

ARTICLES

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NOTES AND  
COMMENTS

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BOOK REVIEW

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## TABLE OF CONTENTS

### ARTICLES

1. From Basel to Hong Kong: International Environmental Regulation of Ship-Recycling Takes One Step Forward and Two Steps Back  
*Saurabh Bhattacharjee* ...193
2. The *Brazilian Tyres* Case: Trade Supersedes Health  
*Nikolaos Lavranos* ...231

### NOTES AND COMMENTS

3. Border Enforcement of Intellectual Property Rights in India  
*Aditya Gupta* ...260
4. Making a Case for the Imposition of Unilateral Trade Sanctions to Protect Labour and Basic Human Rights  
*Aditya Swarup* ...289
5. International Arbitration in the Twenty-First Century: Concepts, Instruments and Techniques  
*Fali S. Nariman* ...308

### BOOK REVIEW

6. Scrutinizing RTAs: A Comparative Review of David Gantz, *Regional Trade Agreements: Law, Policy and Practice* (Durham: Carolina Academic Press, 2009)  
*Raj Bhala, Matt Odom and Ben Sharp* ...319

Nikolaos Lavranos, *The Brazilian Tyres Case: Trade Supersedes Health*  
1(2) TRADE L. & DEV. 231 (2009)

### THE BRAZILIAN TYRES CASE: TRADE SUPERSEDES HEALTH

NIKOLAOS LAVRANOS\*

*The recent WTO Appellate Body decision in Brazil – Retreaded Tyres raises several interesting institutional and substantive issues. Institutionally, it starkly illustrates the inherent tension and potential for conflict that exists between regional dispute settlement systems and the WTO dispute settlement mechanism. In showing remarkably little deference towards the earlier decision of the MERCOSUR Arbitral Tribunal on the same issue, the Appellate Body essentially espouses a regime of supremacy – of WTO law over regional dispute settlement bodies, and of jurisprudence generated by WTO appellate bodies over jurisprudence generated by WTO panels. This attitude appears to be unsustainable in the light of the increasing proliferation of international courts and tribunals and the inevitable consequence of disputes being adjudicated by different courts and tribunals at various levels. Substantively, the dispute is a prime example of the difficulties of balancing non-trade interests and trade interests, with the latter prevailing. However, the Appellate Body’s narrow application of Article XX of GATT leaves WTO members such as Brazil insufficient room to address legitimate, urgent environmental and health problems through restrictions on trade.*

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## TABLE OF CONTENTS

- I. INTRODUCTION
- II. FACTUAL BACKGROUND
  - A. *The Reasons for Brazil's Action*
  - B. *National Legislation at Issue*
- III. THE MERCOSUR DISPUTE
  - A. *MERCOSUR Explained*
    - 1. Protocol of Ouro Preto
    - 2. Protocol of Brasilia
    - 3. Protocol of Olivos
  - B. *MERCOSUR Ruling*
    - 1. Uruguay's Submissions
    - 2. Brazil's Submissions
    - 3. The MERCOSUR *ad hoc* Arbitral Tribunal Ruling
- IV. THE WTO DISPUTE
  - A. *WTO Panel Report*
    - 1. Article XX of GATT
    - 2. MERCOSUR – WTO Dispute Settlement Systems
  - B. *WTO Appellate Body Report*
    - 1. Article XX, GATT 1994
    - 2. MERCOSUR-WTO Dispute Settlement Systems
- V. COMMENTARY
  - A. *Substantive Rights and Obligations: Article XX GATT*
    - 1. Scope of Article XX, GATT
    - 2. Chapeau of Article XX, GATT
    - 3. Interim Conclusion: Trade Supersedes Health
  - B. *Institutional Power Struggle: WTO and MERCOSUR Dispute Settlement Systems*
    - 1. External Effect: Supremacy of WTO Over RTA
    - 2. Internal Effect: *Stare decisis* and the Relationship Between the Appellate Body and the Panel
- VI. CONCLUSION

## I. INTRODUCTION

The topic of competing jurisdictions amongst different courts and tribunals and its eventual fragmentation of international law is one that continues to attract academic research and heated debate.<sup>1</sup> This contribution will analyse a case involving necessary legislative action taken by Brazil in order to protect its

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<sup>1</sup> See generally, Nikolaos Lavranos, *The Mox Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?*, 19 LEIDEN J. INT'L L. 223 (2006); Cesare Romano, *The Proliferation of International Judicial Bodies: the Pieces of the Puzzle*, 31 NYU J. INT'L L. & POLITICS 709 (1999); YUVAL SHANY, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS (2007); YUVAL SHANY, THE COMPETING JURISDICTION OF INTERNATIONAL COURTS AND TRIBUNALS (2003).

population's health and its fragile environment, irrespective of its free trade obligations towards the Southern Common Market (MERCOSUR) and World Trade Organization (WTO). The consequences of Brazil's actions triggered two independent dispute settlement proceedings at each of the international organisations involved. In the first case, Uruguay sought the instigation of proceedings against Brazil under the auspices of the MERCOSUR.<sup>2</sup> The second case against Brazil was brought by the European Communities (EC) in the WTO.<sup>3</sup> Both cases, though concerning the same measure, were independently filed before the dispute settlement bodies of regional and global trading systems. This set of events serves as a recent and concrete illustration of the substantive and potential institutional tension between Regional Trade Agreements and a Multilateral Trade Agreement, and the collateral damage to a common member's best interest.

The following work focuses on two main issues. First, how trade and non-trade interests were balanced against each other by the MERCOSUR and WTO adjudicative bodies and second, the institutional implications of the impact of the MERCOSUR ruling on the WTO proceedings and the interaction between the two different dispute settlement bodies. In order to set the tone of the analysis, the first part lays out a background of the disputes. The second briefly delves into the MERCOSUR and its *ad hoc* Arbitral Tribunal's decision while the third offers a summary of the WTO Panel and Appellate Body reports. Finally, the fourth part contains a commentary and concluding remarks.

## II. FACTUAL BACKGROUND

The following section outlines the causative factors and controversial provisions of the legislation at the heart of the MERCOSUR and WTO disputes.

### A. *The Reasons for Brazil's Action*

One of the most serious and common diseases in Brazil is the dengue fever. It is transmitted by a certain species of mosquito (*Aedes aegypti*), which is found in tropical and subtropical countries. It breeds on stagnant water, found in among other places the 100 million waste tyres scattered throughout the country.<sup>4</sup> There is

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<sup>2</sup> MERCOSUR *ad hoc* Arbitral Tribunal Award, *Import Prohibition of Remoulded Tyres from Uruguay (Uruguay v. Brazil)*, (Jan. 9, 2002) (hereinafter *Uruguay v. Brazil* MERCOSUR Tribunal Award).

<sup>3</sup> Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, (June 12, 2007) (hereinafter *Brazil – Retreaded Tyres* Panel Report); Appellate Body Report, *Brazil – Retreaded Tyres*, WT/DS332/AB/R (adopted Dec. 17, 2007) (hereinafter *Brazil – Retreaded Tyres* Appellate Body Report).

<sup>4</sup> This, at times incomprehensible problem of waste tyres dispersed around the country, is historic and one which the Brazilian authorities struggle to combat.

no specific treatment for the dengue fever or vaccine available to prevent it, rendering the disease fatal.

The dengue, a problem that has affected Brazil since the 19<sup>th</sup> century, is believed to have originated in the State of Rio de Janeiro. The last three national outbreaks were in 1986, 1991 and 2001 and during that period more than two million cases were reported.<sup>5</sup> Since 2002 the State of Rio de Janeiro has been particularly and tragically affected by the outbreak, with other States such as Mato Grosso do Sul, Paraná, São Paulo and Pernambuco following in its footsteps last year. During the first quarter of 2008, 120,570 cases of dengue had already been reported by the Brazilian health authorities, with 48 deaths confirmed. However, the number of infected and dead is believed to be much higher because many cases go unreported, especially in small rural areas. The World Health Organisation (WHO) acknowledges that the dengue has in recent decades become a “major international public health concern”. Approximately 2.5 billion people, *i.e.* two thirds of the world’s population, are now at risk of dengue, with the possibility of 50 million infections worldwide each year. Needless to say, this is a problem particularly affecting developing countries such as Brazil.

Following this continuous health crisis, Brazil’s legislative and executive branches endeavoured to implement as many combative measures as possible.

### B. National Legislation at Issue

The government therefore found it necessary, as long ago as 1991, to dramatically curb the import of breeding grounds for the *Aedes* mosquito, the most popular and widely spread of these being used tyres. Retreaded tyres were also, albeit inexplicitly and controversially, included in this import ban until 2000 when the law was consolidated for clarity. After this consolidation, Brazil’s legislation came under scrutiny not only in its domestic courts but also in the MERCOSUR and WTO dispute settlement bodies.<sup>6</sup>

In fact, Brazil does not have a single overall trade law, adopting instead a large number of laws, provisional measures, decrees and resolutions which govern foreign trade. This body of legislation is amended on a regular basis, including through the use of provisional measures issued by the President and regulations through the use of ministerial acts (“Portarias”).<sup>7</sup> In 1991, Brazil adopted Portaria

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<sup>5</sup> Luis Figueiredo, *Dengue in Brazil: Past, Present and Future Perspective*, 27 DENGUE BULL. 25, 25-33 (2003).

<sup>6</sup> *Brazil – Retreaded Tyres* Panel Report, *supra* note 3, at para.4 *et seq.*

<sup>7</sup> WTO Secretariat, *Trade Policy Review Brazil – Report by the Secretariat*, 4<sup>th</sup> TRADE POLICY REVIEW OF BRAZIL, WT/TPR/S/140 (2004) (hereinafter 2004 Trade Policy Review of Brazil), at 21.

DECEX 8/1991,<sup>8</sup> the first piece of legislation prohibiting the importation of used tyres. As previously stated, retreaded tyres often non-expressly fell into this category.<sup>9</sup> In 1996, Brazil enacted Resolução CONAMA 23/1996<sup>10</sup> in order to reduce undisposed tyre waste. This resolution established that inert waste, with the exception of used tyres, was free from import restrictions.<sup>11</sup>

In 2000, Brazil explicitly banned the importation of retreaded (and used) tyres into its territory by virtue of Portaria SECEX 8/2000<sup>12</sup>. A founding member of both WTO and MERCOSUR, Brazil was subject to litigation under both Agreements.<sup>13</sup>

In August 2001, following the adoption of Portaria SECEX 8/2000, Uruguay requested the initiation of arbitral proceedings within MERCOSUR. In 2002, the MERCOSUR *ad hoc* Arbitral Tribunal decided that Brazil's ban was incompatible with a previous decision on trade restrictions<sup>14</sup> and consequently Brazil amended its legislation to comply with the tribunal's findings.

As a result of the MERCOSUR *ad hoc* Arbitral Tribunal award, Brazil enacted Portaria SECEX 2/2002, which eliminated the import ban for remoulded tyres (a particular kind of retreaded tyres) originating in other MERCOSUR countries. This exemption was incorporated into Article 40 of Portaria SECEX 14/2004,<sup>15</sup> which contains three main elements: (i) an import ban on retreaded tyres (the "import ban"); (ii) an import ban on used tyres; and (iii) an exemption from the import ban of remoulded tyres from other countries of the MERCOSUR,<sup>16</sup> referred to in the disputes discussed as the "MERCOSUR exemption".<sup>17</sup>

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<sup>8</sup> Department of Foreign Trade, Ministry of Development, Industry, and Foreign Trade, Brazil, Portaria No. 8 (May 13, 1991) (hereinafter Portaria DECEX 8/1991).

<sup>9</sup> *Brazil – Retreaded Tyres* Panel Report, *supra* note 6.

<sup>10</sup> National Environment Council of Brazil, Resolution No. 23 (Dec. 12, 1996) (hereinafter Resolução CONAMA 23/1996).

<sup>11</sup> *Brazil – Retreaded Tyres* Panel Report, *supra* note 6.

<sup>12</sup> Secretariat of Foreign Trade, Ministry of Development, Industry, and Foreign Trade, Brazil, Portaria No.8 (Sept. 25, 2000) (hereinafter Portaria SECEX 8/2000).

<sup>13</sup> Brazil has been a member of the WTO since 1 January 1995, when the WTO was established. Brazil joined MERCOSUR at its establishment on 26 March 1991.

<sup>14</sup> *Uruguay v. Brazil* MERCOSUR Tribunal Award, *supra* note 2.

<sup>15</sup> Secretariat of Foreign Trade, Ministry of Development, Industry, and Foreign Trade, Brazil, Portaria No.14 (Nov. 17, 2004) (hereinafter Portaria SECEX 14/2004).

<sup>16</sup> Portaria SECEX 14/2004, *id.* at art.40; Article 40 was later replaced by Article 41 of Portaria SECEX 35/2006, and subsequently by Article 41 of Portaria SECEX 36/2007. The text of the provision remained the same.

<sup>17</sup> *Brazil – Retreaded Tyres* Panel Report, *supra* note 6.



In this context, it must be emphasised that the MERCOSUR exemption did not form a part of previous regulations prohibiting the importation of retreaded tyres, notably Portaria SECEX 8/2000, but was introduced as a result of a ruling issued by a MERCOSUR *ad hoc* Arbitral Tribunal. Portaria SECEX 14/2004 prompted the EC to bring this dispute before the WTO as it contested Brazil's import ban and the MERCOSUR exemption.

Uruguay was, however, the first to pick on Brazil's import ban as contained in Portaria SECEX 8/2000, submitting the dispute to the jurisdiction of the MERCOSUR *ad hoc* Arbitral Tribunal.

### III. THE MERCOSUR DISPUTE

#### A. MERCOSUR Explained

The 1991 Treaty of Asunción<sup>18</sup> marked the establishment of MERCOSUR). Its founding fathers are Argentina, Brazil, Paraguay and Uruguay. Venezuela has recently joined the bloc.<sup>19</sup> Moreover, MERCOSUR counts five associate members, namely Bolivia, Chile, Colombia, Ecuador and Peru.

Although the goal of the Treaty of Asunción was to create a common market with free movement of goods, services and persons by 31 December 1994, this was not attainable within that initial time frame. Therefore, its members decided to set aside this goal for a later date, focusing instead solely on the implementation of a customs union for goods. This was the nature of the MERCOSUR when it came into force on 1 January 2005 and it remains such to date.

The MERCOSUR is also a regional trade agreement (RTA), notified in March 1992. It is currently still under examination by the WTO Committee on Regional Trade Agreements (CRTA).<sup>20</sup> MERCOSUR is also being examined by the CRTA under Article XXIV of GATT.<sup>21</sup>

The following section examines the three Protocols added to the Treaty of Asunción.

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<sup>18</sup> Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 30 I.L.M.1044 (1991) (hereinafter Treaty of Asunción).

<sup>19</sup> With the signing of the Protocol of Accession of Venezuela to MERCOSUR, in July 2006, *available at*: [http://www.mercosur.int/innovaportal/file/655/1/2006\\_PROTOCOLO\\_ES\\_AdhesionVenezuela.pdf](http://www.mercosur.int/innovaportal/file/655/1/2006_PROTOCOLO_ES_AdhesionVenezuela.pdf) (last visited 17 February, 2010).

<sup>20</sup> 2004 Trade Policy Review of Brazil, *supra* note 7, at 27, para. 58.

<sup>21</sup> *Brazil – Retreaded Tyres* Panel Report, *supra* note 3, para. 4.388.

### 1. Protocol of Ouro Preto

As for MERCOSUR's institutional framework, the Protocol of Ouro Preto,<sup>22</sup> which entered into force on 1 January 1995, added four further organs to the transitory organs provided in Article 9 of the Treaty of Asunción. Thus, as set out in Article 1 of the Protocol of Ouro Preto, MERCOSUR is composed of the Common Market Council, the Common Market Group, the MERCOSUR Trade Commission, the Joint Parliamentary Commission, the Economic-Social Consultative Forum, and the MERCOSUR Administrative Secretariat.<sup>23</sup>

The Protocol of Ouro Preto further expressly provided MERCOSUR with a legal personality under international law and a special procedure for incorporation of the decisions of MERCOSUR organs.<sup>24</sup> This special procedure stipulates that before a MERCOSUR act can enter into force, it must first be incorporated in the national law of all member States (known as the system of simultaneous implementation). This special mechanism excludes any supranational features of MERCOSUR law, such as primacy over the domestic law of member States or direct effect of MERCOSUR acts.<sup>25</sup>

Furthermore, it sets out the legal sources of the MERCOSUR, which are the Treaty of Asunción and its Protocols, agreements made in accordance with the Treaty and its Protocols, decisions of the Common Market Council, resolutions of the Common Market Group and directives of the MERCOSUR Trade Commission.<sup>26</sup>

### 2. Protocol of Brasilia

Far more important for the purposes of this discussion is the MERCOSUR dispute settlement mechanism, which was first introduced by the Protocol of Brasilia, which entered into force on April 22, 1993.<sup>27</sup>

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<sup>22</sup> Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR, Dec. 17, 1994, 34 I.L.M. 1248 (1995) (hereinafter Protocol of Ouro Preto).

<sup>23</sup> See also, Nikolaos Lavranos, *An Introduction into the Regional Economic Integration Process of the Americas*, 4 ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 145 (2001).

<sup>24</sup> Protocol of Ouro Preto, *supra* note 22, at arts. 34 and 40 respectively.

<sup>25</sup> ULRICH WEHNER, DER MERCOSUR 5 *et seq.* (1999).

<sup>26</sup> Protocol of Ouro Preto, *supra* note 22, at art. 41.

<sup>27</sup> Brasilia Protocol for the Settlement of Disputes, Dec. 17, 1991, 36 I.L.M. 691 (1991) (hereinafter Protocol of Brasilia). The later Protocol of Ouro Preto also provided for a dispute settlement mechanism, however, it entailed a longer procedure giving member States time to negotiate and exchange information. In a nutshell, the Protocol of Ouro Preto created the MERCOSUR Trade Commission, which, under Article 21, authorised to "consider the complaints presented by the National Sections of the MERCOSUR Trade

Since the dispute between Uruguay and Brazil was initiated on September 17, 2001, it was governed by the rules of the Protocol of Brasilia. The Protocol, it is to be noted, is currently no longer in use. The Protocol of Brasilia was divided into two procedures – complaints by States (Chapters I-IV) and complaints by private parties (Chapter V). The last chapter, Chapter VI, set out the final dispositions, essentially the mandatory nature of the Protocol with respect to member States and a provision noting the temporary nature of the dispute settlement mechanism which was to be replaced by a permanent mechanism at a later date.

Chapters I through IV of the Protocol of Brasilia were most relevant in the proceedings regarding the dispute between Uruguay and Brazil. The dispute settlement mechanism set out in the Protocol of Brasilia was automatic and of an expedited nature. It provided for a mere 15 days negotiation period between the parties.<sup>28</sup> If no agreement was found, the matter could be submitted to the Common Market Group for their consideration.<sup>29</sup> The parties involved would have an opportunity to make submissions to the Common Market Group, whose members would have 30 days to make recommendations to the parties involved in order to settle the dispute.<sup>30</sup>

Failing satisfactory recommendations being made to resolve the dispute, any of the parties could make known to the Administrative Secretariat its wish to rely on arbitral proceedings.<sup>31</sup> The jurisdiction of the Arbitral Tribunal under the Protocol was obligatory, *ipso facto* and without the need for any special agreement. Its jurisdiction would be called upon on a case by case basis.<sup>32</sup> Once a decision was made by the three arbitrators forming the tribunal, it would be final and binding. No appeals were allowed under the Protocol.<sup>33</sup> A party was only allowed to clarify the award within 15 days of it being rendered.<sup>34</sup>

This was, in essence, the mechanism under which Uruguay and Brazil resolved their dispute between September 17, 2001 and January 9, 2002 – within less than 4 months.

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Commission originating with the State Parties or private parties...when falling under its jurisdiction". For a detailed analysis of the procedures of dispute settlement in the Protocols of Brasilia and Ouro Preto, *see further*, Thomas O'Keefe, *Dispute Resolution in Mercosur*, 3 J. WORLD INVESTMENT 507 (2002).

<sup>28</sup> Protocol of Brasilia, *supra* note 27, at art. 3.2.

<sup>29</sup> *Id.* at art. 4.1.

<sup>30</sup> *Id.* at art. 4.2.

<sup>31</sup> *Id.* at art. 7.1.

<sup>32</sup> *Id.* at art. 8.

<sup>33</sup> *Id.* at art. 21.

<sup>34</sup> *Id.* at art. 22.

### 3. Protocol of Olivos

The Protocol of Olivos<sup>35</sup> brought some changes to MERCOSUR's dispute settlement mechanism by replacing the Protocol of Brasilia on January 1, 2004. The rules stated above with respect to negotiation, including its 15 days time limitation, the 30 day involvement of the Common Market Group and the notification thereafter to the Administrative Secretariat for the formation of an Arbitral Tribunal remain pretty much the same as in the Protocol of Brasilia.<sup>36</sup> What the Protocol of Olivos primarily changed is that involvement of the Common Market Group is now no longer mandatory, parties to the dispute now have a choice of forum – either the WTO or MERCOSUR itself – and a review procedure, different from that of the temporary Protocol of Brasilia, is to be followed. Due to this change, MERCOSUR has a Permanent Review Court of 5 arbitrators.<sup>37</sup>

#### B. MERCOSUR Ruling

The MERCOSUR *ad hoc* Arbitral Tribunal was constituted on September 17, 2001 to adjudicate the dispute brought by Uruguay against Brazilian legislation Portaria SECEX 8/2000. As explained above, this piece of legislation expressly provided for an import ban on used and retreaded tyres, a category which included remoulded tyres. Uruguay and Paraguay are the only MERCOSUR countries that export remoulded tyres to Brazil though their production capacity is fairly limited.

The parties' main submissions revolved around whether Brazil's legislation was a *new* restriction to trade prohibited by the MERCOSUR and whether Brazil was in any event estopped from imposing a ban because of its previous conduct.

#### 1. Uruguay's Submissions

In essence, Uruguay's case was that between the entry into force of Portaria DECEX 8/1991, which imposed an import ban on used tyres, and Portaria SECEX 8/2000, its remoulded tyre industry was able to export its products to Brazil without any obstruction. It claimed that Brazil was therefore estopped from banning its regular export of remoulded tyres.

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<sup>35</sup> Olivos Protocol for the Settlement of Disputes in MERCOSUR, Feb. 18. 2002, 42 I.L.M. 2 (2002) (hereinafter Protocol of Olivos).

<sup>36</sup> *Id.*, particularly Chapters IV, V and VI.

<sup>37</sup> The Permanent Review Court has been in existence since January 1, 2004. *See further*, Daniel Pisctiello and Jan Schmidt, *In the Footsteps of the ECJ: First Decision of the Permanent MERCOSUR Tribunal*, 34(3) LEG. ISSUES ECON. INTEGRATION 283 (2007); Raul Vinuesa, *The MERCOSUR Settlement of Disputes System*, 5(1) L. & PRACT. INT'L CTS. & TRIBS. J. 77 (2006).

It further claimed that Portaria SECEX 8/2000 was incompatible with a decision of the MERCOSUR's Common Market Council dated June 29, 2000, which came into effect a few months prior to Brazil's legislation. The decision of the Common Market Council, known as Decision No. 22/2000,<sup>38</sup> obliges MERCOSUR member States not to introduce new *inter se* restrictions of commerce. In other words, MERCOSUR member States are prohibited from bringing in new measures that would restrict trade between the bloc after that date. It also claimed that Brazil was in breach of Article 1 of the Treaty of Asunción, which provides for free movement of goods within member States.

Uruguay further argued that Brazil's legislation was contrary to the spirit of the Vienna Convention on the Law of the Treaties<sup>39</sup>, especially with respect to the principles of *pacta sunt servanda* and good faith.<sup>40</sup>

## 2. Brazil's Submissions

Brazil defended its position in the arbitral proceedings by stating that contrary to Uruguay's assertion, Portaria SECEX 8/2000 did not introduce new *inter se* restrictions of commerce. What it did was simply interpret Portaria DECEX 8/1991. According to Brazil, the latter legislation prohibited the import of used tyres, a category in which retreaded (and consequently remoulded tyres) were included. In Brazil's view, a tyre can only be new or used. A remoulded tyre, in particular, is only composed of 30 per cent new material and has a 30 to 60 per cent lower performance capacity than a new tyre. It cannot, therefore, be considered a new tyre for the purpose of classification. Furthermore, there was a practical reason for clarifying the 1991 Regulation, because remoulded tyres were frequently being retained at customs because of the lack of certainty regarding their classification.

Brazil also argued that Resolution 109/94 of the Common Market Group,<sup>41</sup> passed on February 15, 2004, provided that the manner in which used goods were to be dealt with was to be left to the individual national legislation of member States, thus excluding it from the scope of MERCOSUR law. Consequently, expressly putting retreaded and remoulded tyres together under the used tyre

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<sup>38</sup> MERCOSUR Common Market Council, °*Relanzamiento del MERCOSUR, Acceso a Mercados*, MERCOSUR/CMC/DEC. No. 22/00 (June 29, 2000) (hereinafter Decision No. 22/2000).

<sup>39</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679 (1969) (hereinafter VCLT).

<sup>40</sup> *Id.* at art. 26, which provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith".

<sup>41</sup> MERCOSUR Common Market Group, *Importação de Bens Usados*, MERCOSUL/GMC/RES No. 109/94 (Feb. 15, 2004) (hereinafter Resolution 109/94).

category as Brazil did in Portaria SECEX 8/2000 could not be termed arbitrary. Rather, the question was simply one of technical classification.

Brazil also objected to Uruguay's claim under the principle of estoppel, contending that Portaria DECEX 8/1991 was never meant to allow the importation of retreaded tyres into Brazil. Consequently, Uruguay could not now claim that Brazil had changed its conduct to Uruguay's detriment. Brazil added that the principle of estoppel cannot be relied upon in cases of fraud, which is (through measures such as the erroneous filing of forms) how so many retreaded tyres from Uruguay managed to get through Brazil's borders. Accordingly, Brazil submitted that Portaria SECEX 8/2000 is compatible with its rights and obligations under the MERCOSUR.

### 3. The MERCOSUR *ad hoc* Arbitral Tribunal Ruling

The *ad hoc* Arbitral Tribunal began its ruling by stating that the fundamental principles of MERCOSUR are proportionality, sovereign limitation, reasonableness and commercial predictability.

It found that there had been an important, continuous and growing commercial influx of remoulded tyres from Uruguay to Brazil in the 1990s, during the time Portaria DECEX 8/1991 was in effect. The Tribunal concluded, following perusal of the circumstances and several documents from different organs and authorities of the Brazilian government, that Portaria SECEX 8/2000 did modify the import ban to include retreaded tyres and did not merely clarify DECEX 8/1991. This modification affected the practice of State organs, as a result of which remoulded tyres from Uruguay were no longer given access to the Brazilian market as guaranteed by MERCOSUR.

The Tribunal also found that although Resolution 109/94 of the Common Market Group grants member States independence to legislate on the import of used goods, one must take into account Decision No. 22/2000, also of the Common Market Group. The latter legislation, and in particular the date it came into force, is crucial in the assessment of Portaria SECEX 8/2000. It prohibits new *inter se* restrictions of trade and came into force prior to Portaria SECEX 8/2000. Therefore Brazil could not introduce new restrictions which affected the trade of remoulded tyres.

Finally, the Tribunal found that irrespective of incompatibility with Decision No. 22/2000, Portaria SECEX 8/2000 was contrary to the principle of estoppel, since Uruguay's uninterrupted export of remoulded tyres while Portaria DECEX 8/1991 was in force was cut short by the 2000 legislation. In the Tribunal's view,

such a sudden change in attitude goes against the spirit of integration of MERCOSUR.<sup>42</sup>

It is clear, therefore, that the case before the MERCOSUR *ad hoc* Arbitral Tribunal was purely interpretative and procedural in nature. It was not a case where Brazil conceded its legislation was flawed but defensible – it was simply a matter of analysis and interpretation of the scope of Portaria SECEX 8/2000.

There was no right of appeal at the time of this judgement as the Protocol of Olivos was still being drafted. Consequently, Brazil had no choice but to pass new legislation to include the MERCOSUR exemption.

#### IV. THE WTO DISPUTE

Noticing the presumed incompatibility of Brazil's measures with the rules of international trade law, the EC made a request for consultations with Brazil in June 2005 on its imposition of a ban on retreaded tyres. Failing a mutually convenient agreement, the matter progressed to the establishment of a WTO Panel and thereafter to an appeal by the EC to the WTO Appellate Body. In order to more clearly separate the issues of the dispute, the analysis will focus first on the Panel and Appellate Body's findings regarding the main substantive issue, Article XX of the General Agreement on Tariffs and Trade, 1994<sup>43</sup>. Second, the section will examine the institutional issue highlighted by the dispute, and more specifically, the relationships between the MERCOSUR and WTO dispute settlement systems and also between the Panel and Appellate Body.

##### A. *WTO Panel Report*

Although the EC's main grievance was Portaria SECEX 14/2004, which accommodated the MERCOSUR exemption, it also took issue with the other Brazilian measures discussed previously in this work. It should be noted that the EC was not contesting Brazil's ban on used tyres; the product at the heart of the dispute was retreaded tyres.

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<sup>42</sup> According to author Steen Christensen, the MERCOSUR is "seen as the column of South American Integration". See further, Steen Christensen, *The Influence of Nationalism in MERCOSUR and in South America – Can the Regional Integration Project Survive?*, 50(1) BRAZ. J. INT'L POL'Y (2007).

<sup>43</sup> General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay round, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) (hereinafter GATT).

## 1. Article XX of GATT

Article XX provides general exceptions to GATT obligations.<sup>44</sup> Brazil based its defence on Article XX(b) of GATT, which provides a specific exception for the “protection of human, animal or plant life or health”. It did not, therefore, contest the EC on its claim under Article XI (general elimination of quantitative restrictions), choosing instead to justify its trade restrictive measures as being in accordance with the exceptions in the GATT. With respect to the MERCOSUR exemption, Brazil argued that it was justified by Articles XXIV as the MERCOSUR is a customs union and also by Article XX (d) as the exemption itself is not inconsistent with the GATT.<sup>45</sup>

The Panel found that Brazil was in breach of Article XI:1 with respect to its import ban and the fines under Presidential Decree 3.919.<sup>46</sup> It further found that Brazil’s measures could not be justified, neither under Article XX(b) nor under XX(d).

The measure itself fulfilled the requirements of the exceptions. The Panel reached the conclusion that Brazil demonstrated that the alternative measures identified by the EC (*i.e.* land filling, stockpiling, incineration and recycling) did not constitute reasonably available alternatives to the import ban on retreaded tyres that would achieve Brazil’s objective of reducing the accumulation of waste tyres on its territory and therefore that Brazil’s import ban can be considered “necessary” within the meaning of Article XX (b).

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<sup>44</sup> See further JOCHEM WIERS, *TRADE AND ENVIRONMENT IN THE EC AND THE WTO – A LEGAL ANALYSIS* 178 (2002) (hereinafter WIERS).

<sup>45</sup> GATT, *supra* note 43, at art. XX(d), which provides for an exception when a measure is “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement”.

<sup>46</sup> On September 14, 2001, through Presidential Decree 3.919, Brazil amended Decree 3.179 of September 21, 1999, which provides for the specific sanctions applicable to conduct and activities harmful to the environment, and other provisions. The amendment introduced art. 47-A, which subjects the importation as well as the marketing, transportation, storage, keeping or warehousing of imported used and retreaded tyres to a fine of R\$400/unit.

Art. 1 of Presidential Decree 3.919 provides:

Art. 1. The following article is added to Decree 3.179 of September 21, 1999:

Article 47-A. Importing used or retreaded tyres:

Fine of R\$ 400.00 (four hundred reais) per unit.

Sole paragraph: The same penalty shall apply to whosoever trades, transports, stores, keeps or maintains in a depot a used or retreaded tyre imported under such conditions. (NR)

See *Brazil – Retreaded Tyres* Panel Report, *supra* note 3, at paras. 4-5.



However, Brazil's defence under Article XX failed at the chapeau level.<sup>47</sup> The main cause was the series of internal court injunctions obtained by Brazilian retreading companies that were eager to obtain cheaper and better quality waste tyres from Europe. As a result, the Panel found that these injunctions, in particular the import volume allowed, had significantly undermined the objective of the import ban and were thus a means of unjustifiable discrimination and a disguised restriction on international trade.<sup>48</sup> It was, however, of the opinion that the injunctions were not a result of "capricious" or "random" action by the Brazilian authorities and consequently the import ban was not being applied in a manner constituting arbitrary discrimination.<sup>49</sup>

Having adjudicated on the above, the Panel decided to exercise judicial economy as to whether the MERCOSUR exemption was consistent with Articles I:1 and XIII:1 as suggested by the EC. The Panel also did not rule on Brazil's defence to its MERCOSUR exemption under Articles XXIV and XX (d). In reaching this conclusion, the Panel took into account the volume of imports. In its view, the objective of the import ban had not been significantly undermined by the volume of imports from MERCOSUR members.

## 2. MERCOSUR – WTO Dispute Settlement Systems

The Panel was also of the view that the MERCOSUR exemption was not motivated by "capricious or unpredictable reasons".<sup>50</sup> The MERCOSUR exemption merely resulted from a decision by the Tribunal adjudicating a dispute amongst MERCOSUR members on the basis of MERCOSUR law, the results of which were legally binding on Brazil. The Panel then went further in noting that Article XXIV provides for preferential treatment to members of an agreement intended to liberalise trade such as a customs union, to the detriment of other countries. In its view, even though it did not pronounce the MERCOSUR as legally qualifying as a customs union in accordance with the GATT, discrimination between members of the MERCOSUR and members of the WTO under the umbrella of Article XXIV is not *a priori* unreasonable.<sup>51</sup>

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<sup>47</sup> GATT, *supra* note 43, at art. XX. The chapeau of Article XX reads as follows: 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 condition prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a)-(j).

<sup>48</sup> *Brazil – Retreaded Tyres* Panel Report, *supra* note 3, at paras. 7.306 & 7.349.

<sup>49</sup> *Id.* at para. 7.294.

<sup>50</sup> *Id.* at para. 7.272.

<sup>51</sup> *Id.* at paras 7.273 & 7.274.

Finally, the Panel explicitly stated that it was not in a position to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings.<sup>52</sup> Indeed, the Panel considered it inappropriate to engage in such an exercise.<sup>53</sup> Moreover, the Panel underlined that while the particular litigation strategy followed in that instance by Brazil turned out to be unsuccessful, it was not clear that a different strategy would necessarily have led to a different outcome.<sup>54</sup>

In sum, although Brazil failed in its Article XX defence and hence substantially lost the case, the Panel did not make any negative findings against the MERCOSUR exemption, which was the main motivation for the EC challenge. To the contrary, it was the only measure which complied with the chapeau of Article XX. Had Brazil had a better grip on enforcement of the import ban, it may well have been off the hook.<sup>55</sup>

## B. *WTO Appellate Body Report*

### 1. Article XX, GATT 1994

Like the Panel, the Appellate Body found that the import ban was necessary to achieve Brazil's objective in accordance with Article XX(b) GATT. It also sided with the Panel in finding that Brazil's decision to act in order to comply with the MERCOSUR ruling could not be viewed as "capricious" or "random".<sup>56</sup> However, it added that although discrimination can result from a rational decision, it can still be arbitrary or unjustifiable if it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under Article XX GATT. In the Appellate Body's view the MERCOSUR *ad hoc* Arbitral Tribunal's decision bore no relationship to the objective to be achieved by the import ban and actually went against it.<sup>57</sup> The Appellate Body further reiterated that the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX.<sup>58</sup> It therefore concluded that the MERCOSUR exemption had resulted in the import ban being applied in a manner that

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<sup>52</sup> *Id.* at para. 7.276.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Geert van Calster, *The World Trade Organisation Panel Report on Brazil Tyres – Advanced Waste Management Theory Entering the Organisation?*, 16 EUR. ENVTL. L. R. 304, 305 (2007).

<sup>56</sup> *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 3, at para. 232.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at para. 224. *See further*, Appellate Body Report, *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted May 20, 1996) (hereinafter *US – Gasoline*), 21.

constituted arbitrary or unjustifiable discrimination.<sup>59</sup> The Appellate Body further found that the Panel had erred in considering the significance of the import volume when deciding whether the discrimination would be unjustifiable.<sup>60</sup>

In the same light and consequently, the Appellate Body also found, contrary to the Panel, that the MERCOSUR exemption was applied in a manner that constituted a disguised restriction on international trade.<sup>61</sup>

The Appellate Body also shared the Panel's view that the imports of waste tyres under the court injunctions, obtained by Brazilian retreading companies, were being applied in a manner that constitute a means of unjustifiable discrimination and a disguised restriction on international trade under the chapeau of Article XX. But it rejected the Panel's consideration of the significance of the import volume in coming to this conclusion. It also rejected the Panel's finding that the imports of waste tyres under the court injunctions were not applied in a manner that would constitute arbitrary discrimination.<sup>62</sup>

More particularly, in finding that the imports of waste tyres by way of the court injunctions had resulted in the import ban being applied in a manner that constituted arbitrary or unjustifiable discrimination, the Appellate Body observed that Brazil's explanation that its administrative authorities had to comply with the court orders bore no relationship to the objective of the import ban.<sup>63</sup> The same reasoning was used by the Appellate Body in finding that the imports of waste tyres through court injunctions had resulted in the import ban being applied in a manner that constitutes a disguised restriction on international trade.<sup>64</sup>

## 2. MERCOSUR-WTO Dispute Settlement Systems

The Appellate Body then turned to Brazil's defence before the MERCOSUR Arbitral Tribunal. It noted that 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.<sup>65</sup> Brazil, however, decided not to do so. The

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<sup>59</sup> *US – Gasoline Id.* at para. 228.

<sup>60</sup> *Id.* at para. 233.

<sup>61</sup> *Id.* at para. 239.

<sup>62</sup> *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 3, at para. 242.

<sup>63</sup> *Id.* at para. 246.

<sup>64</sup> *Id.* at para. 251.

<sup>65</sup> Instrument Establishing the Latin American Integration Association (ALADI), Aug. 12, 1980, 20 I.L.M. 672 (1980) (hereinafter Treaty of Montevideo), at art. 50(d), which reads as follows: “No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding:[...]d. Protection of human, animal and plant life and health.”

Appellate Body went further than the Panel by explicitly stating that it would not be appropriate for it to second-guess Brazil's decision not to invoke Article 50(d), which serves a function similar to that of Article XX(b) of the GATT 1994. The Panel had chosen not to discuss Article 50(d) of the Treaty of Montevideo, even though it had been raised by the EC;<sup>66</sup> it simply stated that Brazil's litigation strategy did not seem "unreasonable or absurd".<sup>67</sup> The Appellate Body went on to discuss the defence strategy of Brazil before the MERCOSUR Arbitral Tribunal. A significant difference can therefore be noted in the level of respect and deference given to the MERCOSUR Arbitral Tribunal by the Panel and Appellate Body.<sup>68</sup>

However, the Appellate Body inferred from this analysis that Article 50(d) of the Treaty of Montevideo, 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.<sup>69</sup>

The Appellate Body therefore reversed the Panel's application of the chapeau of Article XX of the GATT by rejecting the Panel's quantitative analysis and instead looking into the cause of the discrimination or the rationale put forward to explain its existence.<sup>70</sup> By doing so, it found that the MERCOSUR exemption did infringe the chapeau.

## V. COMMENTARY

The commentary will be divided in two parts. The first part will analyse the substantive element of the dispute, *i.e.* the defence under Article XX of the GATT. The second part will explore the institutional power struggle between the global WTO and an RTA such as MERCOSUR, from, in particular, the point of view of their dispute settlement systems. The second part will also examine the relationship between the Panel and the Appellate Body.

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<sup>66</sup> *Brazil – Retreaded Tyres* Panel Report, *supra* note 3, at para. 7.275.

<sup>67</sup> *Id.* at para. 7.276.

<sup>68</sup> Nikolaos Lavranos, *The Solange Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals*, 30 LOY. L.A. INT'L & COMP. L. R. 275 (2008) (hereinafter Lavranos).

<sup>69</sup> *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 3, at para 234.

<sup>70</sup> See further, Geert van Calster, *Faites Vos Jeux – Regulatory Autonomy and the World Trade Organisation after Brazil Tyres*, 20 J. ENV'T'L L. 121 (2008) (hereinafter van Calster).

*A. Substantive Rights and Obligations: Article XX GATT*

Article XX may be invoked to justify a measure that would otherwise be incompatible with GATT obligations, such as Most-Favoured Nation Treatment or National Treatment, or the prohibition on quantitative restrictions.<sup>71</sup> It thus establishes an obligation to respect GATT principles when pursuing non-trade goals.<sup>72</sup>

The analysis of a measure under Article XX is two-fold.<sup>73</sup> The first step is to examine whether the measure falls under one of the ten exceptions listed under (a)-(j) of the Article. This is followed by an analysis as to whether the measure at issue satisfies the requirements of the chapeau of Article XX. In other words, the non-trade goals of a member State have to a certain extent comply with the trade goals of the WTO.

Further, such as Brazil did in this case, WTO members are free to choose their own level of protection with regards to measures to protect public health or the environment.<sup>74</sup>

1. Scope of Article XX, GATT

Brazil used Article XX (b) GATT as a defence in the WTO proceedings. As mentioned previously, Article XX (b) relates to measures which are “necessary to protect human, animal or plant life or health”. The party invoking Article XX(b) has to establish two elements (followed by the question of compliance with the chapeau of Article XX): (i) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or health; and (ii) that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objectives.<sup>75</sup>

The first element is fairly easy to fulfil. This is because although the Panel and Appellate Body will check the necessity of the measure taken to achieve that goal, they will not check the necessity of a measure’s environmental policy goal as such. By way of examples, in *Tuna – Dolphin II*,<sup>76</sup> the Panel accepted that a policy to protect the life and health of dolphins pursued by the US within its jurisdiction

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<sup>71</sup> See generally, WIERS, *supra* note 44.

<sup>72</sup> *Id.* at 180.

<sup>73</sup> *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 3, at para. 139.

<sup>74</sup> *Id.* at para 140. See also, *US – Gasoline* Appellate Body Report, *supra* note 58, at para. 33.

<sup>75</sup> *US – Gasoline* Appellate Body Report, *supra* note 58, at para 6.20.

<sup>76</sup> Panel Report, *US – Restrictions on Imports of Tuna II*, DS29/R, 33 I.L.M. 839 (June 16, 1994; unadopted) (hereinafter *Tuna – Dolphin II*).

over its nationals and vessels fell within the range of policies covered by Article XX (b). The Panel also accepted, in *Thailand – Cigarettes*,<sup>77</sup> that smoking constitutes a serious risk to human health and that measures designed to reduce the consumption of cigarettes fell within the scope of Article XX (b). In the *US – Gasoline*, the Panel concurred with the parties that a policy to reduce air pollution resulting from the consumption of gasoline was within the range of policies covered by Article XX (b).<sup>78</sup> Finally, in *EC – Asbestos*,<sup>79</sup> both the Panel and the Appellate Body accepted that the French policy of prohibiting “chrysotile asbestos” fell within Article XX (b).<sup>80</sup>

The second element, necessity, is harder to determine. The Panel neatly summarised the necessity test in its report by looking into previous Appellate Body cases.<sup>81</sup> It stated that the necessity of a measure should be determined through “a process of weighing and balancing a series of factors”, which usually includes the assessment of three factors: (i) the relative importance of the interests or values furthered by the challenged measure; (ii) the contribution of the measure to the realization of the end pursued; and (iii) the restrictive impact of the measure on international commerce. This should be followed up by a comparison between the challenged measure and possible existent WTO – consistent or less WTO – inconsistent alternatives.<sup>82</sup> This examination process was upheld by the Appellate Body as it concurred with the Panel’s conclusion that Brazil’s import ban was “necessary to protect human, animal or plant life or health”.<sup>83</sup>

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<sup>77</sup> Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-37S200 (adopted Nov. 7, 1990) (hereinafter *Thailand – Cigarettes*).

<sup>78</sup> *US – Gasoline* Panel Report, *supra* note 58, at paras. 6.20 *et seq.*

<sup>79</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*, WT/DS135/AB/R (adopted Apr. 5, 2001) (hereinafter *EC – Asbestos* Appellate Body Report).

<sup>80</sup> WIERS, *supra* note 46, 184 – 185. See further, Jochem Wiers and James Mathis, *The Report of the Appellate Body in the Asbestos Dispute*, 28 LEGAL ISSUES ECON. INTEGRATION 211 (2001).

<sup>81</sup> *EC – Asbestos* Appellate Body Report, *supra* note 79; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS169/AB/R (adopted Jan. 10, 2001); Appellate Body Report, *US – Measures Affecting the Cross – Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted Apr. 20, 2005); and Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (adopted May 19, 2005).

<sup>82</sup> *Brazil – Retreaded Tyres* Panel Report, *supra* note 3, at para 7.104.

<sup>83</sup> *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 3, at paras. 182 and 183; see further, a very interesting albeit controversial article on the necessity test, Donald Regan, *The Meaning of ‘Necessary’ in GATT Article XX and GATS Article XIV: the Myth of Cost-Benefit Balancing*, 6(3) WORLD TRADE REV. 347 (2007).

In recapitulating the necessity test under Article XX (b) of the GATT, the Appellate Body stated that:

The fundamental principle is the right that WTO members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX (b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of end 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 interests or the values underlying the objective pursued by it. As 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, we consider that this contribution is sufficient to conclude that the import ban is necessary, in the absence of reasonable available alternatives.<sup>84</sup> (emphasis supplied)

The Appellate Body refers to weighing and balancing throughout its report, albeit with an inconclusive final tally. For instance, the material contribution reference under Article XX(b) GATT, referred to above, would seem to indicate a rather strict approach, whilst in actual fact the Appellate Body let the Panel get away with rather more theoretical musings on the impact of the Brazilian measures.<sup>85</sup>

## 2. Chapeau of Article XX, GATT

Once the import ban was satisfied as meeting the requirements under Article XX(b) of GATT, its application had to undergo the scrutiny of the chapeau of Article XX. This is when it becomes clear that this is an archetypal trade and health case, like in other disputes such as *US – Gasoline* and *EC – Asbestos*. On one hand there is irrefutable evidence of the existence of risks to human, animal and plant life and health posed by mosquito-borne diseases and tyre fires.<sup>86</sup> On the other hand, WTO trade requirements limit the right of WTO members to determine the scope and type of measures they are allowed to adopt in order to protect their population's health, in particular.

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<sup>84</sup> *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 3, at para 210.

<sup>85</sup> van Calster, *supra* note 70, at 133.

<sup>86</sup> *Brazil – Retreaded Tyres* Panel Report, *supra* note 3, at para. 7.108.

In *Brazil – Retreaded Tyres*, the Appellate Body asserted for the first time that the policy objective of the measure at issue should be considered in the chapeau analysis.<sup>87</sup> As previously explained, the Appellate Body rejected the Panel’s quantitative analysis under Article XX on the basis that it was flawed. It therefore found that Brazil’s decision to abide by the MERCOSUR *ad hoc* Arbitral Tribunal’s award and its administrative authorities’ decision to comply with injunctive orders from its judiciary were contrary to the chapeau of Article XX. This was, according to the Appellate Body, because they bore no relationship to the legitimate objective pursued by the import ban.

The Appellate Body further reiterated that the chapeau serves the purpose of ensuring that members’ rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX and not as a means to circumvent one member’s obligations towards other WTO members.<sup>88</sup>

### 3. Interim Conclusion: Trade Supersedes Health

It is hardly in bad faith to follow a binding ruling from an RTA’s dispute settlement body or its own judiciary. Furthermore, the whole purpose of Article XX and its necessity test is to provide WTO members with some room for manoeuvre in order to protect their own non-trade interests. By fulfilling the necessity criteria it is accepted that there is a non-trade goal to be achieved, to which no alternative is available. This is even more so in the present case, where a deadly health crisis is at issue, to which both the Panel and the Appellate Body concur there is no alternative solution available other than the import ban.

It has been argued that international tribunals need to pay greater attention to the potential environmental harm that can result from trade, and to the significant welfare gains that can be derived from allowing a proliferation of different environmental standards to be adopted by different governmental authorities.<sup>89</sup> This is illustrated by the *Brazilian tyres* dispute where it was clearly demonstrated that the trade impact of the import ban was relatively small but the environmental/health risks were certain and significant.<sup>90</sup>

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<sup>87</sup> *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 3, at para. 227, where it states “the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure”. See further, Julia Ya Qin, *Managing Conflicts between Rulings of WTO and RTA Tribunals: Reflections on the Brazil-Tyres Case*, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1490035](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1490035) (hereinafter Qin).

<sup>88</sup> *Brazil – Retreaded Tyres* Appellate Body Report, *supra* note 3, at para. 215.

<sup>89</sup> WIERS, *supra* note 44.

<sup>90</sup> Fabio Morosini, *The MERCOSUR and WTO Retreaded Tyres Dispute: Rehabilitating Regulatory Competition in International Trade and Environmental Regulation*, *Society of International*



Brazil's defence under Article XX failed because its enforcement of the import ban was not watertight and hence not compliant with the chapeau of Article XX. The Appellate Body, however, did not seem to have taken Brazil's situation at face value, focusing instead on a test which diminishes Brazil's obligation to abide by other judicial bodies' rulings and thus impacting Brazil's sovereignty. It is clear from the Appellate Body's report that its main objective is to be the guardian of free trade, in opposition to Brazil's objective in this particular occasion, protecting its population's health. Regulatory priorities are after all very much in the eyes of the beholder, and not for the Panel or Appellate Body to ascertain. The WTO dispute settlement system's attempt to be a global arbiter of regulatory priorities is an awkward and potentially devastating task for it to undertake.<sup>91</sup>

In the circumstances, it has been argued that the Appellate Body has left us with a truly *Byzantine* necessity test and a chapeau analysis much less focused on due process and more on substance (but without clear indication how far Panels have to go to review substance under the chapeau).<sup>92</sup>

Therefore, despite acknowledgement of the dire health circumstances in Brazil the Appellate Body refuted the Article XX defence on the basis that the MERCOSUR exemption and the court injunctions were not in line with the objective pursued by the import ban. Consequently, by abiding with the WTO obligations imposed by the Appellate Body in this ruling, Brazil is back to becoming "the tyre dump of Europe".

### B. Institutional power struggle: WTO and MERCOSUR Dispute Settlement Systems

These WTO proceedings are also interesting at an institutional level because they offer a glimpse into the power struggle between not only the WTO and RTAs such as MERCOSUR, but also between the Panel and the Appellate Body with respect to their deference towards the RTA, each other and the principle of *stare decisis*. In other words, and more particularly regarding the dispute settlement systems of the WTO and MERCOSUR, one can clearly detect a sense of supremacy emanating from the WTO dispute settlement body with respect to its regional counterpart in MERCOSUR, while at the same time the Panel and the Appellate Body's approach is frictional.

It has been argued that there are two ways in which the WTO deals with an RTA. The first is the so – called "WTO monism" because it in essence confers

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*Economic Law (SIEL) Inaugural Conference Paper* (2008) (hereinafter Morosini), 6 available at: <http://ssrn.com/abstract=1154710> (last visited Feb. 16, 2010).

<sup>91</sup> van Calster, *supra* note 70, 132.

<sup>92</sup> *Id.*

rights to its members to form an RTA but only so far as constituting a sub-system to the WTO. In other words, WTO law is supreme and therefore an RTA must be fully in compliance with. The second approach is “WTO dualism”, whereby the WTO and an RTA are independent in nature and hence operate within a dynamic of co-operation and complementarity on one hand, and competition and conflict on the other.<sup>93</sup>

The latter approach seems to be appropriate, as nowhere in the DSU<sup>94</sup> is it stated that the WTO dispute settlement mechanism is supreme over an RTA dispute settlement mechanism. There should therefore be no formal hierarchy in practice between the WTO and an RTA; both should be on the same footing. Other authors, however, presuppose that the WTO dispute settlement is supreme. For some, the WTO dispute settlement is viewed as more legitimate because it is less power-based and more rule-based than RTA dispute settlement.<sup>95</sup> Others are not surprised that many RTA provisions mimic WTO provisions and believe that this is beneficial.<sup>96</sup> And some are concerned that the emergence of diffuse and often conflicting RTAs are a threat to the future predictability and security of the WTO.<sup>97</sup>

Furthermore, other than the “general exceptions” found in Article XX, GATT also provides for “regional economic integration”.<sup>98</sup> Article XXIV of GATT allows members of an RTA to offer each other more favourable treatment in trade matters than to other trade partners outside the RTA. This kind of discrimination is obviously inconsistent with the MFN treatment of the WTO and yet allowed in the pursuit of regional integration if justified under Article XXIV.<sup>99</sup> Therefore, since MERCOSUR is a Free Trade Area/Customs Union within the

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<sup>93</sup> N’gunu Tiny, *Regionalism and the WTO: Mutual Accommodation at the Global Trading System*, 11(4) INT’L TRADE L. & REG. 126, 127 (2005). See also, Panel Report, *Turkey-Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, (adopted May 31, 1999) (hereinafter *Turkey – Textiles*); and *Turkey – Textiles* Appellate Body Report, WT/DS34/AB/R (adopted Oct. 22, 1999).

<sup>94</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay round, Apr. 15, 1994, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) (hereinafter DSU).

<sup>95</sup> William J. Davey, *Dispute Settlement in the WTO and RTAs: A Comment*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 343 (Lorand Bartels & Federico Ortino eds., 2006) (hereinafter Bartels & Ortino).

<sup>96</sup> Locknie Hsu, *Applicability of WTO Law in Regional Trade Agreements: Identifying the Links*, in Bartels & Ortino, *supra* note 95, at 52.

<sup>97</sup> Isabelle van Damme, *What Role is there for Regional International Law in the Interpretation of the WTO Agreements?*, in Bartels & Ortino, *supra* note 95, at 553.

<sup>98</sup> GATT, *supra* note 43, at art. XXIV.

<sup>99</sup> See JAMES MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO (2002).

meaning of Article XXIV, a measure that benefits MERCOSUR members naturally discriminates against non-members.<sup>100</sup>

The decision in *Brazil – Retreaded Tyres*, however, could be taken to illustrate that there is a shift from a horizontal relationship between the WTO and a RTA such as the MERCOSUR towards a vertical relationship by putting the WTO legal order on top. This shift produces both external and internal effects.

### 1. External Effect: Supremacy of WTO Over RTA

The external effect, in this regard, is the claim from within the WTO dispute settlement body to RTAs that the WTO legal order is supreme. This judge made claim is not novel and can be compared to the European Court of Justice (ECJ)'s early approach, in for instance *Costa v. Enel*.<sup>101</sup> In *Costa v. Enel*, although there was no explicit reference to supremacy of community law in the Treaty of Rome<sup>102</sup>, the ECJ did not shy away from declaring it.<sup>103</sup>

The same position seems to be taken by the Appellate Body in the present case. Although the Appellate Body claimed to have stayed clear of reviewing the MERCOSUR Arbitral Tribunal's decision, it nevertheless rejected Brazil's argument that the mere fact of being obliged to implement a ruling from a judicial or quasi-judicial body is *a priori* presumption of WTO law compatibility. Accordingly, the Appellate Body seems to suggest that even though Brazil was clearly obliged by the MERCOSUR Arbitral Tribunal to bring its measure in line with MERCOSUR obligations, Brazil was at the same time required to do it in a way that is compatible with its WTO law obligations. Thus, one can detect here a declaration of supremacy of WTO law and Appellate Body jurisprudence over an RTA and its dispute settlement mechanism.<sup>104</sup>

Another sign of the Appellate Body's declaration of supremacy can be seen in its interference in Brazil's submissions before the MERCOSUR *ad hoc* Arbitral Tribunal. By discussing Brazil's litigation strategy before the MERCOSUR *ad hoc* Arbitral Tribunal and suggesting that Brazil ought to have argued a defence akin to that found in the GATT, the Appellate Body seems to crown itself as the ultimate authority in trade law. This self-proclaimed supremacy interferes with Brazil's

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<sup>100</sup> PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 650 (2<sup>nd</sup> ed., 2007); See Lavranos, *supra* note 68.

<sup>101</sup> Case 6/64, *Flaminio Costa v. Enel* [1964] ECR 585, 593.

<sup>102</sup> Treaty Establishing a Constitution for Europe, Oct. 29, 2004, O.J. (C 310) 1 (2004) (hereinafter Treaty of Rome).

<sup>103</sup> PAUL CRAIG AND GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 344-345 (4d ed., 2008).

<sup>104</sup> Lavranos, *supra* note 68.

sovereignty in defending its interest before other dispute settlement bodies, which are fully independent and free from any supervision by the Appellate Body. Whether this self-proclamation trend by the Appellate Body will escalate is something that remains to be seen.

## 2. Internal Effect: *Stare decisis* and the Relationship Between the Appellate Body and the Panel

Internally, *i.e.* within the WTO dispute settlement system itself, the effects of the Appellate Body's claim as the supreme leader of trade law can also be noted. At least internally, the Appellate Body's role is defined under Article 17 of the DSU. Its role is to "hear appeals from panel cases".<sup>105</sup>

However, it seems to be doing more than simply hearing appeals from the Panel. The Appellate Body seems to be using its self-proclaimed supremacy in trade law to discipline the Panel by imposing a *stare decisis et non quita movere*<sup>106</sup> policy on it. In a striking recent WTO dispute, *US – Stainless Steel*,<sup>107</sup> a heated power struggle between the Panel and the Appellate Body arose, which illustrates how far the Appellate Body is taking its dominant position. Obviously, the Appellate Body has express authority to uphold, modify or reverse the legal finding and conclusions of the Panel.<sup>108</sup> Whether it is using its authority reasonably is a different story altogether.

In *US – Stainless Steel*, the Panel refused to take previous Appellate Body's *stare decisis* into account in its findings, because it disagreed with the Appellate Body's reasoning.<sup>109</sup> It said that it was "troubled by the fact that the principal basis of the Appellate Body's reasoning in the zeroing cases seems to be premised on an interpretation that does not have a solid textual basis in the relevant treaty provisions".<sup>110</sup>

The Appellate Body clearly did not appreciate such unruly freedom from a Panel and lashed out in its Report. It had the following lecture to give to the Panel:

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<sup>105</sup> DSU, *supra* note 94, at art. 17.

<sup>106</sup> The doctrine of *stare decisis* originates from this Latin maxim, which roughly translates to "stand by decisions and do not move that which is established".

<sup>107</sup> Panel Report, *US – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R (Dec. 20, 2007) (hereinafter *US – Stainless Steel* Panel Report); *US – Stainless Steel* Appellate Body Report, WT/DS344/AB/R (adopted May 20, 2008) (hereinafter *US – Stainless Steel* Appellate Body Report).

<sup>108</sup> DSU, *supra* note 94, at art. 17.13.

<sup>109</sup> *US – Stainless Steel* Panel Report, *supra* note 107, at para. 7.115.

<sup>110</sup> *Id.* at para. 7.119.

162. We are *deeply concerned* about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. *The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system.* Nevertheless, we consider that the Panel's failure flowed, in essence, from its misguided understanding of the legal provisions at issue. Since we have corrected the Panel's erroneous legal interpretation and have reversed *all* of the Panel's findings and conclusions that have been appealed, we do not, in this case, make an additional finding that the Panel also failed to discharge its duties under article 11 of the DSU.<sup>111</sup> (emphasis supplied)

The Appellate Body's attitude is understandable as from its point of view it is concerned with the uniformity and consistency of its jurisprudence, in particular due to the fact that the Panels are differently composed each time. This attitude is to some extent comparable to the ECJ, which is also concerned with preserving the uniformity and consistency of EC law within all 27 member States.

Furthermore, it has been argued that the security and predictability necessary to achieve the objectives of the WTO multilateral trading system requires that previously adopted reports be followed unless there are compelling reasons to the contrary. Such an approach provides the foundation for the development of a sound and credible jurisprudence that not only commands the respect of parties to a given dispute, but also the respect of all WTO members.<sup>112</sup>

Having said that, the lack of flexibility for both the Panel and the Appellate Body to be able to depart from *stare decisis* has tragic consequences to WTO members' best interests, in particular with respect to non-trade interests. In *Brazil – Retreaded Tyres*, the Appellate Body used a test it believed to belong to its jurisprudence, thus discarding the Panel's more realistic approach which took into account the circumstances of the case. Consequently, Brazil's health problems continue to be exacerbated. The trade dispute has ended but the dengue fever has only just begun.

In conclusion, it is apparent that Brazil's interests have not been protected by the Article XX exception, nor has the WTO's power struggle helped in its need to protect its population's health. Although entitled to reconcile trade liberalisation with other societal values and interests through the wide-ranging exceptions to the basic WTO rules, Brazil appears to have been deprived of this benefit. While the Appellate Body clarified that the policy objective of the measure at issue should be considered in the chapeau analysis, it has left the standards of "arbitrary or

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<sup>111</sup> *US – Stainless Steel* Appellate Body Report, *supra* note 107, at para. 162.

<sup>112</sup> Adrian Chua, *The Precedential Effect of WTO Panel and Appellate Body Reports*, 17 LEIDEN J. INT'L L. 45, 61.

unjustifiable” discrimination as vague and confusing as ever.<sup>113</sup>

The Appellate Body has also given preference to trade over non-trade issues by conservatively applying the principle of *stare decisis* to its jurisprudence. What is more, it interfered in the dispute settlement system of an RTA and used this interference in arguments against Brazil.

The totality of the Appellate Body’s approach in this case has, in the author’s opinion, undermined the use of the Article XX exception in genuine cases. It has further undermined Brazil’s sovereignty with respect to its dealings with and deference to an RTA’s dispute settlement mechanism and its own judiciary.

## VI. CONCLUSION

This dispute clearly showed that trade supersedes health and environmental issues. This was the case in both the MERCOSUR and WTO retreaded tyre disputes. These organizations’ dispute settlement systems failed to take into account the actual economic impact of the import ban, the political situation that led to the adoption of the bans and the potentially negative consequences that these decisions have on the public’s perception of MERCOSUR and the WTO.<sup>114</sup>

However, considering that the MERCOSUR’s trade *versus* environment jurisprudence is far less developed than the WTO’s<sup>115</sup> and affects far fewer member States, the WTO should have set an example. In this dispute, however, the Appellate Body did the contrary. It used the MERCOSUR *ad hoc* Arbitral Tribunal’s ruling against Brazil to reiterate that not only is trade supreme over non-trade issues but also that its jurisprudence is supreme over that of RTAs.

With respect to Brazil’s health concerns, the Appellate Body failed to appreciate the full extent of the problem caused by the import of retreaded tyres from the EU. Its reasoning that although Brazil’s ban was necessary under Article XX of the GATT but didn’t comply with its chapeau (due to the MERCOSUR exemption and court injunctions) is controversial to say the least.

The MERCOSUR proceedings were solely based on trade arguments as opposed to health like in the WTO. Brazil’s case before the MERCOSUR *ad hoc* Arbitral Tribunal was not that its legislation (SECEX 8/2000) was defensible on health grounds. Brazil chose a more technical and what it thought to be a more bullet-proof argument – that the scope of its new legislation did not introduce new *inter se* restrictions of commerce. Once Brazil lost the case, there was no recourse

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<sup>113</sup> Qin, *supra* note 87.

<sup>114</sup> Morosini, *supra* note 90, at 5.

<sup>115</sup> *Id.* at 64.

to appeal it had to abide by the Tribunal's ruling. The Appellate Body's suggestion that Brazil could have raised Article 50 (d) of the Treaty of Montevideo in the MERCOSUR proceedings was rather unrealistic. In a later very similar case brought by Uruguay against Argentina<sup>116</sup> the MERCOSUR Permanent Review Court rejected Argentina's defence under Article 50 (d) stating that the principle of utmost importance in an integration system such as MERCOSUR is free trade. Non-trade issues have to undergo a rigorous test. If a problem such as the one posed by waste tyres does not pass the test than it is anybody's guess what does. Even if Brazil had raised the Article 50 (d) defence in the MERCOSUR proceedings that it would have most probably lost.

In this context the most recent WTO decision under Article 21.3 (c) DSU in this dispute should be noted.<sup>117</sup> The Arbitrator was called upon to determine the reasonable period of time that Brazil should be granted for bringing its domestic legislation into conformity with the WTO Appellate Body ruling. The Arbitrator, Yusuhei Taniguchi, who was one of the WTO Appellate Body members who delivered the *Brazil – Retreaded Tyres* ruling, also discussed the possibility of raising the Article 50(d) of the Treaty of Montevideo defence in light of the decision of the MERCOSUR Permanent Review Court in the *Uruguay v. Argentina* dispute. The Arbitrator opined that, while it is not his task as arbitrator to discuss the substance of the dispute as determined by the WTO panel and Appellate Body,<sup>118</sup> he considered the ruling in the *Uruguay v. Argentina* case not binding upon Brazil.<sup>119</sup> Moreover, according to the Arbitrator, even though Argentina's reliance on Article 50(d) of the Montevideo Treaty was unsuccessful because of the disproportional nature of Argentine's measures, the invocation of Article 50 (d) was not excluded in principle by the MERCOSUR Permanent Review Court.<sup>120</sup>

In other words, the Arbitrator seems to imply that Brazil could have – with some reasonable chance – relied on Article 50(d) of the Montevideo Treaty as a justification for the import ban. This is a somewhat strange conclusion because there is no fundamental difference between Argentina's and Brazil's import ban. Therefore, it remains unclear why those two quite similar cases would have been treated differently in terms of the invocation of Article 50 (d). Even more puzzling is the Arbitrator's remark that the decision of the MERCOSUR *ad hoc* Arbitral Tribunal “[...] does not, and did not need to, reflect and interpret all rights

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<sup>116</sup> MERCOSUR *ad hoc* Arbitral Tribunal, *Import Prohibition of Remoulded Tyres from Uruguay (Uruguay v. Argentina)*, (Oct. 25, 2005), overturned on appeal by the MERCOSUR Permanent Review Court (hereinafter *Uruguay v. Argentina* MERCOSUR Arbitral Award).

<sup>117</sup> *Brazil – Retreaded Tyres* Award of the Arbitrator, WT/DS332/16 (Aug. 29, 2008).

<sup>118</sup> *Id.* at para. 82.

<sup>119</sup> *Id.* at para. 82, explanation in FN. 141.

<sup>120</sup> *Id.*

and obligations under MERCOSUR law that are relevant to the manner in which Brazil may choose to implement the DSB recommendations and rulings".<sup>121</sup> It seems as if the Arbitrator is suggesting that the MERCOSUR *ad hoc* Arbitral Tribunal did not properly and fully understand and apply MERCOSUR law in its *Brazilian Tyres* decision. Obviously, the question arises whether a WTO Arbitrator is in a position to openly challenge and criticize another tribunal's decision that has been established under another trade regime, and even more so whether this is appropriate in terms of comity and judicial respect. In any case, the WTO Arbitrator fully rejected Brazil's argument that the decision of the MERCOSUR *ad hoc* Arbitral Tribunal required a modification of its domestic legislation in order to implement that decision.<sup>122</sup>

As for the court injunctions, Brazil did successfully appeal most of the cases at a rate of 92.5%<sup>123</sup> but there are, of course, always some big fish which manage to get through the net. The problem is that Brazil's legal system leaves much room for improvement.

In the circumstances, the Appellate Body must believe that it is supreme and that it therefore should be the keeper of consistency in trade law. This belief most probably stems from the fact that the WTO is a multilateral trade agreement and therefore is at the very top of all trade matters. This is however a dangerous place to be at as more than simply trade is at stake here.

Unless the Appellate Body starts listening to and understanding the particular non-trade issues of its 153 members it will end up committing further grave injustice as it has in *Brazilian – Retreaded Tyres*. In this instance it should have followed the Panel in its more flexible and realistic approach and concurred with its respect and deference the Panel showed towards the MERCOSUR dispute settlement body.

In conclusion, a claim of Appellate Body supremacy and its attempt of uniformity in trade law matters can cause more injustice than justice. It is blatantly clear that the Appellate Body's interference with the MERCOSUR dispute settlement system was a veil masking the fact that the catastrophic problems associated with the dengue do not really matter, what does matter is trade. This is bad news not only for Brazil but also to all members of the WTO. If the Appellate Body is not capable of balancing health and environment with trade in an unbiased manner, then perhaps it is time to seriously consider the creation of an organisation solely dedicated to these matters.<sup>124</sup>

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<sup>121</sup> *Id.* at para. 82.

<sup>122</sup> *Id.* at para. 84.

<sup>123</sup> *Brazil – Retreaded Tyres* Panel Report, *supra* note 3, at annex 11, question 15.

<sup>124</sup> See further, DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE (1994).