposure to the risks arising from the accumulation of waste tyres." (Paras. 173-175)

The Weighing and Balancing of Relevant Factors

With regard to the issue of "weighing and balancing" the relevant factors, the European Communities argued that the Panel "has not actually" done so. In this regard, the European Communities stated that, "since the Panel failed to establish ... the extent of the actual contribution the [Import Ban] makes to the reduction of the number of waste tyres arising in Brazil, ... it was incapable of 'weighing and
balancing' this contribution against any of the other relevant factors." It further argued that the Panel based its "weighing and balancing" on an incorrect analysis of the alternative measures. (Para. 176)

In addressing this issue, the Appellate Body noted that the Panel analyzed the trade restrictiveness of the Import Ban and its contribution to the achievement of its objective, and on this basis "considered that, in the light of the importance of the interests protected by the objective of the Import Ban, the contribution of the Import Ban to the achievement of its objective outweighs its trade restrictiveness." The Appellate Body concluded that the Panel's finding in this regard was not in error. (Para. 179) In addition, the Appellate Body rejected the EC contention that the Panel failed to make a "proper collective" assessment of the proposed alternatives. (Para. 181)

Summing up, the Appellate Body said that the Panel's conclusion that the Import Ban is necessary "was the result of a process involving, first, the examination of the contribution of the Import Ban to the achievement of its objective against its trade restrictiveness in the light of the interests at stake, and, secondly, the comparison of the possible alternatives, including associated risks, with the Import Ban." It noted that the weighing and balancing process "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." It therefore rejected the EC view that the Panel did not "actually" weigh and balance the relevant factors or that the Panel "made a methodological error in comparing the alternative options proposed by the European Communities with the Import Ban." (Para. 182)

Conclusion

On this basis, the Appellate Body concluded that the Panel did not err in the manner it conducted its analysis under Article XX(b) as to whether the Import Ban was "necessary to protect human, animal or plant life or health." (Para. 183)

GATT Article XX(b) ("Necessary") / DSU Article 11

The European Communities claimed that the Panel violated DSU Article 11 in its analysis of the "necessity" of the Import Ban under GATT Article XX(b). In particular, the European Communities submitted that the Panel "failed to make an objective assessment of the facts in its assessment of the contribution of the Import Ban to the achievement of its objective, and in its examination of the proposed alternatives." (Para. 184) The Appellate Body considered separately the Panel's analysis of the "contribution" and the Panel's examination of "possible alternatives."

Starting with the Panel's analysis of the contribution of the import ban to the achievement of its objective, the Appellate Body first recalled its prior jurisprudence on DSU Article 11. In this regard, it noted that Article 11 requires a panel to conduct "an objective assessment of the matter before it, including an objective assessment of the facts of the case." It then explained that "a participant challenging a panel's findings of fact under Article 11 of the DSU is required to demonstrate that the panel has exceeded the bounds of its discretion as the trier of facts." (Paras. 185-186) Turning to the facts here, the Appellate Body considered a number of arguments made by the European Communities in this regard, and it rejected all of them. Thus, the Appellate Body found that the Panel "did not fail to conduct an objective assessment of the facts of the case, as required by Article 11 of the DSU, when evaluating the contribution of the Import Ban to the achievement of its objective." (Paras. 187-198)

With regard to the Panel's examination of possible alternatives to the import ban, the EC appeal was related to the Panel's "appreciation of the evidence." Reviewing the EC arguments, the Appellate Body found that "the Panel did not fail to conduct an objective assessment of the facts, as required by
Article 11 of the DSU, in finding that the disposal methods for waste tyres suggested by the European Communities were not reasonably available alternatives to the Import Ban." (Paras. 199-209)

**GATT Article XX(b) ("Necessary") - General Conclusion**

Recalling its findings above on GATT Article XX(b), the Appellate Body noted that a 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." With regard to the facts here, the Appellate Body stated that "[a]s a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the Import Ban produces such a material contribution to the realization of its objective." Like the Panel, it said, "we consider that this contribution is sufficient to conclude that the Import Ban is necessary, in the absence of reasonably available alternatives." (Para. 210) With respect to the alternatives to the Import Ban proposed by the European Communities, the Appellate Body found that "[t]he Panel did not err in concluding that the proposed measures or practices are not reasonably available alternatives." Thus, the Appellate Body said, "having already found that the Panel did not breach its duty under Article 11 of the DSU, and in the light of the above considerations," it upheld the Panel's finding that the Import Ban "can be considered 'necessary to protect human, animal or plant life or health.'" (Para. 212)

**GATT Article XX Chapeau - The MERCOSUR Exemption**

After finding that the Import Ban was provisionally justified under GATT Article XX(b), the Panel had examined whether the application of the Import Ban by Brazil satisfied the requirements of the chapeau of Article XX, which states:

Subject to the requirement that such measures are 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures [of the type specified in the subsequent paragraphs of Article XX].

The Appellate Body noted that this provision focuses on the "application" of a measure, and requires that measures not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail or in a manner that would constitute "a disguised restriction on international trade." In this way, the Appellate Body explained, the chapeau "serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members." In its findings under this provision, the Panel had concluded, inter alia, that the Import Ban was not applied inconsistently with this provision on the basis of the "MERCOSUR exemption," which permitted imports of certain retreaded tyres from MERCOSUR countries. The European Communities appealed this finding. (Paras. 213-216) The Appellate Body considered the issues of "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade" separately.

**Arbitrary or Unjustifiable Discrimination**

On the issue of whether the exemption constitutes "arbitrary or unjustifiable discrimination," the Panel had said that "the MERCOSUR [tribunal] ruling provided a reasonable basis to enact the MERCOSUR exemption, with the implication that the resulting discrimination is not arbitrary." In addition, the Panel had concluded that if the MERCOSUR imports "were to take place in such amounts..."
that the achievement of the objective of the measure at issue would be significantly undermined, the application of the import ban in conjunction with the MERCOSUR exemption would constitute a means of unjustifiable discrimination." However, it found, "as of the time of the Panel's examination, 'volumes of imports of retreaded tyres under the exemption appear not to have been significant.'" As a result, the Panel concluded that "the MERCOSUR exemption has not resulted in the Import Ban being applied in a manner that would constitute arbitrary or unjustifiable discrimination." (Paras. 217-219) The European Communities appealed this finding. (Para. 220)

In addressing this issue, the Appellate Body stated that "[a]nalyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination," and it referred to its reports in \textit{U.S. - Gasoline} and \textit{U.S. - Shrimp} as support. It further stated that "the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence." Here, the Appellate Body said, "Brazil explained that it introduced the MERCOSUR exemption to comply with a ruling issued by a MERCOSUR arbitral tribunal." Thus, the Appellate Body said it would "assess whether this explanation provided by Brazil is acceptable as a justification for discrimination between MERCOSUR countries and non-MERCOSUR countries in relation to retreaded tyres," and, it added, this assessment "should be made in the light of the objective of the measure." It further stated that it had "difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX." (Paras. 225-227)

The Appellate Body then explained that "the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal" which found against Brazil "because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law." According to the Appellate Body, this ruling "is not an acceptable rationale for the discrimination, 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." Therefore, the Appellate Body concluded that the MERCOSUR exemption "has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination." (Para. 228)

With regard to the Panel's reliance on whether "amounts" of MERCOSUR imports were "significant" as part of its findings related to "unjustifiability," the Appellate Body said that this interpretation is based on the "quantitative impact" of the discrimination on the achievement of the measure's objective. The Appellate Body rejected this approach, noting that it had "no support" in the text of Article XX and was inconsistent with past Appellate Body interpretations of Article XX. On the other hand, the Appellate Body noted that "effects" could be relevant in certain cases. However, it made clear that they could not be the exclusive focus, as they were for the Panel. (Paras. 229-230)

As to the Panel's finding related to whether the measure is applied in an "arbitrary" manner, the Appellate Body agreed that Brazil's decision to comply with the MERCOSUR tribunal ruling was not "capricious" or "random." However, it noted, discrimination can result from a "rational decision or behaviour," and yet still be "arbitrary or unjustifiable," because it is based on a "rationale that bears no relationship to the objective of a measure." (Paras. 231-232)

On this basis, the Appellate Body found that the MERCOSUR exemption "has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination." It also reversed the Panel's finding that, under the chapeau of Article XX, discrimination would be unjustifiable only if imports of retreaded tyres entering into Brazil "were
to take place in such amounts that the achievement of the objective of the measure at issue would be significantly undermined." Therefore, the Appellate Body reversed the Panel's findings that the MERCOSUR exemption has not resulted in unjustifiable discrimination and that to the extent the MERCOSUR exemption is not the result of "capricious" or "random" action, the Import Ban is not applied in a manner that would constitute arbitrary discrimination. (Para. 233)

At the same time, the Appellate Body pointed out that "before the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo," but it chose not to do so. The Appellate Body noted that Article 50(d), "as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings, show … that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994." (Para. 234)

Disguised Restriction on International Trade

With regard to whether the Import Ban was applied in a manner that would constitute a "disguised restriction on international trade," the Panel had referred to its reasoning from the "arbitrary or unjustifiable discrimination" section, and it had concluded that the MERCOSUR exemption had not led to a "significant" volume of imports of retreaded tyres, and thus the Import Ban was not applied in this manner. (Paras. 235-237) The European Communities appealed this finding on the same basis as it appealed the "arbitrary or unjustifiable discrimination" finding. (Para. 238)

On this point, the Appellate Body observed that the Panel's reasoning was the same as it was for the "arbitrary or unjustifiable discrimination" issue. Having reversed the Panel's interpretation under this other issue, the Appellate Body also reversed the Panel's findings that "the MERCOSUR exemption ... has not been shown to date to result in the [Import Ban] being applied in a manner that would constitute ... a disguised restriction on international trade." (Para. 239)

GATT Article XX Chapeau - Imports of Used Tyres through Court Injunctions

Certain court injunctions obtained in Brazil had allowed the import of used tyres despite a ban on their importation. (Para. 242) As part of its examination of Brazil's Article XX defense, the Panel considered whether the existence of these court injunctions meant that Brazil was acting inconsistently with the Article XX chapeau (quoted in the preceding section). The Appellate Body considered separately the issues of whether imports through these court injunctions constituted "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade."

Arbitrary or Unjustifiable Discrimination

The Panel had found that the discrimination resulting from the imports of used tyres through court injunctions was not the consequence of a "capricious" or "random" action, and thus the Import Ban "was not applied in a manner that would constitute arbitrary discrimination." (Para. 242) However, it also found that "since used tyre imports have been taking place under the court injunctions in such amounts that the achievement of Brazil's declared objective is being significantly undermined, the measure at issue is being applied in a manner that constitutes a means of unjustifiable discrimination." (Para. 243) On appeal, the European Communities challenged both of these findings. For the issue of whether the imports through the injunctions were "arbitrary," the European Communities said that "[w]hat is arbitrary must be decided in the light of the stated objectives of the measure." As to the "unjustifiable" point, the European Communities noted that the Panel "adopted the same erroneous quantitative approach as it did when discussing the MERCOSUR exemption" and said "the Panel's
approach engenders uncertainty for the implementation of the Panel Report, because the Panel did not identify 'the threshold below which the imports of used tyres would no longer be significant.'” (Para. 244)

In addressing this issue, the Appellate Body recalled its finding above in the context of the MERCOSUR exemption that the focus of an examination of the "arbitrary or unjustifiable discrimination" element should be the "cause or rationale given for the discrimination." Here, it noted, "the fact that Brazilian retreaders are able to use imported casings is the result of the decisions of the Brazilian administrative authorities to comply with court injunctions." However, the Appellate Body said, "this explanation bears no relationship to the objective of the Import Ban—reducing exposure to the risks arising from the accumulation of waste tyres to the maximum extent possible," pointing out that "[t]he imports of used tyres through court injunctions even go against the objective pursued by the Import Ban." Recalling its findings above, the Appellate Body stated that "there is arbitrary or unjustifiable discrimination, within the meaning of the chapeau of Article XX, when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective." Thus, here it found that "the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination." (Para. 246)

With regard to the question of whether the imports of used tyres through court injunctions result in unjustifiable discrimination in the same manner as with the MERCOSUR exemption, the Appellate Body recalled its view that the Panel's quantitative approach "is flawed." Accordingly, the Appellate Body said that it reversed the Panel's finding "that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes unjustifiable discrimination only to the extent that such imports have taken place in volumes that significantly undermine the achievement of the objective of the Import Ban." It also reversed the Panel's finding "that the imports of used tyres under court injunctions have not resulted in arbitrary discrimination to the extent that such imports are not the result of 'capricious' or 'random' action." (Para. 247)

Disguised Restriction on International Trade

The Panel had found that, "since imports of used tyres take place in significant amounts under court injunctions to the benefit of the domestic retreading industry, the [Import Ban] is being applied in a manner that constitutes a disguised restriction on international trade." On appeal, the European Communities referred to its arguments made in the context of "arbitrary or unjustifiable discrimination," and it reiterated its view that "the Panel's reliance on import volumes for the purpose of determining compatibility with the chapeau of Article XX … is erroneous." (Paras. 248-249)

According to the Appellate Body, the Panel's reasoning was the same as that developed in respect of "arbitrary or unjustifiable discrimination." Having explained above why it considered this reasoning of the Panel to be erroneous, the Appellate Body made the same finding here. Therefore, it reversed the Panel's finding that the imports of used tyres through court injunctions have resulted in the Import Ban being applied in a manner that constitutes a disguised restriction on international trade "only to the extent that these imports are taking place in such quantities that they significantly undermine the objective of the Import Ban." (Para. 251)

GATT Article XX Chapeau - Conclusion

Recalling its findings that the MERCOSUR exemption and the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that is inconsistent
with the chapeau of Article XX, the Appellate Body said it upheld, "albeit for different reasons, the Panel's findings … that the Import Ban, found by the Panel to be inconsistent with Article XI:1 of the GATT 1994, is not justified under Article XX of the GATT 1994." (Para. 252)

COMMENTARY

For further reading on this dispute, see:


GATT Article XX(b) - "Necessity" of the Import Ban

The term "necessary" in GATT/WTO jurisprudence has a long and controversial history. In addition to concerns expressed by NGOs and other groups that certain WTO exceptions which use the term "necessary" have been interpreted too narrowly, thereby limiting Members' ability to adopt particular social policies when they have an effect on trade, there is also the more basic issue of how to articulate a clear legal standard for these provisions. In recent years, the Appellate Body has tried to clarify the
standard, in cases arising under GATT Articles XX(b) and XX(d), as well as GATS Article XIV(a), but uncertainties remain nonetheless.

Based on the Appellate Body's jurisprudence, there appear to be two key elements to an analysis of whether a measure is "necessary." First, there is a three factor "weighing and balancing" process. In this regard, in U.S. - Gambling the Appellate Body explained that the weighing and balancing process "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure." As to the other two factors, which, the Appellate Body noted, are not "exhaustive" as to the possible factors to be considered, one is "the contribution of the measure to the realization of the ends pursued by it," and the other is "the restrictive impact of the measure on international commerce." (U.S. - Gambling, para. 306)

The second element in a "necessary" analysis is the existence of a reasonably available alternative measure that could achieve the same objective as the measure at issue. In this regard, in Gambling, after describing the three factors to be "weighed and balanced," the Appellate Body stated that a "comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue." (U.S. - Gambling, para. 307) The Appellate Body has also described this second element as follows: "The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition." (EC - Asbestos, para. 172)

While it is clear that there are two elements to a "necessary" analysis, the relationship between the two is less obvious. Based on the Appellate Body's description of this relationship in the Beef case, they seem to be very closely tied: the Appellate Body said that the "weighing and balancing" process is "comprehended" in the determination of whether there are alternatives. (Korea - Beef, para. 166) Similarly, in Cigarettes, the Appellate Body said: "The weighing and balancing process of these three factors also informs the determination whether a WTO-consistent alternative measure which the Member concerned could reasonably be expected to employ is available, or whether a less WTO-inconsistent measure is reasonably available." (Dominican Republic - Cigarettes, para. 70) There is clearly some overlap between the two elements. The three factors to be "weighed and balanced" include (1) the impact on trade and (2) the contribution the measure makes to its objective. Similarly, the reasonably available alternative element looks at other measures that are WTO-consistent or less-inconsistent (and thus presumably are less trade-restrictive) that will achieve the same end (and thus make a similar contribution to the objective). It appears, then, that in addition to being "weighed and balanced," these two factors help provide a basis for evaluating the alternative measures. Still, the precise relationship between the "weighing and balancing" and "alternative measure" elements is difficult to characterize.

The Panel in the Tyres case was faced with applying this standard to Brazil's import ban on retreaded tyres. In doing so, it considered each of the two elements (i.e., the three factors and the possible alternative measures) in detail and then reached an overall conclusion.

There are some aspects of the Panel's "weighing and balancing" of the three factors that may deserve further scrutiny. As stated by the Appellate Body in U.S. - Gambling in relation to the second two of the three factors: "One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce." (U.S. - Gambling, para. 306) More detail on these two factors was provided in Korea - Beef, where the Appellate Body had originally described them:

One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be
considered to be "necessary". Another aspect is the extent to which the compliance measure produces restrictive effects on international commerce, that is, in respect of a measure inconsistent with Article III:4, restrictive effects on imported goods. A measure with a relatively slight impact upon imported products might more easily be considered as "necessary" than a measure with intense or broader restrictive effects.

(Korea - Beef, para. 163) Thus, the Appellate Body referred to the "extent" of the measure's contribution to the end pursued, and it noted that "the greater the contribution," the more likely it would be deemed "necessary." Similarly, in terms of the trade impact, the Appellate Body referred to the "extent" to which the measure produces "restrictive effects," indicating that measures with only a "slight impact" will be more likely to be considered "necessary" than measures with "intense or broader restrictive effects."

While the precise analysis required under these two factors is hard to define, it could be argued that the Tyres Panel's approach should have been more detailed, in the following way. First, with regard to the contribution of the import ban to the objective of human (and animal or plant) health or life, the Panel said that the question before it was "whether the import ban on retreaded tyres contributes to the realization of the policy pursued, i.e. the protection of human, animal and plant life and health from the risks posed by the accumulation of waste tyres." In this regard, the Panel said that "this demonstration could be made through a quantification, where feasible, but it could also be made through any other means that might sufficiently demonstrate whether the measure can contribute to the reduction of the number of waste tyres." Therefore, the Panel did "not consider that Brazil is necessarily required to quantify exactly the impact of the import ban on the reduction of the number of waste tyres." It further stated that "a determination of a measure's contribution to a particular objective is primarily an analysis of the pertinence and relevance of the chosen means for the achievement of the aim pursued." In essence, this assessment relates to the "relationship of ends and means" between the objective pursued and the chosen measure" and "relates to the capacity of the chosen measure to contribute to the realization of the objective." (See Panel report paras. 7.115-119) Thus, in the Panel's view, only the "capacity" to contribute must be demonstrated. Its findings on the facts of this case reflect this view, as the Panel found that the ban "is capable" of contributing to this objective and "can lead to" a reduction in waste tyres, which "can" reduce the risks Brazil seeks to address. (See Panel report paras. 7.142-148)

Arguably, however, by looking only at whether the measure "can contribute" to the stated objective, the Panel may not have followed the Appellate Body's previous guidance that it should look at the "extent" of the measure's contribution. While assigning a precise figure to the level of the contribution may not be easy, it does seem possible to evaluate the degree of contribution in some way, either quantitatively or qualitatively. As one example of a quantitative analysis, it might have been useful to examine how many retreaded tyres were being imported, prior to the ban, in comparison to the amount of tyres, of all types, being produced and used in Brazil, to see how much impact the ban would have on the reduction of tyre waste.

Second, and along the same lines, as to the trade impact, the Panel said that the import ban is a heavy "weapon" and is "as trade-restrictive as can be," as it "halt[s] completely [the] entry into Brazil." (See Panel report para. 7.114) It is certainly true that a ban is fairly trade-restrictive. However, when examining the effects of a ban, it may be worth considering the amount of trade that is involved. If the prior trade is zero, for example, a ban may have only a limited effect. Here, though, the Panel did not examine the actual trade impact on EC exports.

On appeal, the European Communities raised, inter alia, the first issue, related to the Panel's statements that the measures "can" contribute to achieving the objective. In this regard, the European Communities argued: "By applying a standard of potential contribution, rather than one of actual
contribution, the Panel acted inconsistently with the case law of the Appellate Body, which requires the Panel to have assessed the extent of the contribution made by the Import Ban to the reduction of waste tyres arising in Brazil." (See Appellate Body report para. 11)

The Appellate Body rejected this argument. In doing so, the Appellate Body seems, in some places, to have ignored the Panel's use of the terms "can contribute" and "capacity to contribute," instead emphasizing the Panel's discussion of the substantive issues. For example, the Appellate Body considered "whether the qualitative analysis provided by the Panel establishes that the Import Ban is apt to produce a material contribution to the achievement of the objective of reducing exposure to the risks arising from the accumulation of waste tyres." The Appellate Body also noted that "[a]s a key element of this strategy, the Import Ban is likely to bring a material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tyres." And it said that the Panel "analyzed the contribution of the Import Ban to the achievement of its objective in a coherent sequence." On this basis, the Appellate Body concluded that "the Panel did not err in finding that the Import Ban contributes to the achievement of its objective." (See Appellate Body report paras. 148-155)

Arguably, though, some of the specific language used by the Appellate Body here is not entirely accurate. The Panel did not, explicitly at least, examine whether the measure is "apt" to produce a material contribution. By its own statements, the Panel examined whether the measure "could" contribute. These are very different analyses. Similarly, the Panel also did not examine whether the import ban is "likely" to bring a material contribution, and it did not find that the import ban actually "contributes" to the achievement of the objective. The Appellate Body's decision to overlook the specific terms used by the Panel is somewhat surprising, as the Appellate Body sometimes takes panels to task for these sorts of things. It may be, however, that the Appellate Body simply decided to focus on the more fundamental substantive discussion and ignore the specific language used by the Panel.