Research Paper

The Environment Before the Southern Common Market – MERCOSUR

An Analysis of the Retreated Tires Dispute

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“To see what is in front of one´s nose needs a constant struggle”

(George Orwell)

“Dein Leben wird dadurch nicht flach und dumm, wenn du weisst, dass dein Kampf erfolglos sein wird. Es ist viel flacher, wenn du für etwas Gutes und Ideales kämpfest und nun meinst, du müsstest es auch erreichen.”

(Hermann Hesse)

To my father, Heitor, and my sisters, Anna Collet and Ludmila Kompaniyets

Table of Contents

List of Acronyms and Abbreviations……………………………………..………..6

Introduction…………………………………………….…………..……………..7

Chapter 1: The Trade and Environment Interrelation

Foreword……………………………………………………………………..…….9

I The Trade and Environment Nexus: A Convergence and Conflict Debate……..…….10

a) The Trade-Environment Nexus Before 1990……………………..……….12
b) The Trade/Environment Nexus: 1990 onwards…………………..……….13

II - Environmental Harmonization Within International Fora

a) The WTO…………………………………………………………..…....15
b) Regional Free Trade Agreements……………………………………..…...17
c) International Dispute Settlement……………………………………..……19

Chapter 2: The Retreated Tires Case Before the Mercosur Dispute Settlement Mechanisms: Overlooking the Environmental Factor

I - The waste tires problem………………………………………………………....21

II - The Brazilian trade policy restrictions: triggering an international conflict……..…..23

III - A Brief Introduction to Mercosur´s Dispute Settlement Mechanisms…………..….25

IV - The Dispute´s Procedural Background…………………………………………..….26

V - The Uruguay Allegation…………………………………………………………..…28

VI - The Brazilian Defense……………………………………………………………30

VII - The Decision: El VIº Laudo del Tribunal Arbitral ad hoc del Mercosur (TAHM)...33

Chapter 3: The Case before the WTO: Shifting to an Environmental Rationale

I - The Procedural Background…………………………………………...………….36

II - The European Allegation

a) Material facts……………………………………..…………………..38

b) Legal facts…………………………………………………………….41

III – The Brazilian Defense

a) Material facts…………………………………………………………47

b) Legal facts…………………………………………………………….49

Chapter 4: The Relevance of the Environment within the Mercosur

I - The Mercosur treatment on the Environment…………………………….……..…52

II - Environmental Embargo on a Practical Case: The Mercosur Problematic of the Retreated Tires Trade Relaunched

a) The Case………..……………………………………………………..56

b) The Decision…………………………………………………………..57

c) The Decision of the Permanent Appeals Tribunal……………………...…..59

Conclusion…………………………………………………………...…………62

Selected Bibliography…………………………………………………………64

List of Acronyms and Abbreviations

CC	Comissão de Comércio
CMC	Conselho Mercado Comum
CONAMA	Conselho Nacional do Meio Ambiente
DSB	Disputte Settlment Body
EC	European Communities
GATT	General Agreement on Tariffs and Trade
GMC	Grupo Mercado Comum
IBAMA	Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis
INMETRO	Instituto Nacional de Metrologia, Nomratização e Qualidade Industrial
IO	International Organization
ISO	International Standardization Organization
Mercosur	Southern Common Market
RTA	Regional Trade Agreement
SECEX	Secretaria de Comércio Exterior
TPR	Tribunal Permanenente de Revision
TAHM	Tribunal Arbitral Ad Hoc del Mercosur
WTO	World Trade Organization

Introduction

Since 1991, the Federative Republic of Brazil prohibits the import of used goods. However, following the creation of the Southern Common Market – Mercosur – and the consequential commitments of free trade, particularly the Decision nº22, adopted in 2000, Brazil creates a variety of legal instruments on the import and management of retreated tires that actually result on trade restrictions. In 2001, the Eastern Republic of Uruguay, an exporter of retreated tires, ignited the Mercosur´s Dispute Settlement Mechanism to challenge the Brazilian restrictive measures on retreated tires that economically affected the Uruguayan industry. In the end, the *Ad Hoc* Tribunal finally decided the challenged measures did not follow, indeed, the Mercosur dispositions, and Brazil changed its rules accordingly.

As the restrictive measures continued to countries other than those part to the Mercosur, in 2006 another retreated tires exporter, the European Union, comes before the World Trade Organization – WTO – to challenge the Brasilia´s Policy and thus setting the first WTO case in which a developed country challenges an environmental measure taken by a developing country.

What is the most remarkable in the present case, however, is how the Brazilian response to the complaints abruptly shifted from a mere juridical ground, within the Mercosur, into an environmental one, within the WTO. That is, if before the Mercosur *Ad Hoc* Tribunal, Brazil insisted that the prohibition of retreated tires import was not an illegal extension but rather a mere explanation of the prior Portaria No. 8/91that prohibited every used goods; before the WTO though, Brazil makes a dramatic exposition on fire, health and environmental hazards that the "short lifespan retreated tires" were to inflict on Brazilian territory.

Why? At a first sight, the first reason that comes to mind to justify the Brazilian diplomatic contradiction is that, to the contrary of the WTO law, the Mercosur law did not offer a proper consideration to the environmental

problematique. This is the hypothesis this paper intends to verify, always limited and driven by these two retreated tires cases.

Driven by such an attempt, the first chapter discusses the environmental factor within the international economic scenario, especially in the context of Free Trade Agreements. After this theoretical introduction, in the two following chapters the retreated tires case will be presented, exposing the allegations of Uruguay and the European Union with the respective Brazilian responses. Finally, the disclosure of the Mercosur treatment on the environment, which will eventually pave the way to a conclusion that can justify the sudden Brazilian shift towards a green, so to speak, argumentation.

The Trade and Environment Interrelation

Chapter One

Foreword

The world greeted the last decade of our era´s second millennium and simultaneously an emerging triumphant economic approach. The visualization of this reality remains clear in the powerful symbolism boasted by the fall of the Berlin Wall; just a few weeks before the dawn of the 1990´s. This episode can always be recalled to demonstrate the overwhelming mightiness of free trade and the promises it may have provided to the spirit of those who stepped into that new decade. In fact, however, the economic promises of the Margareth Thatcher and Ronald Reagan reactionary model had actually other policy companions.

In the same year of the formal German Reunification, the United States of America, the very bastion of free trade, embargoed the import of yellowfin tuna from Mexico alleging to be driven by environmental concerns. Mexican boats in the eastern tropical Pacific were not, they said, following the requirements of the U.S. Marine Mammal Protection Act on dolphin-protective fishing practices and, as a result, should not have their environmentally unfriendly products bought.

The case was brought to the former GATT´s Dispute Settlement in the following year, having the American measures been decided to be contrary to the GATT law for one country should not embargo foreign products solely because the country of origin does not follow the domestic politics of the import country (the extra-territoriality issue), being allowed only to make such an embargo based on the quality or content of the product (the *product* versus *process* issue)[1]. As brought under GATT, this unsuccessful American tentative of imposing an environmentally sound fishing process to a developing country eventually became

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[1] http://www.wto.org/English/tratop_e/envir_e/edis04_e.htm (27 May 2007)

the *cause célèbre* on the issue in analyzes owing to the fact that it is generally recognized as the very launcher of the modern trade-environment debate[2].

I. The Trade and Environment Nexus: A Convergence and Conflict Debate

The range of matters that oppose environmentalists and free trade advocates trigger more than a mere democratic antagonism but rather a severe hostility that not rarely brings to light war-like posture and acts. More than divergent punctual ideas, the gap between the two groups give place to a clash of opposing Weltanschauungen, which some scholars dare say to actually reach a real cultural scale[3]. But what is behind this hostility?

The *raison d´être* of whatever policy is to reach the concretization of a deemed positive outcome. In this sense, there may be (and usually there is) controversies on both the value given to this goal (whether it is beneficial or not) and/or on how this policy intends to produce such a result (whether the end justify the means not only on a ethical basis but also on a pragmatic one). In this token, one can perceive the seeds of the trade-environment discord at once by realizing that if, on one hand, the environmental discourse gravitates over preservation; on the other, at the core of the free-trade speech prevails change, or "development". That is, the environmental position states the importance of the environment, whose preservation more than frequently implies the regulation, i.e. restriction, of trade´s impetus; while the free trade position stresses the role of trade liberalization on the promotion of economic welfare: this continuous improvement is jeopardized virtually in the same degree with which trade is restricted[4]. In this wise, one could affirm that not only the means but the very goal of these two policies make up a clash, for their concept of environmental "improvement" is contradictory. But beyond such a superficial analyzes, it remains the uncertainty

[2] Chris Wold, Sanford Gaines, & Greg Block, Trade and the environment: law and policy (Durham: Carolina Academic Press, 2005), pg.4. e Boyle 740

[3] John H. Jackson, World Trade Rules and Environmental Policies: Congruence or Conflict?. In *Trade and the Enviroment – Law, Economics, and policy*, edited by Durwood Zaelke, Paul Orbuch and Robert F. Housman, pg. 220. Washington D.C: Island Press, 1993.

[4] Idem, p. 219.

of whether these two policies and worldviews are *de facto* intrinsically and always divergent.

The civil society, environmentalists, economists and scholars in general are still gulping in the quarrel that tries to answer the question of the nature of the trade-environment relation. The range of opinions varies by large. While searching his own position on this debate, Professor Wold interestingly refers to two very opposing ideas that denounce the range of the scrutiny[5]. Assuming the importance of environmental concerns, some ardent critics of free trade, for example, claim that there is a

> […] systematic pattern of WTO attacks on member nations´ vital environmental concerns and policy priorities, and the biases built into WTO rules that promote unsustainable uses of natural resources. Over its almost nine years of operation, the WTO´s anti-environmental rhetoric has been replaced by more politic pronouncements even as it has systematically ruled against every domestic environmental policy that has been challenged and eviscerated exceptions that might have been used to safeguard such laws. Instead of seeking to resolve conflicts between commercial and environmental goals, the WTO´s largely ineffectual Committee on Trade and the Environment has become a venue mainly for identifying green policies that violate WTO rules[6].

Some free trade advocates also stand before the critics claiming the opposite, v.g.:

> There is no inherent conflict between high labor and environmental standards in the domestic economy and success in the global economy. In fact, the evidence points strongly to a positive correlation between high standards, high national incomes, and economic openness. Nations that have opened themselves to the global economy tend to grow faster, achieve higher per capita incomes, and maintain higher labor and

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[5] Chris Wold, op. cit., pg.5
[6] Lori Wallach & Patrick Woodall, *Whose Trade Organization? The Comprehensive Guide to the WTO* . New Press, 2003.

environmental standards. The belief that higher standards can be promoted only through tough language in trade agreements is built on a myth.[7]

Naturally, the debate is actually more intricate than these extreme ideas may make one ever suppose. Although to provide any substantial contribution thereto is beyond the aims of this paper, the relevance thereof as a theoretical basis to the study in analyzes rests beyond doubt and this need to shed light on the relation trade-environment will inevitably lead to a deeper immersion on the question posed.

I. a) The Trade-Environment Nexus Before 1990

By the moment of its very outset, the trade-environment question first arose with a contour rather different from that one emerged together with the 1990´s and so far generally known today. Reduced solely to the commercial perspective and fueled by, *inter alia*, the 1972 Stockholm Conference, the matter appeared in the first half of the 1970´s virtually limited to the problems of market access and competitive effects, which respectively refer to *product* and *process* standards.

The concern of the international community for their economic competitiveness before the global market always led to certain apprehensiveness towards *process standards*. They fear that by setting higher standards of environmental control on the production processes of their commodities, a depreciation of their exchange rate would come as a result due to the consequent imposition of additional costs on their domestic economies. Although studies indicated that such effect remains irrelevant, to this competitiveness effect it was formulated two equally theoretical answers[8]. First, conducting Ricardo´s comparative advantage theory into the reflection, it was argued that process standards are positive inasmuch they would reflect countries´ different environmental conjunctures, which must be taken into account in order to avoid

[7] Daniel T. Griswold, Trade, Labor, and the Environment: How Blue and Green Sanctions Threaten Higher Standards, Cato Institute Trade Policy Analysis No. 15, Aug. 2, 2001, at10.

[8] Charles S. Pearson. The Trade and Environment Nexus: What is New Since ´72? , In *Trade and the Enviroment – Law, Economics, and policy*, edited by Durwood Zaelke, Paul Orbuch and Robert F. Housman, p.24. Washington D.C: Island Press, 1993.

trade distortions. In other words, the different demands and supplies of environmental resources should compose the market equation just like labor does, avoiding economic inefficiencies. The second answer follows a similar logic affirming that, before stricter process standards, the general competitive position of a country will be maintained, for it would lead to a boost on environmentally friendly export industries. Naturally, however, positive effects grounded on the adjustment to economical reality must not involve governmental subsidies, meaning that the Polluter Pays Principle must be followed[9].

The problem of environmental *product standards* is intimately related to the matter of market access since these measures are highly efficient on imposing a disguised restriction to trade under the "politically correct" green flag[10]. Besides, the matter also carries the same nature of health or sanitary standards. For all that, product standards have been given wide attention, culminating in a variety of proposed standards for international adoption. The Codex Alimentarius Commission, NAFTA, EU, OECD, WTO, etc., all have regulated the matter. Under the WTO, product standards must obey the general conditions of the general agreement (e.g. non-discrimination and national treatment), and, furthermore, the dispositions adopted under the Tokyo Round´s Agreement on Technical Barriers to Trade (Standards Code), which requires members countries to adopt standards developed by multilateral organizations and states that they must not constitute an "unnecessary obstacle to international trade". The TBT Agreement has a broad scope and played a decisive role on environmental-related disputes settlements under the World Trade Organization, including the EC-Asbestos and EC-Sardines[11].

I. b) The Trade/Environment Nexus: 1990 onwards

The debate was renewed in the early 1990´s by force of a combination of factors. Since the 1970´s oil crisis, the world economy was challenged, lately

[9] Idem, p.25.
[10] **BHALA**, **Raj**; **KENNEDY**, **Kevin**. *World trade law*. Charlottesville: Lexis **Law**, **1998**, pp. 123-125.
[11] Chris Wold, Sanford Gaines, & Greg Block, Trade and the environment: law and policy (Durham: Carolina Academic Press, 2005), pg..370.

resulting, with the consequent 1980´s crisis, in the fall of development-oriented dictatorial regimes in developing countries and on substantial changes of developed countries´ economic orientation. Likewise, the so-called third, second and even the first world, especially those who adopted the welfare-state model, felt a need for opening their economies. The neo-conservative economic wave resulted, *inter alia*, on the integration of national economies processes. The result of these processes was naturally the enhancement or even resurgence of the trade-environment problem, for the integration of economies emphasized the problem of divergent environmental policies.

Although important, the economic stimulus did not come alone, but rather was accompanied of a genuine environmental one. Moving far beyond the scope of the *Trail Smelter* case, that is, short-distance transboundary pollution, by around the year 1990, the countries of the world had been coming always closer to deal with environmental problems of global scope. With this concern, it was signed, among other texts, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and the 1992 United Nations Framework Convention on Climate Change. By that time, the international progress and awareness led to a real "globalization of environmental problems"[12].

In this wise, to some extent, the world saw a certain shift of view; and the trade-environment issues started to be seen also from an environmental perspective. The very notion of sustainable development is an expression of that. Since then, the study of the effects of free trade on the environment and the use of commercial measures to improve environmental conditions became widespread. Put it simply, the discussion now also addresses the "scale and composition effects" and the "regulatory effect"[13].

Environmentalists claim that the growth of the commerce stresses the environment inasmuch it implies in increasing consumption of environmental resources due to both higher output and input productions. Even worst, unfettered trade would nullify several environmental rules. Defending the environmentally soundness of free trade and therefore advocating against the trade-environment

[12] Charles S. Pearson, op. cit., p.29.
[13]Chris Wold, op. cit., pg.5.

conflict, it is also said that economic growth changes the preferences of those affected thereby resulting on stronger environmental claims and consequent protection. Moreover, free trade advocates also state that trade restrictions "are a second-best approach to international environmental problems" and inflict poverty and environmental degradation on developing countries[14]. Free trade agreements would result furthermore on the elimination of environmentally harmful subsidies and easily result on exchange of pollution control technologies.

To sum up, there are indeed traits of incompatibility between trade and environment, especially from a first and superficial sight. But there are also clear evidences that commercial and environmental policies are plainly congruent. What really lacks is a proper harmonization of the two policies. But, given that, how have international organizations dealt with the theme? What have been the answers they found to this dilemma? It leads to the study of the harmonization of environmental rules.

*II - **Environmental Harmonization Within International Fora***

a) The WTO

The World Trade Organization regulates trade restrictions and distortions and is based on three basic disciplines: most-favored-nation; national treatment; and non-protection. This international organization, which will be central to the Chapter 3, has a leading role on the free trade context and, as a natural result, a highly important role on the development of the trade-environment debate. Object of much criticism by part of the society and some academic literature[15], the WTO has decided a few primordial disputes on the present matter, including those that first called general attention to the problematic relation between trade and environment, as one can notes from the foreword to this Chapter. These rules include, *inter alios*, (a) The Gasoline Case, (b) The Shrimp/Turtle Case (The Tuna/Dolphin Case), (c) The Asbestos Case, (d) The Hormones Case and (e) The Australian Salmon Case.

[14] Idem, p.6.
[15] http://en.wikipedia.org/wiki/World_Trade_Organization#Criticism_3 (27 May 2007)

However, prior to its settlements, we have the dispositions of its agreements. As a matter of fact, the WTO recognizes the environmental matter yet in the Preamble to the Marrakesh Agreement. Initially, however, no explicit call for harmonization was made, although its rules inevitably led to an approximation of national regulations. As these first disciplines were considered weak to solve the problem, during the Tokyo Round some parties adopted the GATT Standards Code on technical barriers to trade. This text requires the parties to ensure their standards donnot impose "unnecessary obstacles" to international trade and encourages the adoption of international standards created by international organisms. The mechanism was later developed in the Uruguay Round when the Sanitary and Phytosanitary Code was adopted.

The GATT´s Art. XX, however, is a disposition that lies at the core of the environmental harmonization issue. This Article exempt environmental measures of the free trade provisions to the extent that these same measures are proven to be really designed to protect human, animal or plant life or health; that the measure is necessary to fulfill the claimed policy objective, which includes the need to prove that there is no less restrictive measure available (cf. Art.XX(b)); or that the measure is related to the conservation of exhaustible natural resources and that it is applied in conjunction with equivalent restrictions on the domestic production and consumption (cf. Art.XX(g)). It is important to note that these restrictions to the national production and consumption mean not only that the same measures must apply domestically, but also that foreign and national industries must posses the same range of options, which implies the need of impartiality when setting the measure[16]. Fulfilling these requisites, the member state that has its measures challenged before the Dispute Settlement Mechanism must also prove that the measure is not applied in a manner that constitutes an "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction to international trade" (cf. Art. XX Chapeau). It is decisive that the country intending to make use of an environmental measure negotiates with the parties involved, especially when the later is a developing country[17]. This need

[16] VARELLA, M. D. Direito internacional econômico ambiental. Belo Horizonte: Del Rey, 2004. v. 1., p. 266
[17] Idem, 269.

was particularly highlighted, having a decisive role, in the United States — Import Prohibition of Certain Shrimp and Shrimp Products.

b) Regional Free Trade Agreements

The formation of regional free trade blocs is both a fundamental step to the trade flow in the globalized world today and a not less important tool for the concerted efforts of environmental protection[18]. This contradiction shows, once again, the intimacy of the trade-environment relation and offers more examples of the harmonization policy.

The treatment given to the environment by the Southern Common Market (Mercosur), a Regional Trade Agreement that composes the scenario of the next Chapter to this paper, is still object of much fewer studies. The environmental concerns of this RTA will be more extensively studied on the Chapter 4, but a brief introduction is hereby pertinent. Its environmental concerns are first noted in the Preamble to the 1991 Asuncion Treaty. After emphasizing that freeing the regional trade "constitutes a fundamental condition" to economic development, the parties affirm that this development must occur with a due "equilibrium", exploiting efficiently the natural resources and protecting the environment. In the same year of this treaty´s signature, the Common Market Council (CMC) Resolution 03/91 addressed the need to include the environmental cause on Sectorial Agreements. However, the deemed Mercosur´s first document on the environment, was the Canela Declaration, which interestingly ended up to be important for the 1992 United Nations Conference on Environment and Development be based in Brazil[19]. It was on 1992, however, that not only the meeting in Las Leñas, Argentina, included in its goals environmental matters, but that it was established the Special Meetings on the Environment (REMA), which were intended to study the member countries´ environmental legislations and propose recommendations to the Common Market Group (GMC), the executive branche of Mercosur. One of these

[18] Michelot, Agnès. *Environnement et Commerce*. Genève, Suisse: UNITAR, 2003, p. 113.
[19] Lopes, Fernando Augusto Montai y; Belincanta, Fernando César. *Estudo da Evolução do Tratamento Ambiental no Mercosul: do Tratado de Assunção até o Acordo Quadro sobre Meio Ambiente*. Jus Navigandi, Teresina, ano 6, n. 59, out. 2002.

recommendations was the text “Basic Orientations on an Environmental Policy” that would eventually become the proposed Additional Protocol on the Environment. The REMA later became a definitive body responsible for the environment within Mercosur – the Subgroup Nº6 – and the Protocol on the environment was rejected. In its place, the parties adopted the less ambitious Mercosur Framework Agreement on the Environment (Florianopolis Agreement) in 2001. There have been some efforts of adjustment of standards, but still, the most important is that, similarly to the WTO, the Mercosur boasts an article providing an environmental exception to the free trade provisions – the Article 50 to the 1980 Montevideo Treaty, which has inclusive be applied on a recent Mercosur´s Dispute Settlement Mechanisms in the retreated tires case opposing Uruguay and Argentina, which will also eventually be studied more extensively due to its crucial role.

Naturally, a different system is to be found in the North American Free Trade Agreement – NAFTA. Here, one can perceive a more environmentally sensitive institution[20]. The North American RTA also calls its three members to adopt international standards, yet it goes a step further by also precluding downward harmonization and exhort them not to “waive or otherwise derogate” security measures (including environmental) in order to encourage investment[21]. However, the requirements set under WTO to environmental standards have no similar within the NAFTA. An important shift from the last examined system rests in the burden of proof. Before NAFTA, the later lies on the complaining party and not on the defendant who keeps the environmental measure. Moreover, NAFTA also works based on the OECD´s Polluter Pays Principle and the need of set standards according to scientific methods.

Within the European Union, standardization is seen as a promoter of the Lisbon Strategy, which involves the goal of this RTA of becoming “the most competitive single market”22. The EU has been enacting rules on environmental policy extensively, resulting even in conflicting rules23. The Treaty of Rome boasts

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[20] John H, Jackson, op. cit., p. 277.
[21] www.ftaa-alca.org/wgroups/wgin/english/fta_3c2e.asp (27 May 2007)
[22] http://ec.europa.eu/environment/standardisation/index_en.htm (27 May 2007)
[23] John H, Jackson, op. cit., p. 275.

a whole chapter on harmonization of rules, in a system that calls its members to maintain “high” levels of environmental guardianship. In fact, the harmonization of environmental standards is a explicit objective to the EU – to the contrary of NAFTA, for instance24, and, together with the substantial developmental assistance to its poorer members, is part of the efforts of providing a “level playing field” for economic competition within the bloc25. Within the EU system, the member states are free to adopt and maintain their own standards whenever the issue is not regulated by the Council of Ministers, who, by a qualified majority, has the competency to legislate on internal market standards26. However, in adopting higher standards, the member state may keep track of the limits imposed on Article 36 of the Treaty of Rome. This disposition is based on GATT´s Article XX, yet with a narrower scope, and prohibit the environmental standards to be actually used in such a manner that would a) constitute an arbitrary discrimination, b) have negative effects disproportionate to its objectives, c) do not be necessary to achieve its goals and d) donnot use the less restrictive means of reaching its objectives. Thus, prevails the rule that the powers not exercised by the EC remains to member countries, which must mutually recognize other member´s standards unless they run counter the common dispositions, particularly Art. 30 and 36 of the mentioned agreement.

c) *International Dispute Settlement*

As it could be seen, the balance between the trade and the environment is not made by the International Organization´s legal texts alone. As there frequently are controversies over how to apply them to a concrete case, the member countries open the proceedings for the establishment of the IO´s Dispute Settlement Mechanisms whenever they feel economically harmed by the other member´s acts. In so doing, the decision emanated by the competent organs

[24] Chris Wold, Sanford Gaines, & Greg Block, Trade and the environment: law and policy (Durham: Carolina Academic Press, 2005), pg. 841.
[25] Idem, 843.
[26] John H, Jackson, op. cit., p. 275.

inevitably help to shape the legal texts solution found to the trade-environment dilemma.

Our study focuses on some of these international disputes. Firstly, it will be analyzed a dispute between Uruguay and Brazil within Mercosur (Chapter 2), following this, a dispute between Brazil and the EC before the WTO (Chapter 3), and, more concisely, a dispute between Argentina and Uruguay also in Mercosur (Chapter 4). All these cases relate to the same issue: import embargo of retreated tires.

Although the trade-environment question was somehow overlooked in the first case, and this is part of the problem that motivated this paper, the other two disputes provide a clear picture of the theoretical background discussed throughout this Chapter. In the WTO, for instance, the EC denies that the Brazilian import ban was motivated by environmental concerns, affirming that it is a mere disguised protectionist measure thus serving solely economic purposes. If, however, the EC also denies that waste tires are environmentally problematic, the Uruguay recognizes an environmental problem associated with this waste but nevertheless successfully refutes the Argentinean claims that their import ban was environmentally necessary. But given the scale and composition effect on the environment that the import of retreated tires allegedly has, could it be that one country totally block its market access to this product on an environmental basis? This is the question that motivates most of the cases to be analyzed.

The Retreated Tires Case Before the Mercosur Dispute Settlement Mechanisms: Overlooking the Environmental Factor

Chapter Two

I - The waste tires problem

Although not really considered hazardous wastes, its durability and production volume make used tires lie among the largest and most problematic sort of wastes present in the world today. Their carcasses contribute for the propagation of several diseases, e.g. West Nilo Virus, encephalitis, dengue fever, and hanta virus[27], for they are convenient breeding grounds for mosquitos and rodents. This problem is made worst by the attractiveness this trash may have to children, who can also be easily injured playing among them[28]. Furthermore, tires contain high combustible and pollutant materials and whenever burnt, tires liberate large amounts of toxic air pollution, oil, and heavy metals. But at the core of the whole problem is the indeterminate existence that this good actually has. Since they are specially produced to be robust and durable, tires, once thrown apart, let these difficulties last for virtually forever.

The negative idiosyncrasies of this waste are such that municipal trash haulers seldom accept them and the special dumps where used tires are usually kept frequently undergo legal antagonisms with municipal authorities[29]. As a result, they are easily thrown in landfills or illegally disposed all around thus enhancing the safety and health concerns they by themselves generate[30].

The necessity to cease with all these long-term complications turned out leading to the definitive need to make used tires somehow reusable. As a result,

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[27] http://www.charityguide.org/volunteer/fewhours/used-tires.htm (27 May 2007)
[28] Idem.
[29] http://en.wikipedia.org/wiki/Tire#Other_use_and_recycling (27 May 2007)
[30] Tire Reuse and Recycling: Guide to Used Tire Recycling Options in the Los Angeles Area. Available at: http://www.lacity.org/san/docs/tire-reuse-brochure.pdf (27 May 2007)

tires became one of the most reused sorts of trashes. Demonstrating this, if in 1989 only 10 percent of the more than 250 million tires the United States discards a year were recycled or reused, now more than 80 percent account as being so[31]. Recycled tires are used to manufacture several new other products such as playgrounds and aesthetic mats, floor tile, carpet underlayment and rubber-modified asphalt pavements. Some companies also accept used tires to have it as combustion fuel – used in the place of coal. Moreover, researches continue and keep exploring innovative ways to solve the used tires problems. New technologies include, for instance, grind the tires up and place the rubber bits beneath golf course greens[32] or the use of truck tires for low-coast, easy-to-install culverts[33].

However, the costs and deficiencies of every solution ever found are evident. The burn of used tires for energetic purposes (averagely a tire has the energy of 9.4 Liters of oil), for instance, is a peculiarly dangerous process yet and, in Brazil, must be done under strict supervision of authorities. But the most pertinent problem of reusing this waste lies in the matter of *retreated* tires. These are tires used before but that underwent a process of reformation by means of applying new rubber in the carcasses. That is, as, for safety reasons, new tires cannot be made entirely of old ones (new tires must be manufactured primarily from virgin rubber – recycled rubber can thus only account for 5 to 15 percent of the finished product[34]), the carcasses of used tires are reformed to extend its trend life[35]. The result is the reformed tire, whose worn tread is replaced of new material, i.e. about 30 percent of new material is added to the carcasses[36]. As soon as the effects of such a palliative measure are over, the carcasses become the same problematic trash once again.

It must be said, however, that this problematic view of the waste tires is not uncontroversial. Although it appears to be the mainstream position, some are of the view that this sort of waste is not necessarily environmentally problematic. The

[31] http://en.wikipedia.org/wiki/Tire (27 May 2007)
[32] A development of the UW-Madison University:
http://www.engr.wisc.edu/news/headlines/2003/Nov10.html (27 May 2007)
[33] http://fp.uni.edu/rrttc/grants/project.asp?projectID=149 (27 May 2007)
[34] http://en.wikipedia.org/wiki/Tire#Other_use_and_recycling (27 May 2007)
[35] Some studies point out that the durability of a reformed tire is about the half of a new one (but it remains controversial): http://www.apromac.org.br/cartabertapneus.htm (27 May 2007)
[36] In addition, retreated tires are from 30 to 60 percent less efficient than new ones (cf. Laudo arbitral)

Brazilian federal deputy Ivo José (PT-MG), for instance, argues in line with the European Communities. He affirms that the import of tires´ carcasses does not imply on environmental harm because the tires retreating Brazilian industry can properly manage these wastes[37].

II - The Brazilian trade policy restrictions: triggering an international conflict

In 2002, Brazil produced 41 million new tires, 45 million in 2003 and 53 million in 2004[38]. It discards approximately 35 million per year[39], but it is by no means possible to give them the proper destination[40] - in 2003, 22 million of tires were collected and had a proper treatment[41]. Brazil has a developed environmental regulatory system[42], but as far as the problem of tires is concerned, just like in the whole world, it serves only to guarantee the best treatment available, for unfortunately it still lacks effectively appropriate solutions[43]. That is the environmental advocates point of view.

However, on the other hand, it must be noted that Brazil retreats 15 million of tires per year. Thus, as far as this activity is considered, if the United States holds the first position in the economy of the world, Brazil holds the second[44]. Being eminently a highly lucrative business, although prohibited of doing so, due to a matter of legal interpretation, Brazilian retreaders import cheap foreign used tires by virtue of interim relief adopted by Brazilian courts. In this wise, after the import

[37] http://www.fnucut.org.br/Bol%2015122005.htm (29 May 2007)
[38] http://www.cempre.org.br/fichas_tecnicas_pneus.php (27 May 2007)
[39] http://www.lixo.com.br/pneus.htm (27 May 2007)
[40] "Estima-se que sejam dispostos 285 milhões de pneus por ano, algo em torno de 4,7 milhões de toneladas, o que representa mais de um pneu, por habitante, por ano. Desse montante, 33 milhões de pneus são recauchutados, 22 milhões são reutilizados (revendidos) e os outros 42 milhões são destinados a diferentes aplicações. Os 188 milhões de pneus restantes são enviados para aterros ou dispostos ilegalmente" (HEITZMAN, 1992).
[41] 58% for *laminação* to the production of, *inter alia*, carpets; 31% for *cimenteiras*; 6% for treatment and extraction of minerals and 5% others (e.g. for asphalts). About 14.2 million of tires were reformed: http://www.revistacaminhoneiro.com.br/ed217/217_pneusref.html (27 May 2007)
[42] The Greening of Trade Law: International Trade Organizations and Environmental Issues (edited by Richard H. Steinberg, Boulder: Rowman & Littlefield, 2002).
[43] http://www.fes.org.br/default.asp?paginaId=134&moduloAcao=mostraNoticia¬iciaId=12 (27 May 2007)
[44] http://www.fnucut.org.br/Bol%2015122005.htm (27 May 2007)

ban on retreated tires, the import of *used* tires from the EC, for example, dramatically increased from about 10 million per year to more than 70 million of tires per year[45]. Considering all that, and literal references to protect the tire retreating national industry during the parliamentary discussions that led to the adoption of the import ban, one gets the trade picture.

Driven by the environmental or commercial motivations explained above, or probably concurrently by both, Brazil adopts a variety of laws. Some have an uncontestable environmental purpose, others, such as the very retreated tires import ban, may actually hide commercial motives.

The Brazilian legislation on tires is rather abundant. On May 13, 1991, the Brazilian Secretariat of Foreign Trade (SECEX), via Portaria No. 8 (hereinafter Portaria No. 8/91), prohibited the import of used goods, including tires. Five years later a Resolution adopted by the Brazilian National Environment Council (CONAMA) that regulated the import and use of hazardous materials, prohibited the import of several solid wastes, used tires included (cf. Resolution No. 23/96)46. It was followed by the Resolution 258 of August 26, 1999, which set the responsibility of collection and final disposal of irreversible tires dispersed all over the national territory by their importers and producers – it would be done according to the proportion of tires imported and produced respectively. Later, in 2001, the Decree 3179, which set the environmental crimes, was emended by the Federal Executive´s Decree 3919, adding an Article that establishes a fine for the import of used or retreated tires (400 BRL per unit) and prohibits the commerce, transport or keeping of used or retreated imported tires. Finally, by September 19, international trade managers were already informed that the import of remolded tires implied on a previous license and on September 25, 2000 CESEX adopts the Portaria No. 8 (hereinafter Portaria 8/00). Being the eminent target of the eventual challenge imposed by Uruguay under Mercosur dispute settlement mechanisms, the Portaria 8/00 imposes an import ban on used and retreated tires (classified under the codes 4012.20 and 4012.10 of the Combined Nomenclature, respectively).

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[45] Brazil – measures affecting imports of retreaded tyres: EC First Written Submission Pg.23.
[46] www.pt.org.br/assessor/NTpneusUsados.doc and http://www.planalto.gov.br/ccivil_03/revista/Rev_79/pareceres/nota_pneus_RGS.pdf (27 May 2007)

*III - **A Brief Introduction to Mercosur´s Dispute Settlement Mechanisms***

The functioning of the Dispute Settlement Mechanisms of the Southern Common market underwent four different phases directly related to the dispositions of Mercosur´s primary agreements: a) Assuncion Treaty; b) Brasilia Protocol; c) Ouro Preto Protocol; and d) Olivos Protocol47.

The 1991 Assuncion Treaty founded Mercosur, consolidating six years of works on its creation, which formally started in 1985 with the Foz do Iguazu Declaration. In the Annex III to this treaty, the parts agreed on the need to develop a Dispute Settlement Mechanism and therefore established a temporary one. Shaping the first phase, this system to settle disputes arisen of the application of Mercosur law stated that the dispute should first be object of a direct negotiation. If the parties failed to find a solution, the matter would be brought to the Grupo Mercado Comum (GMC) which would have 60 days to present a settlement. If the GMC did not find this solution, the Conselho do Mercado Comum (CMC) would come to life in order to find one48.

A few months later, the Brasilia Protocol was signed, reshaping the mechanism. Initially, it was also to be temporary but ended up becoming permanent49, solely eventually undergoing some minor changes, mostly set by the 2002 Olivos Protocol.

The Brasilia Protocol delimited the issues that could be object of controversy and established the right of individuals to initiate the Dispute Settlement Mechanisms (cf. Chapter V). Under this text, these mechanisms are three: a) direct negotiations, b) GMC intervention and c) Arbitral Proceedings. That is, if the parties donnot reach a solution negotiating the matter alone, any of them can submit the matter for the GMC consideration, which will present a solution, and if whatever party disagree with this proposition, the matter can finally be brought to the Arbitral Proceedings (cf. 7, § 1). The Tribunal will then have 60 days to decide, being

[47] http://jus2.uol.com.br/doutrina/texto.asp?id=4514 (27 May 2007)
[48] Idem.
[49] Idem.

possible to prorogate for more 30 days by a request of the President (cf. Art.20)50. This is exactly the procedure we will find in the analyzes of the case presented in this Chapter.

The 1994 Ouro Preto Protocol comes merely to introduce an additional proceeding in which the reclamation is submitted to the Commerce Commission - CC. This procedure, however, does not nullify the Brasilia Protocol process and its scope is limited by the issues of CC competency51.

Finally, the 2002 Olivos Protocol on the Dispute Settlement Mechanisms (Protocolo de Olivos para la Solución de Controversias) regulates the prior arrangement set by the Brasilia protocol with more details, therefore institutionalizing it as it works today. It is important to note that the system set under the Brasilia Protocol remains; as a result, it continues to lack a supranational body. However, although the three phases remain, it was added a second stage. That is, the party that does not accept the decision of the ad hoc Tribunal can appeal to the Mercosur Permanent Appealing Tribunal (Tribunal Permanente de Revisión del Mercosur).

In spite of the changes, the case involving Brazil and Uruguay initiated before the signature of the Olivos Protocol and followed just the three steps set by the provisions of the Brasilia Protocol. The case ended with the ad hoc arbitration. On the other hand, on the tires dispute involving Argentina and Uruguay, it is possible to see the performance of the Permanent Appealing Tribunal (cf. Chapter 4).

IV - ***The Dispute´s Procedural Background***

As the legal measures adopted by Brazil ran counter economic interests of Uruguay, an exporter of reformed tires, some months after the promulgation of Portaria No. 8/00, on March 12, 2001, Uruguay requested to Brazil, via Note No. 538/2001, the start of direct negotiations to solve the so established commercial divergence (Articles 2 and 3, Brasilia Protocol).

[50] **RODRIGUES**, **Horácio Wanderlei.** VIEIRA, Débora Crstina, et outrtos.**Solução de Controvérsias no Mercosul**. Porto Alegre: Livraria do Advogado, 1997.
[51] http://jus2.uol.com.br/doutrina/texto.asp?id=4514 (27 May 2007)

The direct negotiations between Brazil and Uruguay were then conducted on April 23, in Assuncion, Paraguay. With only a few minutes of extent, the meeting results in no agreement. Uruguay then notifies Brazil of its decision to consider the negotiations phase terminated and by the end of May asks the Pro Tempore Presidency to add the tires controversy on the GMC agenda.

The GMC intervention phase took place on June 12 and 13, 2001, during the XLII Ordinary Meeting of this organ, held again in the Paraguayan capital, Assuncion. The matter also was taken to the GMC XXI Extraordinary Meeting, held in Montevideu on July 13 of the same year. In neither occasion an agreement was ever reached. The intervention phase was then finished to give place to the arbitration proceedings.

On august 27 the Administrative Secretariat (SAM) was notified by Uruguay of its decision to start the arbitration phase (Brasilia Protocol, Chapter IV). After the due notification of Brazil, the TAHM (Tribunal Ad Hoc del Mercosur) was established on September 17 and had its first administrative meeting on October 12, when it adopts its working rules. The arbiters designated were Raul Emilio Vinuesa of Argentina (the Tribunal President), Maristela Basso of Brazil and Ronald Herbert of Uruguay. Enrique Augusto Gabriel represented Brazil in court, while Uruguay was represented by Jose Maria Robaina. Several assessors supported both representatives[52].

The Tribunal called the parties for an Audience to be held on December 3. The parties, however, asked for a suspension on the proceedings and the Audience only occurred on December 18, in the SAM building, Montevideu. Orally, the parties presented their positions and provided information demanded by the Tribunal. Finally, a written resume of each party allegation was submitted to the Tribunal. On December 28, the latter asked to the parties a prorogation of the deadline and the parties conceded it. Therefore, it is only by January 9 that the TAHM provided its decision on the mater[53].

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[52] Brazil: Andre Alvim de Paula Rizzo, Mario Canabarro Abad, Marcio Bicalho Cozendey, Marcelo Baumbach, Liliam Beatriz Chagas de Moura and Arruda Benjamin. Uruguay: Roberto Puceiro, Washington Duran, Ricardo Nario and Luis Plouvier

[53] See Arbitral Award VI – Tyres – from Uruguay to Brazil – 01/09/2002.

V - *The Uruguay Allegation*

Uruguay states that the controversy rests on the Portaria No. 8/00 and all the related instruments that directly or indirectly contribute to the import barrier set to retreated tires classified in the position 4012 of the Common Nomenclature. It affirmed that Brazil banned the import of *used* tires (classified in the NCM subposition 4012.20) with the Portaria No. 8/91, but that the challenged text, the Portaria of 2000, extended the same prohibition to *retreated* tires (classified in the NCM subposition 4012.10). According to Uruguay, between the whole period of time that separate these two Portarias, its companies exported reformed tires to Brazil in a frequent basis. Likewise, it concludes, the Portaria No.8/00 illegally frustrated this commercial movement running against several Mercosur dispositions, especially the Assuncion Treaty, CMC Decision No. 22/00 and international law principles.

Uruguay emphasizes that the frequent export of retreated tires (4012.10) to Brazil during almost a decade is strong evidence that during such a period only the import of used tires (NCM 4012.20) was forbidden, while, *per contra*, the import of retreated tires was legally allowed. That is, the reference made by the Portaria No. 8/91 to “used” goods actually did not encompass retreated tires, as Brazil seemed to be trying to allege. Furthermore, Uruguay proves that from 1991 to 2000 several Brazilian authorities formally admitted that remolded tires were allowed to enter into Brazilian territory, including the Receita Federal, which clearly differentiates the conditions of tires under the NCM 4012.20 and 4012.10 subpositions. In 1995, for instance, answering a Paraguay consult, the Ministry of Industry, Commerce and Tourism of Brazil affirmed that the import of reformed tires was not subject to any legal or administrative restrictions. Uruguay states that Brazil answered in the same sense to others consults, such as the No. 32/98, letting it clear the position the Brazilian government, and consequently Portaria No. 8/91, had towards the import of retreated tires, i.e. they were accepted and were therefore not strictly considered “used” goods. Even the CONAMA Resolution 258/99, in its end-of-life tires destruction and recycling program, admitted the import of the reformed tires and, besides, in its Resolution 23/96 the same environmental agency makes clear

distinction between used and reformed tires and their respective environmental and import treatment[54].

In this wise, in other words, Uruguay looked forward proving that Portaria No. 8/91 reference to “used goods” did not encompass remolded tires, and that Brazil as a whole was aware of this reality and also that, as a result, the Portaria No. 8/00 comes to apply a new and illegal commercial measure that runs against the provisions that regulate market access within Mercosur (cf. Decision 22/00).

With the attempt to frustrate any other defense coming from Brazil, Uruguay also declares that used and reformed tires are clearly discernible in the NCM classification and that consequently Brazil could not affirm that the NCM refers only to “used” and “new” tires because while the position 4011 refers to “new”, the position 4012 is subdivided, making the distinction between retreated (4012.10) and “used” tires (4012.20). Brazil could neither, Uruguay continues, make any allegation claiming the liberty states have to determine what encompass “new” and “used”, for this freedom cannot undermine technique rules, the NCM or the good-reasoning. Moreover, defend itself on the basis of environmental policy would not be possible too because it would not be sound with the mere interpretative nature Brazil had been giving to the problem and, furthermore, the CONAMA Resolution No. 258/99 would also run counter such an approach.

Uruguay also looks forward safeguarding a broad extent to the dispute. It mentions that the controversy cannot be limited to the Portaria No. 8/00, for several other legal instruments have similar effect and are also in conflict with the compromises assumed under Mercosur. In this sense, as an example, it is named the Decree No. 3010 that impose special fines on imported reformed tires and also INMETRO Portaria No. 123 that establish new technical exigencies to tires reformed abroad – but letting those reformed in Brazil apart of these additional requirements.

The argumentation of Uruguay is concluded when it points out what dispositions of Mercosur were not observed. In this sense, it is cited the Decision No. 22, also adopted in 2000, but even though before Portaria No. 8/00, for it sets the prohibition on Mercosur Members on adopting any restrictive measures to their

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[54] See Arbitral Award VI – Tyres – from Uruguay to Brazil – 01/09/2002.

reciprocal trade flow. Uruguay recognizes, however, that this prohibition is limited by the disposed in the Assuncion Treaty Article 2 (b), which refers to the 1980 Montevideu Treaty´s Article 50. Uruguay is of the view that these exceptions, however, are not applicable to the present case and affirms conclusively that Brazil never contested this fact. The same measures, according to Uruguay, also violated Art. 1 of the Assuncion Treaty, and Art.1 and 10 (2) of its Annex I.

Finally, the attitude of Brazil would also have ran against principles of international law, namely the “pacta sunt servanda” and “goodd faith” (Vienna Convention on the Law of the Treaties, Art. 18, 26, 33.1), which, as states Uruguay, become even more relevant within the context of an international integration bloc such as Mercosur. Another principle Brazil would have not observed is the estoppel – *venire contra factum proprium* – (Art. 45, Vienna Convention) due to the inconsistency of the Brazilian trade policy measures with its prior allegations and attitude.

To sum up, Uruguay´s allegation is mostly based on the abrupt adverse effect Brazilian measures imposed on the trade flow of retreated tires and the prohibition of so doing established especially via Decision CMC No. 22/00. It also make reference to a possible environmental defense that it, in advance, classifies as unacceptable given the interpretative defense Brazil presents since the beginning.

*VI - **The Brazilian Defense***

Brazil first manifests contrary to the broad approach of the challenge inflicted by Uruguay. Brazil is of the view that this not only works against its right to offer a proper defense, but other legal instruments than Portaria No. 8/00 were not mentioned before in the process and it would not be according to Mercosur law to enlarge the object of controversy in that late in the arbitration.

Also trying to make of Portaria No. 8/00 the unique point at stake, Brazil affirms that the Decree No. 3919/01 and the INMETRO Portaria No. 133/01 were

adopted by different organisms regulating the environment and consumers protection and thus could not be classified as measures modifying Portaria No. 8/00, as does uruguay.

Additionally, Brazil denounces the Uruguay´s misuse of the prior phases of the dispute settlement. Indeed, the negotiations held on April 23 were finished only 15 Minutes after its start because of the Uruguay insistence. Moreover Uruguay did not let it clear what the controversy was about. Brazil asserts that always sought to solve the controversy but Uruguay seemed to never share the will to such an attempt[55].

Concentrating its efforts in the Portaria No. 8/00, Brazil insists this text had a mere interpretative nature. That is, the prior Portaria No. 8/91 would have prohibited both used and reformed tires. Brazil believes that reformed tires are indeed used goods that underwent a process aiming to add a value into it and extent its durability. The entry of this sort of used goods into Brazilian territory was due to fails on the import system. The informational import system only considered the possibility of a good to be *used* or *new* and made no reference to the NCM, even because if it did, it would be difficult to make the distinction between used and new. This way, reformed tires were classified as new and thus were given the license to enter in Brazil.

Because of this fraud, several imports in this situation were taken by the Customs and due to the increasing number of reformed tires import throughout the years, Brazil felt the necessity of clarifying the scope Portaria No. 8/91 had by clearly prohibiting the import of *reformed* tires. That is the very function given to the Portaria No. 8/00. Finally, in this sense, the ban on reformed tires import would not stand as a new and additional prohibition, as affirms Uruguay.

As far as the CONAMA Resolution No. 258/99 is concerned, Brazil alleges that its reference to the import of remolded tires is only of a preventive nature. It actually meant that in case of an eventual import of remolded tires, they should also have a proper final disposal. Doing so, it would be by no means formally recognizing the import of remolded tires, even because it is not its function.

[55] See Arbitral Award VI – Tyres – from Uruguay to Brazil – 01/09/2002

According to Brazil, the GMC Resolution No. 109/94 permits the parties to adopt its own economic policy on the areas where the harmonization of regulations was not yet reached. And this is exactly the case of used goods. Moreover, the very definition of used goods is let to each state define. The works of the Technique Comission III are proving that.

Brazil states that its decision of considering reformed tires as used goods is not arbitrary. It is confirmed by Mercosur Technique Norms that define reformed tires as *used* goods that merely had added new material to be reused. Reformed tires have a much lower efficiency and durability than new ones. The classification of used and reformed tires in different subpositions within the NCM does not modify the fact that reformed tires, by their nature, are used goods that rapidly become an undesirable waste. Moreover, the same prohibition was applyied by Argentina, fact which Brazil utilizes to affirm that its position is by no means isolate or arbitrary.

In this manner, Brazil alleged its trade policy measures fall under the exception on free-market provisions provided by the GMC Resolution No. 109/04. Brazil states that such an exception was not modified by the Decision No. 22/00, for it does not create new obligations of eliminating commercial restrictions. As Portaria No. 8/00 has only an interpretative nature, no new restrictions on market was made and this is how Brazil can not be accused of not observing Decision no. 22/00. Finally, CMC Decision N 70/00 confirms the intention of the parties to the Mercosur to exclude pieces for vehicles apart of the free-market within Mercosur.

Brazil concludes from the given that the *pacta sunt servanda* and good-faith Principles were not broken. As for the estoppel, Brazil denies any ground to Uruguay count with an expectation of continuity on the commerce of remolded tires. In this sense, it mentions a decision of the Regional Federal Tribunal of Rio Grande do Sul (TRF-RS), which decided eight months before the adoption of Portaria N 8/00 that it was legal the act of the Customs to retain remolded tires because Portaria 8/91 prohibited its import. A decision of its highest court, the Supreme Federal Tribunal (STF) in the same line is also mentioned. Brazil continues its argumentation remembering the Tribunal that the estoppel cannot originate from fraud. Furthermore, considering the mutually agreed autonomy

states parties to Mercosur had on ruling on used goods, the estoppel would also be also implausible.

VII - The Decision: El *VIº Laudo del Tribunal Arbitral ad hoc del Mercosur* (TAHM)

To define the object of controversy, the Tribunal reads article 28 of the Brasilia Protocol and affirms that the matter had to be limited on the papers submitted to the Arbitration. However, it is obvious that the theme had to be directly connected to the discussions of the diplomatic phase. Likewise, the Tribunal recognizes the Decree No. 3019/01 and INMETRO No. 133/01, but states that the analyzes of both will be strictly dependent of Portaria 8/91, for the former did not receive specific attention of Uruguay and the later has not a commercial nature and was mentioned generally for the sake of argument. As for the eventual normative acts that directly or indirectly difficult the commercial flow of retreated tires that was not specifically mentioned by Uruguay, the Tribunal decided it was too abstract and could not be considered part of the issues at stake.

Letting the matter defined, the Tribunal enters the *question quid iuris* phase. By analyzing the Art. 19 (1) of the Brasilia Protocol, the Tribunal states that it will decide the matter based on the dispositions of the Assuncion Treaty, the related agreements, the CMC Decisions, the GMC Resolutions, the MERCOSUL Commercial Comission Guidelines and on the relevant principles and dispositions of international law. Furthermore, the interpretation of these provisions might be based on an integrational approach.

The development of the integration principles´ analyzes led the Tribunal to clarify that commercial restrictive measures must observe the proportionality, i.e. the measure shall be applied only if there is no less restrictive possible actions; the mutually agreed reserved sovereignty, i.e. the exceptional accepted grounds to restrict the commerce as set in Art.50 of the Montevideu treaty; reasonability, meaning that the measure can not exceed in any way the legal objectives and,

finally, the commercial security, or in other words, the stability of the commercial environment.

Presenting each party´s position on Portaria No.8/00, the Tribunal declares that the commercial flow of retreated tires between Brazil and Uruguay was indeed important, continuous and crescent, and the Brazilian authorities considered the prohibition set by Portaria No. 8/00 as referring only to used goods. That is, the Tribunal adopted the view presented by Uruguay. To demonstrate this reality, the Tribunal presents several texts (rules, acts, reports, etc.) coming from several Brazilian governamental organisms and remembered the allegation of Brazil that these texts are originated in organisms not responsible to international trade and thus should not be considered. The Tribunal responds affirming that, according to the International Law Commission on State Responsibility, and therefore to the international consuetudinary law, the conduct of every organisms belonging to a State shall be considered as an act of this very State.

Interpreting the meaning of the Resolution 109/94, the Tribunal states that this text establishes an exception and must therefore be read in a restrictive manner. The very Decision 22/00, which Brazil believes is irrelevant to the matter, comes imposing a limit to the Resolution 109/94. That is, if by Resolution 109/94 it is true that Mercosur countries are free to rule on used goods, including on the definition of used goods, it is also true that with Decision 22/00 the *status quo* must be preserved. If, as observed by the Tribunal, the Brazilian regulatory system permitted the import of retreated tires before the adoption of Portaria No.8/00, the next Portaria adopted in 2000 is illegal because it creates a new prohibition that runs counter the Decision 22/00. Whereas the latter was adopted in June, Portaria No. 8/00 was adopted in September and therefore is not in due harmony with Mercosur provisions. From the given Portaria 8/00 also constitutes a “venire contra factum proprium”, - the principle of estoppel – and, finally, must be modified in order to establish the *status quo ante*, i.e. the important flow of retreated tires that once its regulatory system permitted.

Nemine contradicente, the Portaria No.8/00 was declared incompatible with the Mercosur system and Brazil was given 60 days to modify it accordingly. Two months later, on March 8, Brazil adopted the Portaria SECEX No. 2/02 that

revoked the controversial Portaria No. 8/00. Later in time, in February 2003, it adopted the Decree 4.592/03 to provide the due exception[56] to the fine established under the Decree 3.179/99[57].

The corrective measures were brought to the domestic courts both challenged by the Ministério Público Federal and as a result of an initial malfunction of the new dispositions, but environmental and constitutional appeals notwithstanding, in the end, the courts, including the highest constitutional court of Brazil, maintained decisions in harmony with the final ruling of the TAHM[58].

Finally, on December 1, 2003, the Portaria SECEX 2/02 was revoked by the Portaria SECEX No. 17[59], which in November 17, 2004, was replaced by the Portaria No. 14/04. The latter is thus the basis of the Brazilian trade policy that establish an import ban on reformed tires providing an exception to the Mercosur Members. Naturally, this text inherited the luckless nature of its predecessor, the disputable Portaria No.8/00, and became the main object of a new dispute. Challenged by the European Union under the World Trade Organization, the Portaria No.14 of November 17, 2004, now takes the leading role in the next chapter of the tires question. However, it, and the other related instruments, somehow turn green.

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[56] A Paragraph was added to Art.47-A

[57] The exception to the fine came only after the claims of Uruguay and Paraguay against the difficulties to reestablish their export of retreated tires. In this sense see: http://www.mrree.gub.uy/Mercosur/GrupoMercadoComun/Extraordinaria0302/Acta.htm (27 May 2007)

[58] To see a more detailed exposition of the retreated tires controversy in the domestic courts of Brazil after the Mercosur ruling: http://www.mercosur.int/msweb/SM/General/Textos/Infome%20Derecho%20Mercosur%20-%202003.pdf (27 May 2007)

[59] http://www.planalto.gov.br/ccivil_03/revista/revistajuridica/pareceres/ParecerMariaElizabeth.pdf (27 May 2007)

The Case before the WTO: Shifting to an Environmental Rationale

Chapter Three

I - The Procedural Background

The matter, as carried on before the World Trade organization, is set in motion in November, 15, 2005 with a formal complaint against the Brazilian measures formulated by the Bureau International Permanent des Associations de Vendeurs et Rechapeurs de Pneumatiques (BIPAVER) to the European Communities authorities pursuant to Council Regulation (EC) No 3286/9460.

The submission of this complaint led the European Comission to open an investigation whose conclusion was that the Brazilian measures were indeed illegal under the WTO commitments[61]. The problem inclined the EC to engage on coming to terms with the Brazilian government. The tentative of reaching a mutually satisfactory solution to the tires case by means of negotiation with Brazil occurred before, during and after that investigation[62]. As the parties always failed in this task, the case is formally brought to the World Trade Organization when the EC formally requests consultations with Brazil before this international organism (June 20, 2005)[63]. In this occasion, the controversy is determined as relating to (a) the prohibition of the issuance of import licenses for retreated tires; (b) the fine of 400 BRL per unit on the importation, marketing, storage and keeping of imported tires and (c) the exception given to Mercosur Members on both the import ban and

[60] http://trade.ec.europa.eu/doclib/docs/2005/december/tradoc_126363.pdf (27 May 2007)
[61] Brazil – measures affecting imports of retreaded tyres: EU First Written Submission, p.2 (7)
[62] Idem.
[63] Brazil – measures affecting imports of retreaded tyres: Request for Consultations by the European Communities (WT/DS332/1 - G/L/741)

financial penalties[64], which was the one established in response to the decision of the Mercosur panel studied in the prior Chapter to this paper.

The consultations ended up bringing Argentina, which, presenting its commercial interests on the case, requests to be joined (July 6) [65]. Brazil concedes on 20 July[66]. According to the EC, the consultations “took place in a constructive atmosphere” and provided relevant clarifications on the matter[67], but, again, no solution to the controversy was agreed. Likewise, the EC finally requests the establishment of a Panel[68] (November 17, 2005), but, when the DSB considered it, Brazil objected the establishment of the Panel by presenting a statement with its new environmental views (November 28)[69].

On January 20, 2006, the request was then renewed at the meeting of the DSB, according to Art. 6.1 of the CDU. The panel was established in the same day, for Brazil, as the part “in the dock”, could block the creation of the Panel only once, and as it had already so done before, now the Panel had to occur regardless of the Brazilian position. Brazil nevertheless submitted another statement to formalize its disagreement. This time more aggressive, Brazil affirms that the environmental risks used tires represent are undisputable and makes reference to the relevant EC legislation, stating that the EU position in the case, whenever considered their domestic rules, is contradictory, for, whereas the latter asserts the need of waste prevention and of not exporting waste to non-EC countries, now they behave, Brazil affirms, overlooking the right of Brazil of preventing the accumulation of wastes. As the European Union is of the view that retreated tires are actually not wastes, Brazil states that this thesis is also inassimilable, for this material is made of “at least 70% of waste” and “will generate waste in short time” to be disposed in Brazil[70]. In this wise, Brazil defends the idea that the EC consciously intends to use

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[64] Idem.
[65] Brazil – measures affecting imports of retreaded tyres: Request to Join Consultations (WT/DS332/2)
[66] Idem: Acceptance by Brazil of the Request to Join Consultations (WT/DS332/3)
[67] Idem: EU First Written Submission, p.3 (11)
[68] Idem: EU Request for Establishment Panel (WT/DS332/4)
[69] See Brazil Statement on the EU Request for Establishment Panel.
[70] Brazil – measures affecting imports of retreaded tyres: Brazil Statement on the Request for the Establishment of a Panel (20, Jan), 5.

the Brazilian territory as a disposal area of European wastes and it is said very clearly, even literally[71].

The statements of Brazil notwithstanding, the process proceeds and on March, 6, 2006, the EC requests the Direcotor-General to determine the composition of the panel. On March, 16, the panel was then constituted, being Mr. Mitsuo Matshushita the Chairman and the Members Mr Donald M. McRae and Mr Chang-Fa Lo.

The EC First Written Submission was delivered on April, 27, 2006, and the Brazilian First Written Submission on June, 8. The first meeting of the Panel took place on July, 5-7. Later on, the Second Written Submission of both Brazil and EC were delivered on August, 11. The second meeting took place in September, 4. On June 12, 2007, the report of the Panel was ready. The decision held that the Brazilian policy (ban, fine, etc.) was inconsistent with Article XI:1 of GATT 1994 and not justified under Article XX(b) of GATT 1884. On September 2007 the European Communities appealed to the Appellate Body, though. This body upheld the Panel´s decision that the ban can be regarded as "necessary" according to Article XX(b) but reversed the Panel´s view that the MERCOSUR exemption has not resulted in arbitrary discrimination.

Briefly given the dynamics of the parties in court, we shall analyze what were the allegations of the parties in order to visualize how exactly the same import ban on retreated tires became an environmental discussion under the WTO[72].

II - The European Allegation

a) Material facts

The EC first defines the scope of the dispute by presenting the concept of retreated tires. Its point is to clearly make the distinction between used and retreated tires looking forward making the later equivalent to new tires. This is, in

[71]Idem, 8.
[72] In this wise, there is no need to resort to the examination of the second submissions.

fact, at the heart of the European position, just as it is for the Brazilian defense to associate retreated tires with waste tires.

This important matter continues to be dealt with during most of the factual allegation. For instance, the retreating process is also described in the EC First Submission always emphasizing the rigidity of the security rules that regulate such activity. That is, it aims to demonstrate that the quality of a retreated tire is not considerably distant of a new one´s. Interestingly, when describing the retreating process, or, more precisely, the tires that will suffer this process, the European Union makes the idea of a used tire smoother when it gives preference to the adjective “worn” and later the substantive “casing”[73] to refer to what Brazil actually more frequently calls “used” instead. This difference revels, once again, how the nature of the retreated tires is at the core of the dispute. Furthermore, to make retreated tires nearer of new ones, the EC makes it clear that, although the security rules limit the retreating process to only one for commercial vehicles´ tires, this product is made to have such a life-span that it could suffer the retreating process 3 or 4 times, to do not mention other types of tires such as those of aircraft and trucks, which have not the same limit and can be retreated twice the number of times commercial vehicles can[74]. The EC goes beyond and literally affirms that retreated tires are similar to new ones in every aspect of performance, safety and durability[75]. It states that although Brazil refers to retreated tires as “short life-span products”, Brazil allows the retreating process, which, as the EC infers, proves that Brazil does not consider it an inferior type of tire[76] and, in the same sense, it also mentions the statement of Brazilian senators and even the Director of INMETRO, Alfredo Lobo, who also says that retreated and new tires are comparable on durability and security[77].

In this sense, the EC later directly censures the Brazilian contrary efforts. That is, they affirm Brazil tries to blur the boundaries of retreated and waste tires[78]. It is a direct attack to the Brazilian tendency of emphasizing the problems of tires

[73] In this sense, see the EC First Written Submission in the page 7, item 24, and the page 8, item 27.
[74] Brazil – measures affecting imports of retreaded tyres: EC First Written Submission, pg 9, Item 26
[75] Idem, Pg. 9, Item 32.
[76] Item, 34, p.10.
[77] Item, 35, p 9.
[78] Item, 41, p.12.

wastes disproportionally – the greater part of Brazilian statements is composed of the negative effects of waste tires and, indeed, one can say the link between waste and retreated tires is therefore somehow overlooked. Not less important, and following the same reasoning, the EC also rejects the Brazilian allegation that retreated tires are "short life-span products" that quickly becomes waste. Hence, it is possible to note that the EC programmatically and efficiently refutes every possibility of defense. However, of course, the material allegation that retreated tires are "low-quality" or "short life-span products" in contrast to equivalent to new ones and vice-versa, just like any other material affirmation, is a matter of fact that must be analyzed by specialists in order to solve the controversy. But it must neither be forgotten that Brazil did not present the statement of specialists to support its material allegations in the first two statements.

In addition, the EC also refers to the environmental benefits of retreated tires. Based on a document of the Environment Agency of the United Kingdom, it affirms that retreated tires are environmentally friendly because its use "leads to considerable savings in terms of energy, materials, and emissions"[79].

Finally, any possibility Brazil had to defend itself without directly challenging the facts presented by the EC vanishes when the later proves with Brazilian data that, after the legal measures challenged, whereas the imports of retreated tires from the EC fell from more than 10 million tires per year to a virtual zero, the import of used tires also from the EC dramatically increased from about 10 million per year to more than 70 million of tires per year[80]. As the European Union affirms, it shows that the Brazilian ban on retreated tires was only positive to Brazilian retreaders, who buy used tires from the EC to add the new material and sell them within the national market never worried about the competition with European retreaders. This fact alone already proves that the Brazilian casings in general cannot be retreated, for "the poor condition of the road infrastructure in Brazil, driving habits, and poor vehicle maintenance" results in used tires in such poor conditions that no retreating process is ever possible[81]. Likewise, Brazilian retreaders need the European used tires to operate and import them despite of the

[79] Brazil – measures affecting imports of retreaded tyres: EC First Written Submission , pg.13, Item 45.
[80] Idem, pg.23
[81] Idem, pg.23

ban on importation of used tires that stands sine 1991, because, as this prohibition is not regulated in detail, the retreaders make use of this weakness of the legislation and get liberation to import via judicial decisions[82]. It is not necessary to note that this is a clue of a disguised protectionist measure.

b) legal facts

The EC analyzes each of the challenged measures contrasting them with the WTO dispositions to demonstrate that they are not compatible with each other. This study naturally starts with the import ban on retreated tires, which, by this time, is in operation in Brazil by virtue of Portaria SECEX No. 14 of 17 November 2004.

Specifically, the ban would run counter, first of all, the Article XI GATT, which reads:

> No prohibition or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be institutes or maintained by any contracting party on the importation of any product of the territory of any other contracting party or the exportation or sale for export of any product destined for the territory of any other contracting party.

As Brazil always raised environmental appeals to sustain its measures, the main efforts of the EC are towards showing that the Brazilian measures are not compatible with the exception of the Article XX (b) and (g) GATT, which provides the following:

> Subject to the requirements 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

[82] http://yahoo.carros.com.br/icarros/noticias/noticia.jsp?id=2040 (27 May 2007)

> international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (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.

The WTO prior decisions reveal that to have a measure under the Article XX (b), it must be proved that the same act is both a policy designed to protect human life or health and that the measure is necessary to reach this objective.

Likewise, the EC sustains that the challenged measure could not have been designed to protect human life or health because there is no health risk involved[83]. In this sense, it reaffirms that retreated tires are not wastes, but to the contrary, equivalent to new ones and that their fabrication involves methods that eliminate viruses, bacteria and insects[84]. Moreover, the measures would not be necessary firstly because the import of retreated tires does not result in an increase number of waste tires to be disposed of in Brazil, for Brazil must import used European tires to retreat, and also because there are reasonable alternatives to the import ban if one ever considers, arguendo, retreated tires do imply on risk[85]. This alternative, the EC believes, is already applied in Brazil via CONAMA Resolution No. 258/99 as amended by Resolution No.301/02: to make mandatory for domestic tires producers and importers to provide an adequate disposal of unusable tires.

The same logic is applied to contrast the import ban with the exception provided by the Article XX (g). Affirming that this disposition, according to the previous WTO decisions, requires a consistent link of cause and effect between the measure and the conservation of exhaustible natural resources, the EC sustains it is impossible to establish this link because, if one considers that Brazilian allegations towards waste tires are accurate, once again it should be said

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[83] Brazil – measures affecting imports of retreaded tyres: EC First Written Submission, pg. 30.
[84] Idem.
[85] idem, pg.31/32

that retreated tires are not waste and donnot contribute to the accumulation of waste tires in Brazil since the used tires of this country in general cannot be retreated. In this wise, it affirms that retreated tires become wastes just like any product, and if the WTO authorize the Brazilian measure based on this, it should also liberate the Member countries to impose an import ban on whatever product, for they always eventually become wastes. Moreover, the lack of relations between the ban and the conservation of natural resources would be clearer if one considers that several types of tires can actually be retreated several times and thus are much farther of the notion of wastes. It is interesting to note that the EC states that an additional evidence that the Brazilian measure maintain no link with the protection of the environment rests on the prior case before the Mercosur Arbitral Tribunal. This is so exactly because, on that opportunity, Brazil raised no environmental defense[86].

The EC argues that neither the ban fulfill the second part of the Article XX (g), for no restrictions are imposed to tires retreated in Brazil. In this sense the EC presents a statement of the Appellate Body in the United States – Gasoline affirming that measure of this kind could not but be a discrimination to support locally-produced goods[87].

Although already sustaining that the import ban does not fulfill the requisites of the incises (b) and (g), the EC also argues that the measure does not satisfy the "Chapeau" of the Article XX. This disposition is intended to prevent abuses of the exceptions established by the incises and, according to prior Appellate Body decisions, it is analyzed after it is seen that the measure is adequate with the incises.

In this manner, the ban would be arbitrary and unjustifiable, the EC continues, because there is an exception to Mercosur countries. Considering that retreated tires have the same environmental externalities irrespective of where they come from, the measure is clearly arbitrary. The import ban cannot be reasonable also because the tires retreated in Brazil are made of imported used tires due to interim relief adopted by Brazilian courts.

[86] Brazil – measures affecting imports of retreaded tyres: EC First Written Submission, pg 38, 133
[87] Appellate Body Report, US – Gasoline, p. 21.

Finally, the import ban, the EC concludes, is a disguised restriction on international trade because the structure of the Brazilian legislation points out in this direction[88]. The import ban was established by SECEX, which is a commercial organ of the Brazilian government and not an environmental one. The CONAMA, an organ responsible to the protection of the environment, however, in the CONAMA Resolution No. 23/1996 did not prohibit the import of retreated tires, but only the import of used tires. EC suggests, remembering the draft decree law No. 243/2000, that the ban was a byproduct of the lobby of domestic retreaders who did not want to compete with the European retreated tires[89], even because, as explained before, they usually import the used tires from Europe to only make the retreating process in Brazil.

The last but not the least, the Mercosur exception is also directly challenged, but now as being contrary to Articles XIII:1 and I:1 GATT. The former provides the following:

> No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other party or on the exportation of any product destine for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

From the given, it seems clear the incompatibility of the Brazilian measures on the import ban and the fines on the importation, marketing, transportation, storage, keeping or warehousing of imported retreated tires. The EC sustains the same happens with Art. I:1. It reads:

> With respect to customs, duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation

[88] Brazil – measures affecting imports of retreaded tyres: EC First Written Submission, pg. 45, item 167.
[89] Idem, p.45, Item 166.

> and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Naturally, the retreated tires from EC ("like products") received no unconditional and immediate offer of the advantages given to Mercosur Members, and this is why the EC concludes that the Art. I:1 was not observed either.

However, WTO rules provide an exception of trade liberalization necessary to the formation of a customs union of free trade area in the Article XXVI:5:

> A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
>
> duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XI and XX) are eliminated with respect to substantially all the trade in products originating in such territories, and,
>
> (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by eah of the members of the union to the trade of territories not included in the union

A customs union is defined in Article XXIV:8 GATT as follows:

> Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; Provided that:
>
> (a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or intereim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be

higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the consitutent territories prior to the formation of such union or be the adoption of such interim agreement, as the case may be;

The EC believes that the fact that the Brazilian defense is based on Article XX GATT, which is explicitly excluded by Article CCIV:8 (a) (i) GATT from the requirements of eliminate commercial restrictions, makes it impossible to be "necessary" as asks Article XXIV:5 GATT[90]. In this wise, if the Brazilian ban and fines on imported retreated tires ever becomes acceptable before the Art. XX, the Mercosur exception had logically be misplaced.

Conclusively, the EC demonstrate that Brazil cannot justify its measures on the basis of the Enabling Clause, which reads:

> Following the negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES decide as follows:
>
> Notwithstanding the provisions of Article 1 of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.
>
> The provisions of paragraph 1 apply to the following:
>
> a) […]
>
> b) […]
>
> c) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;
>
> d) […]
>
> Any differential and more favourable treatment provided under this clause:

[90] Brazil – measures affecting imports of retreaded tyres: EC First Written Submission, pg. 55/56.

shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trader of any other contracting parties;

shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most favoured nation basis

[…]

By analyzing these provisions the EC argues the Enabling Clause is not applicable because, first, it provides an exception only to Article I:1 GATT and therefore donnot encompasses the Article XIII:1 GATT, also incompatible with the measures challenged[91]; second, paragraph 2 (c) makes reference to regional arrangements that have criteria for the elimination of non-tariff measures, which is not the case in Mercosur (in this circumstances it would be possible to invoke this disposition only to defend tariff measures)[92]; third, paragraph 3 (a) states the measure must not create trade difficulties with other contracting parties, but it is exactly what happens according to the prior arguments intended to prove that the measures were an arbitrary and unjustifiable; fourth, the Brazilian measures also run counter paragraph 3 (a) that states that the Enabling Clause cannot be invoked in such a manner that would impede the most-favored nation basis for reduction and elimination of tariffs and other restrictions to trade.

*III – **The Brazilian Defense***

a) material facts

Brazil brings to court the same material facts brought in its prior statements. This is how substantial accommodation to the EC argumentation remained punctual. In fact, Brazil affirms that the rebuttal to the EC´s First Written Submission would be given only in the Second Written Submission[93]. Likewise, it

[91] Brazil – measures affecting imports of retreaded tyres: EC First Written Submission , p.58, item. 256.
[92] Idem, p.59, Item 219.
[93] footnote 155, pg. 42.

first described, once again, but now with more details, how the accumulation of waste tires poses a threat to human health and the environment, once again emphasizing associated diseases and toxins liberated by the same wastes. Subsequently, Brazil highlights the difficulties of dealing with waste tires illustrating how whatever method present in the world today aiming to minimize the effects of waste tires is still costly, limited and often considerably inefficient, resulting in the continuity of the problem imposed by this sort of wastes.

Considering the moment of the dispute, i.e. the EC argumentation, the most pertinent Brazilian allegation in the First Written Submission rests in its exposition of how the export of retreated tires to Brazil exacerbate the waste management problem[94]. However, even at this moment Brazil insists on not better explaining the equivalent treatment that it gives to both waste and retreated tires and solely reaffirms that both are prejudicial to the national waste management while basically discoursing upon waste tires. The nearest Brazil goes of adequately providing an answer to the centrally important EC allegation that retreated tires are equivalent to new ones is to reaffirm that retreated tires are discriminated by European consumers[95], but no technical studies is offered to challenge the EC allegation at the same level. Nevertheless, Brazil presents an important allegation directly against the EC statement that Brazilian used tires are rarely suitable for retreating. This actually is a determinant question for the material, and consequently also the legal, analyzes of the case. According to Brazil, 30 percent of its used passenger car tires are suitable for retreating, while in the UK only 30-10, Australia 15-20 and US merely 12 percent96. Concurrently, Brazil affirms that actively promotes the retreating of its tires and boasts a well-established retreating industry that retreats a substantial part of the tires it consumes per year[97].

As for the ban itself, Brazilian material allegation emphasizes that a similar policy is adopted by several countries, namely Argentina, Bangladesh, Bahrain, Nigeria, Pakistan, Thailand and Venezuela[98]. And in this sense it is also affirmed that whereas this restriction is a need for developing countries, it is not necessary

[94] Brazil – measures affecting imports of retreaded tyres: Brazil First Written Submission, p. 23.
[95] Idem, pg.23, item 62.
[96] Idem, Pg.31, item 79.
[97] Idem, pg.30, item 79.
[98] Brazil – measures affecting imports of retreaded tyres: Brazil First Written Submission pg. 26, item 67.

for the EC[99]. Brazil describes the national policy towards waste tires and measures taken to deal with the adverse environmental effects thereof, also putting the challenged measures in this context, i.e. as equivalent.

b) legal facts

The Brazilian attempt is to demonstrate that the import ban, although prima facie contrary to Article XI:1, is justified by Article XX (b); that the fines, if alternatively contrary to Article XI:1 and Article III:4, are justified by Article XX (b) and (d); and, finally, that the Mercosur exemption, even if contrary to Articles XIII:1 and I:1, are authorized by Article XXIV and justified by Article XX (d).

Brazil argues that the import ban is a measure that falls within the range of policies designed to protect fundamental interest of the society, i.e. their health and the environment. In this sense, it briefly restates the adverse effects of waste tires and affirms, without developing an argumentation, that this measure is not different of that one of France in the EC – Asbestos.

Based on Appellate Body prior decisions, Brazil decided to prove that the import ban fulfills the necessity requirements by separately analyzing (a) the importance of the interests protected by the measure; (b) the contribution of the measure to the end pursued; (c) the trade impact of the measure; and (d) the existence of alternative measures that a Member could reasonably be expected to employ.

The importance of a measure really intended to protect the environment and the health of human beings rests beyond doubt and the Appellate Body itself already acknowledged such a fact in prior cases[100]. In fact, the very exception brought by Article XX GATT is a full evidence of that.

To sustain that the measure contributes to the end pursued, Brazil states that, as retreated tires cannot be retreated again, the import ban, forcing the

[99] Idem, pg.25, item 67.
[100] Appellate Body Report, EC-Asbestos, at para. 172

retreatment of tires used in Brazilian territory, reduces the amount of waste tires and, therefore, the problems associated therewith.

Brazil argues that the trade impact of the ban does not favor the national tire industry inasmuch CONAMA Resolution 258/1999 makes mandatory the proper dispose of waste tires in the proportion of import and/or production and the production coasts to retreaders grows higher because the import of cheap foreign casings is prohibited.

The analysis of an alternative measure is made with a study of the CONAMA Resolution No.258/909 as emended by Resolution 301/02, which the European Union denounces as being a less restrictive alternative. In so doing, Brazil acts correctly since it is up to the complaining party to demonstrate the existence of an alternative measure101. In this sense, the core of the defense rests on the fact that the import ban prevents the generation of wastes, while the Resolution referred above only deals with the disposal of wastes, which always implies in costs and inefficiencies[102].

The analyzes of the measure gains a focus on how it is applied in order to prove that it fulfills the requirements established by the chapeau of the Article XX GATT, which determines that the challenged measure shall not be applied in a manner that constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

Brazil remembers that the provisions of the chapeau do not refer to the same standards of discrimination of those present to other substantive obligations of GATT.103 Thus, the relevance of an argument that looks forward pointing out a discrimination based on products origin is restricted to the analyzes of Articles I:1 and III:4, being only relevant to precise whether the measure is applied reasonably, that is, that the measure is not arbitrary. Likewise, Brazil states that the import ban cannot be considered arbitrary because it is not "based on mere opinion or preference" nor is it "unrestrained in the exercise of will or authority"[104].

[101] Appellate Body Report, *US – Gambling*, at para 320
[102] Brazil – measures affecting imports of retreaded tyres: Brazil First Written Submission , pg.43, item 119.
[103] Brazil – measures affecting imports of retreaded tyres: Brazil First Written Submission, pg. .47, 133.
[104] Idem, pg.48, 135.

Additionally, Brazil affirms that the exemption to Mercosur Members can neither be seen as arbitrary or unjustifiable discrimination since it was established exactly to adhere to the rule of law[105].

Finally, Brazil argues that the import ban, although resulting in a restriction of international trade, is actually not disguised106. Brazil sustains that the measure does not favor domestic new tires manufacturers of new tires nor is intended to do so to national retreaders, who, under the same legal system, are required to follow environmental requirements and are prohibited to import used tires to retreat, which are preferred by domestic retreaders not because Brazilian used tires are unsuitable for retreating but rather because foreign used tires are a lot cheaper than national ones[107]. And the used tires imports made under preliminary injunctions will soon stop occurring, for within Brazilian higher courts progressively prevails the understanding that these injunctions are legally erroneous and thus the temporary imports are getting upheld[108].

Brazil is also of the view that the fines, as made to enforce the import ban, are permitted under GATT rules in the same way that are the rules they were enacted for.

[105] Idem, pg.50, 138.
[106] Idem, pg 52, 146.
[107] Idem, pg.55, 151.
[108] Idem, pg.56, 153.

The Relevance of the Environment within the MERCOSUR

Chapter Four

I - *The Mercosur treatment on the Environment*

The Mercosur is a Regional Trade Agreement between Argentina, Brazil, Paraguay, Uruguay and Venezuela. It aims to reach a deep integration, with a full common market, also having a common foreign relations policy and common formulation of macroeconomic and sectorial policies[109]. Being the biggest food producer of the world[110], Mercosur also has huge environmental attributes. It extends for over most of South America, which boast paramount water resources, the biggest tropical forest and the richest biological diversity on the Earth[111]. The combination of its enormous economic and environmental prominences could not but lead to significant environmental regulations.

Although portion of the scholars believe the Partial Agreement on Cooperation and Goods Exchange Defending and Protecting the Environment[112] to be the first Mercosur legal instrument dealing with the environment[113], it is always important to remember that the Preamble to the very Asuncion Treaty makes an influential environmental appeal. After affirming the importance of market integration for the "economic development with social justice", which is the main Mercosur`s goal, the parties to the Asuncion Treaty state that

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[109] http://www.esaf.fazenda.gov.br/parcerias/ue/cedoc-ue/no-brasil/texto-mercosul.html (27 May 2007)
[110] http://www.zonaeconomica.com/mercosur/cumbre (27 May 2007)
[111] http://www.planalto.gov.br/ccivil_03/revista/Rev_77/artigos/Leyza-rev77.htm (27 May 2007)
[112] In Portuguese: Acordo Parcial de Cooperação e Intercambio de Bens em Defesa e Proteção do Meio Ambiente.
[113] Cf. GAUDINO Erica, *La Variable Ambiental em el Processo de Integracion Del MERCOSUR*, in *Interaccion, Desarrollo Sustentable y Medio Ambiente* (Coria, Silvia and Gaudino Erica, ed. Ciudad Argentina, Buenos Aires, 1997, p.75)

> that this objective may be achieved through a more efficient utilization of available resources, the environment preservation, the improvement of physical interconnections, the coordination of macro-economic policies for complementation of different economic areas based on the principles of graduallity, flexibility and balance. (originally not underlined)

But, obviously, the environmental concerns of the Mercosur go far beyond these dispositions. In 1991, for instance, dispositions of the CMC Resolution 03/91, in line with the second and sixth Articles of the Asuncion Treaty, stated the need of the Sectorial Agreements hold environmental protective dispositions[114]. But it was yet in the following year that a crucial step was given. By virtue of the 1992 Earth Summit (ECO 92)[115], based in Brazil, the need of an environmental commitment taken by the South America countries led to the adoption of the Canela Declaration on February 21, 1992. Being Chile also a contracting party thereto, the Canela Declaration, which comes to reaffirm the regional environmental concerns, makes reference to, inter alia, the need of protecting the atmosphere, the biological diversity, water resources, the forests, the management of wastes and the strengthening of institutional arrangements in order to reach a sustainable development[116].

Having thus permanently established the environmental problematic within the Mercosur, the contracting parties met again in Las Lenas, Argentina, in June 1992, and agreed on several goals and deadlines to be met. The Sub-groups to the Common Market Group (CMG) nº 7, 8 and 9, were then given environmental tasks and even institutions according to their different areas of work, respectively: Industrial and Technological Policy, agricultural policy and energetic policy. Furthermore, in Las Lenas the parties to the Mercosur also decided to establish the Specialized Meeting on the Environment (REMA) via Resolution nº 22/92.

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[114] http://www.planalto.gov.br/ccivil_03/revista/Rev_77/artigos/Leyza-rev77.htm (27 May 2007)

[115] LOPES, Fernando Augusto Montai y; BELINCANTA, Fernando César. Estudo da evolução do tratamento ambiental no Mercosul: do Tratado de Assunção até o Acordo Quadro sobre Meio Ambiente. Jus Navigandi, Teresina, ano 6, n. 59, out. 2002.

116 FREITAS JÚNIOR, Antonio de Jesus da Rocha. Considerações acerca do Direito Ambiental do Mercosul . Jus Navigandi, Teresina, ano 8, n. 136, 19 nov. 2003.

The REMA was deemed to be in charge of studying the environmental legislation of the member countries and presenting recommendations to the Common Market Group, having, in the end, met five times throughout its existence (November 1993 – November 1994). It is during the third meeting, however, that the parties adopted the Resolution nº 10/94, which held the Mercosur Basic Guidelines on Environmental Policy. This instrument recommend a variety of environmental measures and ended to be the seed of the eventual Additional Protocol on the Environment Project.

The REMA was brought to an end after the adoption of the Ouro Preto Protocol on December, 1994, on the moment in which the Mercosur´s Ministers of the Environment met for the first time. It was on June, 1995, that they adopted the Taranco Declaration and decided to improve the environmental structural organization of the Mercosur by transforming the REMA in the CMG Sub-group nº 6, the first Sub-group to be entirely in charge of environmental issues. According to the GMC Resolution 28/95, its priority areas had specific goals, v.g.: 1) non-tariffs restrictive measures related to the environment, proposing ways to harmonize them; 2) the competitiveness and the environment, studying ways to valorize the environmental costs within the production process and permit a fair trade within and out of Mercosur; 3) international law, analyzing the discussions and implementation of international standards; 4) sectorial issues, study the proposes of the other specialized Sub-groups; 5) the elaboration of a single environmental instrument to be adopted by the Mercosur; 6) the creation of an informational system on the environment between the contracting parties and 6) the elaboration of an eco-label system.

In Addition to the agreements signed by the Mercosur bloc with other countries and economic blocs expressing environmental concerns, the work of the Sub-group nº 6 eventually culminated on an ad hoc group responsible for the environmental information system within the Mercosur and on the approval of several work programs. Meanwhile, it is noteworthy that the Additional Protocol on the Environment Project, based on the Mercosur environmental guidelines of the GMC Resolution 10/94, was sent to the GMC and rejected. Scholars believe the text was not accepted owing to its impreciseness, lack of attention to important

themes and bad issues structure[117]. Even though, it tends to be seen as quite audacious because of its comprehensiveness[118].

However, mostly due to the civil society appeals, especially in Uruguay, the rejected Protocol was reformulated to eventually bring to life the Mercosur Framework Agreement on the Environment (Florianopolis Agreement)[119], adopted on March, 2001, during the IV Extraordinary SGT nº6 Meeting in the Brazilian southern city of Florianópolis. The Florianópolis Agreement recalls the texts emerged during the 1992 United Nations Conference on Environment and Development, including the Agenda 21, and provides the basis for the Mercosur environmental law, as it follows the framework approach, meaning that more detailed considerations will be eventually added by Protocols. This is how controversial issues present on the prior Additional Protocol on the Environment Project, such as the treatment to be given to transgenic products and the application of the Precautionary Principle without the necessity of proof to embargo importations[120], were let apart. The pragmatism of this shorter and less ambitious text has divided the public opinion, triggering much criticism, but also praises.

To sum up, the clear existence of Mercosur environmental concerns due to its extensive environmental regulations leads to the conclusion that it is not necessary to mention other and less important dispositions on the environment adopted by this commercial bloc. However, the exception to this fact rests on one of the oldest texts relative to the Mercosur[121]: the 1980 Montevideu Treaty. The Article 50 to this agreement provides an exception to the free market requirements of Mercosur similar to that of the GATT´s Article XX within the WTO or the Article 60 to the Roma Treaty within the EU. It reads:

> No disposition in this Treaty shall be interpreted as impediment to the adoption and accomplishment of measures destined to:

[117] LOPES, Fernando Augusto Montai y; BELINCANTA, Fernando César, op. Cit.
[118] Idem
[119] Idem.
[120] This last theme is considerably important and the Mercosur position thereto will be seen on the study of the TPR decision in the following part of this Chapter.
[121] The Asuncion Treaty, on the Article 2, inc. D, refers to the 1980 Montevideu Treaty´s Article 50 as a still valid disposition to limit the free trade principle.

Protection of public morals;

Application of security laws and regulations;

Regulation of importation or exportation of weapons, ammunition and other war materials and, in exceptional circumstances, of all other military Article s;

Protection of human, animal or plant life and health;

Importation and exportation of gold and silver metallic;

Protection of national patrimony of artistical, historical or archeological value; and

Exportation, utilization and consumption of nuclear materials, radioactive products or any other material used in the development or utilization of nuclear energy.122

Needless to say, this disposition is quintessential to the aims of this investigation. Luckily, it was recalled and applied on a concrete case before the Dispute Settlement Mechanisms of Mercosur. This case is virtually identical to the previous one involving Brazil and Uruguay and its study makes up the last phase of our analyzes.

*II - **Environmental Embargo on a Practical Case: The Mercosur Problematic of the Retreated Tires Trade Relaunched***

a) The Case

A few years after the dispute involving Brazil and Uruguay on the Brazilian embargo of retreated tires, the later country opened a new challenge within Mercosur, but now against the Republic of Argentina, whose politic of also imposing an embargo to the import of retreated tires negatively affected the Uruguayan economy. The Argentinean policy is mostly represented on the Law nº 25.626, enacted in 2002.

The proceedings started on November, 2004, and the decision of the ad hoc Tribunal was made by October 25, 2005. Now, however, as far as this decision is

[122] Full text can be found on: http://www2.uol.com.br/actasoft/actamercosul/espanhol/tratado_de_montevideu.htm (27 May 2007)

concerned, the answer was an environmental one, for Argentina gave the environment a chance by recalling the exception provided by the Article 50 of the 1980 Montevideu Treaty.

According to Argentina, which also previously ruled that the import of used tires was forbidden (cf. Decree 660/00, Art. 38), the law nº 25.626 merely came into being with the purpose of making it clear that the Decree 660 prohibition actually encompassed the import of retreated tires. Uruguay, once again, affirmed the embargo set by the law nº25.626 was a new one and overlapped a continuous and legal flow of Uruguayan retreated tires into Argentina.

Furthermore, Uruguay attests the quality of retreated tires, affirming that Argentina ignored the true differences between those tires and new ones. Not involving different security or environmental problems different from those of a new tires, retreated tires, Uruguay continues, could not suffer the Argentinean embargo based on whatever exception of the Article 50 to the Montevideu Treaty. In this sense, the embargo was contrary to the free market provisions of the Articles 1 and 5 to the Asuncion Treaty and several international principles of law, such as the pacta sunt servanda, good faith and estoppel.

The overwhelming similarities with the prior case involving Brazil continues as Argentina complains against the unwilling of Uruguay to reach a solution during the consult phase and claims the general Uruguayan challenge had to be restricted solely to the law nº 25.626. The similarities finish, however, as, Argentina, to the contrary of Brazil, allege to be driven by environmental concerns, therefore asking for the application of the exceptions found on Article 50 to the Montevideu Treaty given that the measure challenged is, indeed, exceptional, proportional, non-discriminatory and there is not a less restrictive alternative measure thereto.

B) The Decision

The Ad Hoc Tribunal notes that it rested uncontroversial not only both the Mercosur free market dispositions and the environmental exceptions thereto, but also the fact that a commercial flow of Uruguayan retreated tires existed especially during the period of time that comes from 1997 to 2001. Given that, it affirms that

two principles clashes, the free market and the environment ones, and that it is necessary to precise, given the circumstances of the case, which one prevails[123].

After an extensive reference to international dispositions on the matter to be found on other international fora, including Article XX to the GATT, and also inside the Mercosur, emphasizing that the Asuncion Treaty accepted the environmental factor and the Florianópolis Agreement had foreseen the trade-environment conflict on its Article 3, inter alios, the Tribunal concludes that the preservation of the environment is highly necessary and is, indeed, an objective of the Mercosur, but it must not be recalled to justify an arbitrary measure. The Tribunal also reminds that the reaffirmation of the free trade principle, present on the Decision 22/00, whose role was to relaunch Mercosur, makes a clear reference to the exceptions of the Article 50. Furthermore, the CMC Decision 57/00, which comes to complement the Decision 22/00, states the necessity of safeguarding principles for the protection of life and public security. In addition, beyond all that, the principles of economic integration must be seen in due harmony with the principles of proportionality, reasonability, sovereignty[124]. In this line, the precautionary principle is also reaffirmed by the decision[125].

With due consideration to all the given, the ad hoc Tribunal decides that the dispute is limited to the contents of the law nº 25.626, which, although contrary to the free-market dispositions, must be accepted for environmental reasons. That is, due to the uncontroversial environmental problematic nature of used tires, even considering that one of the research institutes affirmed retreated tires can boast the same durability of a new one[126], the Argentinean measure can be justified inasmuch retreated tires increase the environmental passive of the importer country. It happens because although new tires can be retreated once, retreated tires cannot be retreated again. Finally, the Uruguayan appeal to the estoppel principle was refuted on the basis of the short period of time and volume of the

[123] Argentina - *Proibição de Importação de Pneumáticos Remodelados Procedentes do Uruguai***.** Laudo Arbitral, item 56.
[124] Idem, item 66.
[125] Idem, item.70.
[126] The Brazilian IPT – Instituto de Pesquisas Tecnológicas – concluded that, in relation to new tires, retreated tires have a durability of 30%. On the other hand, the Argentinean INTI – Instituto Nacional de Tecnologia Industrial – found that retreated tires can have a durability of 100%.

import of retreated tires from Uruguay to Argentina and the very relativity with which the free-trade dispositions must be analyzed.

C) The Decision of the Permanent Appeals Tribunal

As the determination of the Ad Hoc Tribunal (arbitration painel) was positive to Argentina, Uruguay makes use of the second stage set by the 2002 Olivos Protocol on the Dispute Settlement Mechanisms, appealing to the Mercosur Permanent Appeals Tribunal (Tribunal Permanente de Revisión del Mercosur) on November 9, 2005.

The Permanent Appeals Tribunal (hereinafter TPR) denies the clash of two principles referred by the Ad Hoc Tribunal, affirming that there is not but the principle of free trade and exceptions thereto. These exceptions, including the environmental one, can be found on the 1980 Montevideu Treaty, which, however, does not provide a proper detailed analyzes of the requirements necessary for the due application of these same exceptions on a concrete case. Likewise, it is the role of the Tribunal to set jurisprudence to answer this question whenever studying the given cases. The TPR heavily criticizes the Ad Hoc Tribunal for not doing so and thus set its own four dimensional criteria for the application of the environmental exception given by the Article 50, D.

Firstly, it must be determined whether the measure implies on a free trade restriction. Obviously, a positive answer to this question does not necessarily lead to the inviability of this measure, for it can fulfill the objective justification provided by the next three steps of the evaluation.

If the measure is restrictive, it is required to shed light on the discriminatory character of the challenged measure, which, as a matter of fact, can be direct or indirect. It happens to be indirect when the measure is applied equally to nationals and foreigners but the effects thereof are actually different. The TPR concludes then that the measure is clearly directly discriminatory considering the national Argentinean products vis-à-vis foreigners not only from Uruguay but from all over

the world. Affirming that the fact that the measure is both restrictive and discriminatory does not lead to the conclusion that they are contrary to Mercosur law, the TPR goes further to the analyzes of the third criterion.

The Argentinean measure finally fails within the third, the justification test. At this moment it is necessary to consider whether the measure claiming to be an environmental propose effectively has the preservation of the environment as its objective. The TPR decides the Argentinean embargo has not the alleged environmental goal, for, during the elaboration of the law, the representatives made literal reference to the "protection of the national industry that produce such goods" even before the environmental question appears during the discussions[127].

Assuming, arguendo, that the challenged measure had been justified under the prior assessment, it would then come the most difficult step: the matter of proportionality. The latter is a general principle related also by the necessity and the possible existence of less restrictive measures. The embargo is, from this analyzes, therefore equally incompatible to the Mercosur law given that its claimed environmental harm is neither serious nor irreversible and, in addition, it is not the less restrictive alternative measure and does not avoid the harm. In fact, the TPR concludes, it would be better to Argentina to orient its policy towards the limitation and elimination of waste tires[128].

Having considered the Argentinean measure to be contrary to the Integration Law, the TPR continues considering other relevant topics rose during the discussions. By analyzing the applicability of the Precautionary Principle, the TPR affirms there was no need to bring such a principle into consideration, for both Uruguay and Argentina recognized the environmental problematic of waste tires. In addition, this principle can justify environmental measures, but they must equally fulfill the four dimensional criteria established before. As for the burden of proof inversion, allegedly associated with the Precautionary Principle, it is denied given that such an inversion must be literally present in the legal text, which does not occur in the given case.

[127] Argentina – Prohibicion de Importacion de Neumaticos Remoldeados Procedentes Del Uruguay. Laudo de Revisión, item 16.
[128] Idem, item17.

The last but not the least, the TPR agrees with the Ad Hoc tribunal on the fact that the Estoppel Principle is not absolute. However, it notes that this principle is not originally of the Integration Law, to which belongs Mercosur, and shall therefore be only considered as a last resource. That is why it does not apply to the case in analyzes.

CONCLUSION

Whether the import ban is an economic or environmental measure is hard to precise inasmuch there are an amount of determinant technical facts that remain controversial and rest beyond the study of law. At any rate, even if we deem the embargo to be economically driven, it would not properly justify the intriguing alteration of the Brazilian defense within Mercosur and the WTO, for it would obviously not prevent the possibility of making an environmental defense within both International Organizations and thus enhance the chances of having the ban accepted. A possible and better alternative interpretation for the defense alteration lies on a thinkable disinterest or underestimation by the Brazilian government of the contemporary environmental *problematique*. However, this possibility becomes harder to defend considering the internationally recognized advancement of the Brazilian environmental law.

Given that, a different hypothesis, the most likely correct, was verified throughout this work. However, it was refuted. A juridical explanation to the Brazilian defense contradiction could only be the fact that the WTO provides the environment a chance that Mercosur does not. As it could be seen throughout this work, however, it is certainly not the case. The abrupt change of defense strategy appears thus to have no ground on international rules.

It was demonstrated that Mercosur does boast a variety of environmental regulations and, what is the most important, a clear environmental exception to the free trade provisions of this TRA. Besides, the four criteria established by the TRP, although set after the dispute involving Brazil, shows a set of requirements in due harmony with those enunciated within the most important international fora, including the WTO. The TRP decision itself proceeded with each step always mentioning the understanding of the issue within the European Union[129].

The dispute involving Argentina and Uruguay was highly important to corroborate these conclusions. It reveals that the fact that, at the time of the

[129] The TPR took as a model the EU decision of December, 2004. Comisión/Alemania. C-463/01. Rec. P. I-11705, apartado 75, and Radlberger Getrankegesellshaft y S. Spitz. C-309/02. Rec. P. I-11763, apartado 75.

Brazilian dispute, Mercosur lacked prior decisions on the environmental exception does not mean at all that this fact could actually happen to result detrimental to an environmental defense and thus justify the Brazilian conduct. If we ever considered this negative possibility, *arguendo*, it is obvious that to make the legal-economic considerations Brazil did also invoking the environmental exception could not result on a worst outcome to the Brazilian policy. It is exactly that that Argentina does, presenting an economic and environmental defense, clearly showing that the Brazilian actuation in court certainly involved a misstep.

For sure, and once again the Argentinean case comes to demonstrate this, it does not mean that a Brazilian appeal to the environmental exception would inevitably result on the acceptance of the embargo by the Tribunals. However, the same case shows the perceptible one more time: a parallel environmental appeal would enhance considerably the chances of success.

To sum up, the fact that the environment was virtually overlooked within Mercosur during the Brazilian actuation has not an Integration Law[130] basis. It does not mean that the acceptance of an environmental measure would be more likely accepted before WTO and not in Mercosur. As a matter of fact, the Mercosur understanding of the environmental exception is quite similar to that of other international fora. Accordingly, overlooking the environmental factor within Mercosur was solely a Brazilian diplomatic *faux pas*.

[130] Integration Law is the part of the law that regulates Mercosur. It is, in fact, the equivalent of the Community Law within the European Union.

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