Trade and environment under WTO rules after the Appellate Body report in *Brazil-retreated tyres*

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Abstract: This paper will analyse some recent developments as to the acceptability of trade restrictive measures aimed at protecting the environment under WTO rules, and more specifically under Article XX of the GATT. In that regard, the necessity test included in Article XX (b) of the GATT constitutes the first legal benchmark that any trade-restrictive measure aimed at the protection of the environment will have to pass. As will be seen from the recent AB ruling in *Brazil – retreated tyres*, more attention is progressively being given to environmental considerations through the interpretation of this 'necessity test', i.e. the assessment of what constitutes a necessary restriction or not. The second legal test is included in what is commonly called the "chapeau" or introductory clause of Article XX. This clause prohibits any measure which pursues one of the objectives listed in the same article to be applied in a manner which would constitute an unjustifiable or arbitrary discrimination or a disguised restriction on international trade. Following the *Brazil – retreated tyres* ruling, it appears that this test will in fact be the most important one as a means to evaluate a State's good faith in enacting such trade-restrictive measures. In view of these developments in judicial interpretation, it may be anticipated that the EU would probably have more freedom in the future in order to enact trade restrictive measures aimed at protecting the global environment without being found in breach of its WTO obligations.

1. Introduction

The trade-and-environment debate has been subject to increasing focus both from lawyers and governmental officials and from the media, civil society and NGOs since the setting up of the WTO in 1994. After having faced much criticism for failing to take broader environmental concerns on board, following the conclusion of the Uruguay Round and the drafting of the Marrakech Agreements, WTO Panels and the Appellate Body have developed a more generous test into Article XX of the GATT, which provides for the general exceptions to be invoked by Contracting Parties found to have violated one of the other substantive provisions. This has been made possible in great part following the introduction of environmental concerns into the Preamble to the Agreement establishing the WTO, which states in its second paragraph:

> "*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, ***while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment*** and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, (…)" (emphasis added)

However Article XX of the GATT did not – and still does not – contain a provision referring to environmental considerations among the grounds enabling Contracting Parties to depart from the Agreement. Indeed, its wording, which has not been amended since the drafting of the GATT in 1947, only provides:

> "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 by any contracting party of measures: (…)
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> (b) ***necessary to*** protect human, animal or plant life or health;

> (g) ***relating to*** the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (…)" (emphasis added)

This is probably the main reason why previous panels have been very reluctant to accept that general environmental considerations could be invoked under one of these two exceptions.[1] In the *Tuna/Dolphin* dispute for example, the Panel had concluded that Article XX did not authorize, neither in paragraph b) nor g), such national measures aimed at protecting the global environment or protected species located outside a State's national territory.[2] In subsequent cases, while the Panels or the Appellate Body did not reject *per se* environmental concerns raised by some Members, the level of scrutiny that they applied to these measures has been considerably high, be it under the "necessity test" of Article XX (b) or under the "chapeau" (or introductory clause) of Article XX.

It is in this context that the ruling of the Appellate Body[3], confirming to a large extent the Panel's findings in the *Brazil-retreated tyres* case, is to be welcomed as being a new important step forward towards a more deferential approach with regard to Members' regulatory autonomy in sensitive fields such as the protection of the environment. The aim of this paper is to discuss in more detail the main findings in this case, and to show how some of these findings contrast with previous case-law in the field. The AB report brings a lot of clarification into the interpretation of the "necessity test" into Article XX (b), which was intensely needed after the much debated *EC-Asbestos* case. It also gives back its proper role to the chapeau of Article XX, which now becomes the crucial test to pass in order to have an environmental exception upheld. Finally, some conclusions will be drawn from this, with potential implications of the ruling on ideas that are making their way, in the EU notably, to impose environmental taxes on goods imported to the EU from countries in which environmental dumping is taking place.

2. Brazil-retreated tyres: factual background

Retreated tyres are defined as "used tyres that have been reconditioned for further use by stripping the worn tread from the skeleton (casing) and replacing it with new material in the form of a new tread, and sometimes with new material also covering parts or all of the sidewalls."4 At the end of their useful life, tyres become waste, the accumulation of which is associated with risks to human, animal, and plant life and health. Specific risks to human life and health include (i) the transmission of dengue, yellow fever and malaria through mosquitoes which use tyres as breeding grounds; and (ii) the exposure of human beings to toxic emission caused by tyre fires which may cause several disabilities or negative effects on health.5 One important difference between new and retreated tyres is that the latter have a shorter lifespan and therefore reach the stage of waste earlier.6

Brazil has taken action to minimize the adverse effects of waste tyres. Such policies include preventive measures aiming at reducing the generation of additional waste tyres, as well as remedial measures aimed at managing and disposing tyres that can no longer be used or retreated, such as landfilling, stockpiling, the incineration of waste tyres and material recycling.7 One of the measures taken by Brazil has been to enact a total ban on imports of both used tyres and retreated tyres.8 However, following a ruling of a MERCOSUR arbitral tribunal, certain retreated tyres from other MERCOSUR countries would benefit from an exemption from the import ban (hereafter the 'MERCOSUR exemption').9 There was also evidence that there had been imports of large quantity of used tyres through court injunctions.10 A complaint was then lodged by the EC against the import ban on retreated tyres and the MERCOSUR exemption, but not on the import ban on used tyres.11

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1 Article 3(2) of the Dispute Settlement Understanding states indeed that the aim of the dispute settlement of the WTO is "to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

2 See the Panel Report in the Tuna/Dolphin dispute, DS21/R, not adopted, paragraphs 5.25-5.26. This statement has maybe been overstated as precluding any environmental measures. The Panel wanted to indicate more probably that such measures would not be allowed if they were aimed at regulating situations falling outside the State's own jurisdiction.

3 *Brazil – Measures affecting imports of retreated tyres*, Report of the Appellate Body of 3 December 2007, WT/DS332/AB/R.

4 Panel report, para. 2.1.

5 *Ibidem*, para.7.109.

6 *Ibidem*, paras. 7.129 and 7.130.

7 AB Report, para. 120.

8 *Ibidem*, para. 122.

9 *Idem.* It is important to note that the MERCOSUR exemption was not part of the original ban on the importation of retreated tyres adopted by Brazil, but was only introduced following a ruling in 2002 by a MERCOSUR arbitral tribunal (*Ibidem*, para. 127).

10 Panel report, paras; 7.297 to 7.303.

11 *Ibidem*, para. 123.

In its analysis, the Panel found that the import prohibition on retreated tyres was provisionally justified as "necessary to protect human, animal or plant life or health" under Article XX (b). However, the Panel also found that the importation of used tyres under court injunctions resulted in the import prohibition on retreated tyres being applied by Brazil in a manner that constituted both a "means of unjustifiable discrimination between countries where the same conditions prevail" and a "disguised restriction on international trade", within the meaning of the chapeau of Article XX of the GATT.12

3. The new necessity test as applied by the Appellate Body

Since the *Korea-Beef*[13] and *EC-Asbestos*[14] cases, it is clear that the necessity test embodied in Article XX (b) of the GATT involves a three-stage analysis. First, it has to be examined whether the measure is in itself apt to achieve its stated objective. This implies also that the policy of the measure invoked falls within the range of policies covered by Article XX (b). Second, it has to be seen whether the measure is necessary to attain its stated objective. This implies that there are no less trade restrictive alternatives, taken individually or collectively, which are reasonably available to achieve the same goal. Finally, the AB has stated in the above-mentioned cases that the definition of "necessary" involves in every case a "process of weighing and balancing a series of factors", understood as "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"[15]. I will now turn back to analyse each of these conditions more in detail, following the findings made by the AB in its report in the *Brazil – retreated tyres* case.

3.1. The contribution of the measure to the achievement of its objective

The Panel had noted in that regard that the import ban would contribute to the achievement of the objective of reducing the number of waste tyres if imported retreated tyres would be replaced either with domestically retreated tyres made from tyres used in Brazil, or with new tyres capable of future retreading.16 The Panel therefore came to the conclusion that "the prohibition on the importation of retreated 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."17

The AB recalled at the outset that "it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve, as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt."18 It is thus clear that the application of the necessity test cannot lead to a lowering of a State's chosen level of protection. It has only to be verified whether the measures adopted are in fact designed to achieve this level of protection and whether they are able to attain it.

The AB then went on to observe that a "necessary" measure is located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".19 In order to examine whether a measure is "necessary" it is also important to assess the relative importance of the interests or values furthered by the challenged measure. The Panel had found in that regard that "few interests are more vital and important than protecting human beings from health risks, and that protecting the environment is no less important."20 The most important part at this stage is to find a causality link, or a "genuine relationship of ends and means between the objective pursued and the measure at issue."21 There is no obligation however, as the EC were advocating, to conduct a quantitative analysis showing detailed evidence of the amount of imports that would exist on the Brazilian market without the import ban. The AB recalled in that regard that it had emphasized in EC-Asbestos

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[12] AB Report, para. 4.
[13] *Korea – Measures affecting Imports of Fresh, Chilled, and Frozen Beef*, AB Report adopted on 10 January 2001, WT/DS169/AB/R.
[14] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, AB Report adopted on 12 March 2001, WT/DS135/AB/R.
[15] AB report, para. 182.
[16] AB report, para. 135: "If retreated tyres are manufactured from tyres used in Brazil, the retreading of these used tyres contributes to the reduction of accumulation of waste tyres in Brazil by giving a second life to some used tyres, which otherwise would have become waste immediately after their first and only life." Therefore, "an import ban on retreated tyres can encourage domestic retreaders to retread more domestic used tyres than they might have done otherwise because it compels consumers of imported retreated tyres to switch either to retreated tyres produced domestically or to new tyres."
[17] Panel report, para. 7.148.
[18] AB report, para. 140.
[19] AB report, para. 141. This was already stated in *Korea-Beef*, cited above, para. 161.
[20] Panel report, para. 7.108.
[21] AB report, para. 145.

that there is "no requirement under Article XX (b) (…) to quantify, as such, the risk to human life or health."22 Following the AB, the same line of reasoning applies to the analysis of the contribution of a measure to the realization of the objective pursued by it, which can be done either in quantitative or in qualitative terms.23 Therefore, "the Panel's choice of a qualitative analysis was within the bounds of the latitude it enjoys in choosing a methodology for the analysis of the contribution."24

Further, the AB examined whether it was sufficient for the Panel to have concluded that the import ban was capable of making a contribution to the attainment of its stated objective and could result in a reduction of exposure to the targeted risks. In that regard, it firmly 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."25 However, the AB emphasized that "[t]his does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX (b). We recognize that certain complex health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. (…) Moreover, the results obtained from certain actions – for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time – can only be evaluated with the benefit of time."26 This is probably one of the most important findings in this case. It recognizes for the first time the right for WTO Members to set up ambitious environmental policy goals, even if the attainment of these goals can have trade-restrictive effects and if their achievement is not directly measurable or quantifiable in the short run. The "necessity test" embodied in Article XX is thus, first of all, a qualitative test.

3.2. The existence of possible less trade restrictive alternatives

As the Appellate Body recalled, "[i]n order to determine whether a measure is "necessary" within the meaning of Article XX(b) of the GATT 1994, 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. If 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."[27] There are three important elements to bear in mind at that stage of the test. First it is up to the Member States to fix its desired level of protection. Therefore, a less restrictive alternative will only be considered as being a true alternative if it is capable to achieve the same level of protection. Contrary to what may have been suggested in the past, there is no weighing and balancing (or proportionality) test at this stage of the analysis. Only those measures which are, individually or collectively, able to achieve the same level of protection will be considered as alternatives. Second, the burden of proof lies on the complaining party. It is its responsibility to identify possible alternative measures and to show that these measures would be less trade-restrictive while achieving the same level of protection.[28] Third, the less restrictive alternative still has to be "reasonably available". This might not be the case where the measure at stake is "merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[29] The test thus allows for the first time to take on board in a WTO dispute recognized principles of international environmental law, such as Common but Differentiated Responsibility.[30] Indeed, following this ruling, a measure which is deemed to be reasonably available for an industrialized country will not necessarily be considered as being as reasonably available for a developing country, so that the level of scrutiny for trade-restrictive measures enacted by industrialized or developing countries might vary considerably.

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[22] AB report, para. 146.
[23] *Ibidem*, para. 146.
[24] *Ibidem*, para. 147.
[25] *Ibidem*, para. 150.
[26] *Ibidem*, para. 151.
[27] *Ibidem*, para. 156.
[28] *Idem.*
[29] *idem*, quoting its report in the *US-Gambling* case (WT/DS285/AB/R), at para. 308.
[30] This principle has mainly been asserted in the context of climate change. The *Rio Declaration* states for example that: "In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." Similar language exists in the *Framework Convention on Climate Change*: parties should act to protect the climate system "on the basis of equality and in accordance with their common but differentiated responsibilities and respective capabilities." See also "A consensual international accord on climate change is needed", speech of Pascal Lamy, Director General of the WTO before the European Parliament of 29 May 2008.

Applying these criteria to the measures which were presented by the EC as constituting alternatives to the import ban, the Appellate Body found that none of these measures constituted a "reasonably available alternative". First, with regard to measures presented by the EC to reduce the number of waste tyres accumulating in Brazil, such as encouraging domestic retreading or improve the domestic retreadability of domestic used tyres, the AB upheld the Panel's findings that such measures, which are designed to avoid the generation of waste, "could not apply as a substitute for the import ban but are, rather, complementary measures that Brazil already applies, at least in part."[31] Secondly, turning to alternatives aiming to improve the management of waste tyres, such as landfilling, stockpiling, incineration of waste tyres and material recycling, the AB found either that the proposed measures would pose similar risks to those which the import ban aims to combat and therefore would not constitute a real alternative to the import ban[32], or that they would not be "reasonably available" due to their prohibitive costs or the non-availability of the required technology[33]. The AB also noted that non-generation measures are more apt to achieve the objectives of health and environmental protection "because they prevent the accumulation of waste tyres, while management measures dispose of waste tyres only once they have been accumulated."[34]

3.3. The "weighing and balancing process"

It could appear at first sight that the third stage of the "necessity test" as elaborated by the AB would involve a proportionality test, i.e. weighing and balancing the different elements of the equation *against* each other. This would allow the AB to carry out an examination of whether the chosen level of protection was not excessive considering the economic interests at stake and the possible alternative measures available (even if these measures would not achieve a comparable level of protection). There is no such proportionality test into Article XX (b) however. The only thing that it suggests is that all relevant factors must be taken into account in the analysis of the necessity of a given measure, "particularly the importance of the interests at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness"[35]. A total import ban will thus in principle be more difficult to justify than other less restrictive measures such as internal taxes, regulations for example. However, one must always look at the importance of the interests at stake. Importantly, the AB upheld the Panel's findings in that regard, considering that "the objective of the import ban also relates to the protection of the environment, a value that it considered – correctly in our view – important"[36]. This is particularly interesting, as it is the first time that the AB explicitly mentions environmental protection as such, as being implicitly included in the "protection of animal or human or plant life or health" proviso of Article XX (b).

One point which may be more open to criticism is whether WTO panels and the AB Body are really the appropriate fora to discuss which values are of "particular importance" and which are not. If the AB has shown very deferential towards environmental protection in this case and to human health in the *EC-Asbestos* dispute[37], will it be stricter in a case where other values are invoked? Obviously, any value or interest which is invoked will have to fall within one of the exceptions mentioned in Article XX (b). But is it possible to draw a hierarchy between the different grounds mentioned in that provision? Instinctively, one would tend to recognize that human life or health is a more important value to protect than plant or animal life or health. However, nothing in the wording of Article XX (b) allows us to draw such a conclusion.

4. The requirements of the chapeau

Finally, the AB went on to examine the question whether the import ban, although it could constitute a necessary measure to protect human or animal life or health under Article XX (b), would nevertheless not constitute an "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" following the terms of the chapeau. In that regard, the AB reversed the Panel's findings and further clarified the role of the chapeau in the assessment of a measure's legality under Article XX.

Following previous case-law, "the chapeau of Article XX is, in fact, but one expression of the principle of good faith"[38]. Accordingly, the task of interpreting and applying the chapeau is the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the

[31] *Ibidem*, para. 159.
[32] *Ibidem*, paras. 163-164.
[33] *Ibidem*, paras. 165-166.
[34] *Ibidem*, para. 174.
[35] *Ibidem*, para. 178.
[36] *Ibidem*, para. 179.
[37] Cited above, note 14.
[38] AB Report in *US-Shrimp*, para. 158, quoted at para. 224.

rights of the other Members under varying substantive provisions of the GATT, so that neither of the competing rights will cancel out and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement.[39]

By its express terms the chapeau addresses not so much the disputed measure or its specific content as such, but rather the manner in which that measure is applied.[40] Nevertheless, following the AB, "analysing whether a discrimination is arbitrary or unjustifiable involves an analysis that relates primarily to the cause or the rationale of the discrimination"[41]. In that regard, the AB completely disagreed with the Panel, which had found that the term "unjustifiable" did not depend on the cause or rationale of the discrimination but, rather, was focused exclusively on the assessment of the effects of the discrimination.[42] The Panel had to examine the delicate question whether the exemption granted by a MERCOSUR arbitral tribunal constituted an "arbitrary or unjustifiable discrimination between countries where the same conditions prevail". It came to the conclusion that this would only be the case if imports from MERCOSUR countries were to take place "in such amounts that the achievement of the objective of the measure at issue would be significantly undermined"[43]. As of the time of the Panel's investigations volumes of imports of retreated tyres under the exemption appeared not to have been significant, the Panel concluded that the MERCOSUR exemption had not resulted in the import ban being applied in a manner that would constitute arbitrary or unjustifiable discrimination[44], thereby introducing a kind of *de minimis* rule into the chapeau. The AB strongly disagreed and indicated that it would be difficult to understand "how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discrimination 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."[45] Therefore, the MERCOSUR exemption, which is based on the prohibition of new trade restrictions under MERCOSUR law, did not constitute, in view of the AB, an acceptable rationale for the discrimination, "because it bears no relationship to the legitimate objective pursued by the import ban (…) and even goes against this objective, to however small a degree"[46].

This brings again a lot of clarification into the interpretation of Article XX, especially as regards the relationship between the individual exceptions and the chapeau requirements. In the past, the chapeau has often been interpreted as precluding purely unilateralist initiatives[47] or as demanding a certain degree of tolerance and good faith in the application of the measure[48]. The criteria, if there were any, were not very clear and predictable and were more often set out on a case-by-case basis. In this case, the AB states very clearly for the first time that a measure will not satisfy the requirements of the chapeau if the discrimination its application generates is not justified by the same objective which is invoked under the individual exception. Thus, it recalls that no discrimination at all is permitted in principle in the world trade system and that discriminatory measures can only be saved under the specific headings of Article XX.

It is surprising however that the AB did not examine much more in detail the argument relating to Article XXIV of the GATT, which allows for derogations justified by the constitution of a free trade area or a customs union, in order to justify the MERCOSUR exemption. The Panel had found indeed that the discrimination arising from the MERCOSUR exemption was not "a priori unreasonable", because this discrimination arose in the context of an agreement of the type expressly recognized under Article XXIV of the GATT that "inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries"[49]. The AB simply noted in that regard that Brazil could have tried to justify the challenged import ban before the MERCOSUR arbitral tribunal on the same ground of human, animal or plant life or health but that it had decided not to do so. This shows sufficiently following the AB that "the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994"[50]. It is not clear however what conclusions have to be drawn from this statement. Does it simply mean that there would not have been "arbitrary discrimination" under Article XX if Brazil had invoked the same exception before the MERCOSUR arbitral tribunal? Or should the arbitral tribunal also have ruled in favour of Brazil in order for it to be still able to invoke the exception before a WTO Panel? What about Article XXIV then? Was Brazil's claim that this provision constitutes an independent ground for exception into the general structure of

[39] See AB report, cited above, para. 224.
[40] AB report in *US-Gasoline*, pp. 21-22.
[41] Ibidem, para. 225.
[42] Ibidem, para. 229.
[43] Panel report, para. 7.287.
[44] AB report, para 219.
[45] *Ibidem*, para. 227.
[46] *Ibidem*, para. 228.
[47] *US – Shrimp*.
[48] *US – Gasoline*.
[49] *Ibidem*, para. 217.
[50] *Ibidem*, para. 234.

the GATT completely devoid of any purpose? These questions will remain unanswered and will probably be subject of harsh discussions in future litigation.

Finally, the AB did not conduct a separate analysis under the second ground of the chapeau, namely the "disguised restriction on international trade" proviso. It applied the same reasoning as for the "arbitrary or unjustifiable discrimination" test and therefore reversed the Panel's findings on the same grounds. This is also to be regretted if, as the AB itself acknowledged in previous cases, "interpretation must give meaning and effect to all the terms of a treaty", and "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"[51]. Following the AB's interpretation, it seems that both expressions have to be read together as simply requiring good faith in the application of the measures that are to be justified.

5. Future prospects and conclusions

As we have seen, the report of the AB in the *Brazil – retreated tyres* case constitutes another important step forward towards a progressive recognition of environmental objectives as a legitimate exception to the general obligations arising under the GATT. The AB clarified several elements of the "necessity test" embodied into Article XX (b). It also explicitly recognised environmental objectives as a value of fundamental importance and the fact that such objectives could clearly be included into the wording of Article XX (b). The AB recognizes thus broad regulatory powers to Members willing to tackle global phenomena such as climate change, but it also warns that measures taken to tackle these problems may not be applied in a discriminatory manner, unless the discrimination itself is justified by the objective pursued. Member States are thus allowed to impose certain trade-restrictive measures in order to protect the environment, but all they are required in doing so is to act in good faith.

Following this ruling, one may wonder what conclusions States would be able to draw in their efforts to combat climate change and to protect the environment. It has been suggested in Europe for example that the EC should impose additional duties to products originating in countries that are not taking part in the Kyoto Protocol and the emissions reductions involved. While some authors have expressed some doubts on the WTO compatibility of such measures[52], the AB report in *Brazil – retreated tyres* seems to suggest at least that such measures could possibly be upheld under Article XX of the GATT. Such possible measures have also been objected as being against customary principles of international law embodied in the Vienna Convention of the law of treaties, such as *res inter alios acta* or the principle following which only parties to an international treaty may be bound by such a Treaty. These critics assume that imposing such measures on States which have expressed their desire not to be bound by international conventions such as the Kyoto Protocol would amount in fact to impose on them by the backdoor precisely the same measures they have explicitly rejected by not entering in these agreements. Furthermore, it would also encourage unilateralism over multilateral negotiations, impose undue burdens on developing countries and affect the delicate balance between all Members' respective interests within the WTO.

This is not the case however if we think about the specific nature of the climate change problem and the possible ways to address it. Climate change cannot be confined, as a global phenomenon, to the jurisdiction of one single Member State or to every single Member State with respect to its own territory. Indeed, if the EU were the only place in the world to impose strict rules aimed at reducing greenhouse gases emissions on its companies, the effect on the reduction of global warming would only be marginal. Of course, this does not imply that the EU would have jurisdiction to regulate all companies emitting greenhouse gases in the world. But it should not be precluded to ensure that no competitive advantage is gained by not complying with these rules, or in other words, to avoid environmental dumping to take place. WTO rules do not preclude such measure aimed at restoring equal competitive conditions between companies selling their products inside the EU and therefore competing with each other on the EU market. WTO rules would only preclude such measures if these were applied in a discriminatory manner or would constitute a form of disguised protectionism. Nor would there be any violation of any customary principle of international law: imposing additional duties to companies willing to export goods into the EU depending on the impact that the production of these goods are having on the environment does not amount to impose treaty obligations on the States from which they originate. Exporting States still have a sovereign choice not to enter into such international agreements. But they simply know that in doing so they might have to pay additional duties if they wish to continue to export their goods to the EU.

[51] AB report in *US-Gasoline*, p. 22.

[52] The focus is often put on the intepretation of Article III, paragraph 2 of the GATT and the question whether taxes imposed on energy product which are not incorporated into the final product seems to remain an open one. (see notably Goh, Birnie & Boyle and Biermann & Brohm). However, even if a violation of Article III were to be found, the measure could still be justified under Article XX. For the purpose of this paper, it is therefore assumed that any Border Tax Adjustment system would *a priori* fall foul from Article III of the GATT.

The main difficulty however would be to put in place a system which is sufficiently flexible and genuinely non-discriminatory. As WTO Director General Pascal Lamy stated, "questions such as how you calculate the greenhouse gas emissions of others, how you would compare them to your own, and how you would build "flexibility" into your system to accommodate the specificities of other trading partners would all be part of the uphill climb"[53]. Different methods have already been suggested, the most realistically feasible being either a Border Tax Adjustment scheme, or a full involvement of all importing companies into the EU emissions trading scheme. Whatever the form these measures would take, I am confident, after the signals that were given by the Appellate Body, that if these measures are sufficiently flexible and non-discriminatory, they would not be incompatible with WTO rules.

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