

BRAZIL — MEASURES AFFECTING IMPORTS OF RETREADED TYRES

- **Brazil — Measures Affecting Imports of Retreaded Tyres** (*Brazil — Retreaded tyres*); Complainant: European Communities; Respondent: Brazil; Panel report circulated: **12 June 2007**; Appellate Body report circulated: **3 December 2007**.
- **Legalities involved:** Mercosur law; Mercosur Arbitral Tribunal; WTO law.
- **Tool to deal with inter-legality:** interpretation of the specific provision terms in light of the standards of ‘good faith’ and ‘unjustifiable discrimination’.

SUMMARY

This case involved trade restrictions imposed by Brazil on the import of ‘retreaded tyres’. After the adoption of the trade restrictions by Brazil, Uruguay requested arbitral proceedings before the Mercosur dispute settlement mechanism alleging that such measure would be incompatible with the Mercosur legal framework. The Mercosur arbitral tribunal then decided that Brazil’s import ban of retreaded tyres was illegal under Mercosur law. Following this award, Brazil eliminated the ban for remoulded tyres imported from Mercosur countries. In other words, it added an exception to the trade restrictions to Mercosur Member States.

This is an interesting case of interlegality since the adjudicators were confronted with the decision to create a discriminatory treatment, incompatible with the WTO regime, because of the Mercosur arbitral award.

In the WTO, the European Communities alleged that such exception was incompatible with the Most Favored Nation clause in GATT 1994 (Article I:1). Brazil invoked Article XX(b) and (d) of the GATT, arguing that the measure was aimed at protecting human life and health and the environment, and that the measure was necessary to secure compliance with Brazil’s obligations under Mercosur.

The Panel accepted Brazil’s claim. In examining whether the measure constituted an ‘arbitrary or unjustifiable discrimination’ pursuant to Article XX *chapeau*, the panelists concluded that

“The exception of remoulded tyres originating in MERCOSUR therefore does not seem to be motivated by capricious or unpredictable reasons. It was adopted further to a ruling

within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR". (Panel report, para 7.281).

The Appellate Body however reversed this finding, arguing that the Article XX requirement of non-arbitrary or unjustifiable discrimination should be examined according to the objectives of the measure, and concluded that Brazil's decision to exempt Mercosur countries was incompatible with the objectives of the measure:

"we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX". (AB report, para 227).