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MULTILEVEL JUDICIAL GOVERNANCE BETWEEN GLOBAL AND
REGIONAL ECONOMIC INTEGRATION SYSTEMS:
INSTITUTIONAL AND SUBSTANTIVE ASPECTS

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
MAX WEBER PROGRAMME

*Multilevel Judicial Governance between Global and Regional Economic Integration
Systems: Institutional and Substantive Aspects*

NIKOLAOS LAVRANOS (EDITOR)

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Abstract

The *Brazilian Tyres* case that was adjudicated by both MERCOSUR and WTO dispute settlement bodies illustrates the issues raised by multilevel judicial governance. The relationship between regional and global trading systems has become increasingly complex, raising the question whether Article XXIV GATT is still sufficient. Similarly, the way Article XX GATT is applied to balance trade and non-trade issues is increasingly disputed. Underlying these issues are more fundamental aspects of delivering justice while at the same time preserving the world trading system.

In his contribution Lavranos takes the view that the WTO Appellate Body failed to show sufficient respect to the MERCOSUR dispute settlement body decision. More specifically, Lavranos argues that trade interests were wrongly given primacy over the health and environmental concerns of Brazil.

Mathis' paper discusses in more detail Article XXIV GATT and the question whether this could serve as an exception for Brazil being a member of MERCOSUR to give precedence over its GATT obligations. Mathis also analyzes Article XX GATT in this regard, concluding that Brazil finally is presented with the option to comply with its own regional law and compensate its WTO partners accordingly, or to comply with the WTO ruling and disregard its own regional law.

Abbott's indicates some of the lessons to be drawn from past experience in applying Art.XXIV during the 1970s and 1980s, as well as some problems associated with Art.XX, and looks ahead to an important future debate – potentially – on trade and non-trade factors: the measures that may be taken in association with measures to reduce greenhouse gas emissions and to control the effects of global warming and climate change.

Finally, Petersmann's outlook criticizes Lavranos critique on the Appellate Body by arguing that at the end of day justice was delivered according to the present WTO rules.

In sum, this collection of very different views on multilevel judicial governance offer a *tour d'horizon*, which hopefully stimulates further discussion and analysis.

Keywords

Brazilian Tyres; competing jurisdiction; MERCOSUR; WTO; dispute settlement

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Foreword

The Max Weber Programme bridges all the disciplines of the European University Institute, with an active multidisciplinary group of Max Weber post-doctoral Fellows (44 Max Weber Fellows and 6 Visiting Fellows, formed the 2008 – 2009 cohort), and benefits from a close collaboration with the EUI Departments. The 28 November 2008 Workshop on *Multilevel Judicial Governance between Global and Regional Economic Integration systems: Institutional and substantive aspects* is an example of this productive collaboration, in this case between the Law Department and the Max Weber Programme. But beyond the financial and logistic support (hosting the conference in Villa La Fonte is always appreciated by participants), there is a key element in the co-sponsoring of the Max Weber Programme: the involvement of the Max Weber Fellows in the organization and final outcome of the conference. This can be seen in the participation of Max Weber Fellows (not only associated with the Law Department) and, in particular, in the leading role that Nikolaos Lavranos played from the conception of the conference to his role as editor and author in these proceedings of the workshop.

As Director of the Max Weber Programme I have been particularly pleased to see how high-level experts from academia and the practical world of policy, as well as other faculty, visitors, PhD researchers and post-docs of the EUI, have engaged in the discussion of a general and very relevant issue (*Multilevel Judicial Governance*) by first focusing on a particular case (the *Brazilian Tyres* case), in a discussion sparked by a Max Weber Fellows. To all of them, and specially to Nikos, my thanks.

Ramon Marimon

Preface

On 28 November 2008, a workshop on *Multilevel Judicial Governance* was organised by Max Weber Fellow Dr. N. Lavranos at the European University Institute (Florence) in the home of the Max Weber Programme, Villa La Fonte. The reason for organising this workshop was sparked by the *Brazilian Tyres* cases in national courts in Brazil, in MERCOSUR arbitration and in WTO Panel and appellate reports as well as a WTO arbitral award. These cases illustrated many of the systemic problems associated with the increasing interaction between dispute settlement bodies, belonging to different legal trade regimes, at national, regional and worldwide levels.

With the generous support of the Law Department of the EUI and the Max Weber Programme, it was possible to organise a one-day event in which many high-level experts from practice and academia as well as young scholars participated.

This working paper is in five parts that reflect many of the issues that were discussed at the workshop:

Part 1, written by Dr. Nikolaos Lavranos, provides a general analysis of the factual and legal aspects of the *Brazilian Tyres* before the MERCOSUR and the WTO dispute settlement systems.

Part 2, written by Dr. James Mathis, the *Brazilian Tyres* case is discussed more specifically in the light of Articles XX and XXIV GATT.

Part 3, written from a practitioner's perspective by Roderick Abbott, the former ambassador of the European Union at the WTO and former WTO Deputy Director-General, highlights some of the lessons to be learned from the *Brazilian Tyres* case.

Part 4 summarizes the often controversial discussions and analyses of the workshop.

The Outlook written by Prof. Petersmann, in *Part 5*, discusses the 'justice dimensions' of multilevel judicial governance and challenges the conclusion of Dr. Lavranos that the Appellate Body ruling in *Brazil-Retreaded Tyres* finished by 'committing grave injustice.'

It is hoped that readers find the publication of the various materials a valuable contribution to the ongoing debate.

The editor is in particular indebted to Dr. Mathis, Roderick Abbott and Professor E.U.Petersmann for their written contributions, as well as to the Law Department and the Max Weber Programme of the EUI for their generous support in the organisation of the workshop and the publication of its outcomes.

Dr. Nikolaos Lavranos

The *Brazilian Tyres Case*: A Case-Study of Multilevel Judicial Governance

Nikolaos Lavranos *

Introduction

The topic of competing jurisdictions amongst different courts and tribunals and its eventual fragmentation of international law is one that continues to attract academic research and heated debate.¹ In this contribution I analyse a particular case involving necessary legislative action taken by Brazil in order to protect its population's health and its fragile environment, irrespective of its free trade obligations towards the MERCOSUR and WTO. The consequences of Brazil's actions triggered two independent dispute settlement proceedings to each of the international organisations involved. In the first case Uruguay sought the instigation of proceedings against Brazil under the auspices of the MERCOSUR.² The second case against Brazil was brought by the European Communities (EC) in the WTO.³ This is a recent example of the friction existing between Regional Trade Agreements and a Multilateral Trade Agreement and its collateral damage on a common member's best interest.

In this contribution I focus on two main issues. First, I examine how trade and non-trade interests were balanced against each other by the MERCOSUR and WTO adjudicative bodies. Second, I will discuss the institutional implications of the impact of the MERCOSUR ruling on the WTO proceedings and the interaction between the two different dispute settlement bodies. In order to set the tone of our analysis, I first set out the background of the disputes. Third, I briefly delve into the MERCOSUR and its *ad hoc* Arbitral Tribunal's decision. Fourth, this is followed by a summary of the WTO Panel and Appellate Body reports. And last, a commentary and some concluding remarks wrap up this contribution.

Factual background

In this part I set out the main reason that prompted Brazil to enact the legislation which was the primary cause of the disputes in the MERCOSUR and WTO. The legislation in dispute is also accordingly set out.

The reason behind Brazil's action

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

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¹ See i.e.: Nikolaos Lavranos, "The Mox Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?", 19 *Leiden Journal of International Law* (2006), 223; Cesare Romano, "The Proliferation of International Judicial Bodies: the Pieces of the Puzzle", 31 *Journal of International Law and Politics* (1999), 709; Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts*, (2007); Idem, *The Competing Jurisdiction of International Courts and Tribunals*, (2003).

² MERCOSUR *ad hoc* Arbitral Tribunal, *Uruguay v Brazil-Import prohibition of remoulded tyres from Uruguay* (9 January 2002).

³ Panel Report, *Brazil-Measures Affecting Imports of Retreated Tyres*, WTO case no WT/DS332/R, (12 June 2007); Appellate Body Report, idem, WTO case no WT/DS332/AB/R (3 December 2007).

throughout the country.⁴ There is no specific treatment for the dengue fever or vaccine available to prevent it and it can lead to death.

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

Following Brazil’s continuous health crisis caused by deadly tropical mosquitoes, its legislative and executive branches decided to pass as many measures as possible to combat the problem.

National legislation at issue

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

As a matter of fact Brazil does not have a single overall trade law, adopting instead a large number of laws, provisional measures, decrees and resolutions which govern foreign trade. This body of legislation is amended on a regular basis, including through the use of provisional measures issued by the President and Regulations through the use of Ministerial Acts (Portarias).⁶ The first piece of legislation Brazil adopted prohibiting the importation of used tyres dates back to 1991 by virtue of Portaria DECEX 9/1991. As previously stated, retreaded tyres would also non-expressly often fall into this category. In 1996 Brazil enacted CONAMA 23/1996 in order to reduce undisposed tyre waste. This resolution established that inert waste is free from import restrictions with the exception of used tyres.

In 2000 Brazil explicitly banned the importation of retreaded (and used) tyres in its territory by virtue of Portaria SECEX 8/2000. As Brazil is not only an original member of the WTO but also one of the founding fathers of the MERCOSUR, it was subject to litigation from both Agreements. Following the adoption of Portaria SECEX 8/2000, Uruguay requested in August 2001 the initiation of arbitral proceedings within MERCOSUR. In 2002 the MERCOSUR *ad hoc* Arbitral Tribunal decided that Brazil’s ban was incompatible with a previous decision on trade restrictions and consequently Brazil amended its legislation to comply with the tribunal’s findings.

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

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

⁵ Luis Figueiredo, “Dengue in Brazil: Past, Present and Future Perspective”, 27 *Dengue Bulletin* (2003), 25.

⁶ WTO Secretariat, “Trade Policy Review of Brazil”, *Trade Policy Review* (2004), 21.

remoulded tyres from other countries of the MERCOSUR, which is referred to as the ‘MERCOSUR exemption’.

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

Uruguay was the first to pick on Brazil’s import ban contained in Portaria SECEX 8/2000 and since both countries are members of the MERCOSUR, its *ad hoc* Arbitral Tribunal took jurisdiction over the matter.

The Mercosur Dispute

A brief explanation of the institutional fabric of the MERCOSUR and in particular its dispute settlement mechanism, followed by an overview of the MERCOSUR *ad hoc* Arbitral Tribunal’s ruling will be set out below.

MERCOSUR explained

The 1991 Treaty of Asunción marked the establishment of the MERCOSUR (Common Market of the South).⁷ Its founding fathers are Argentina, Brazil, Paraguay and Uruguay. Venezuela has recently joined the bloc.⁸ Moreover, MERCOSUR counts five associate members, namely Bolivia, Chile, Colombia, Ecuador and Peru.

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

The MERCOSUR is of course also a Regional Trade Agreement (RTA). To this effect it was notified to the GATT 1947 in March 1992 under the Enabling Clause and it is still under examination in the WTO Committee on Regional Trade Agreements (CRTA).⁹ The MERCOSUR is also currently being examined by the CRTA under Article XXIV of the GATT 1994.¹⁰

In the following section we will explain three Protocols added to the Treaty of Asunción.

Protocol of Ouro Preto

As for the MERCOSUR’s institutional framework, the Protocol of Ouro Preto, which entered into force on 1 January 1995, added four further organs to the transitory organs provided in Article 9 of the Treaty of Asunción. Thus, as set out in Article 1 of the Protocol of Ouro Preto, the MERCOSUR is composed of: the Council of Common Market; the Common Market Group; the MERCOSUR Trade Commission; the Joint Parliamentary Commission; the Economic-Social Consultative Forum; and the MERCOSUR Administrative Secretariat.¹¹

The Protocol of Ouro Preto also expressly provided the MERCOSUR with legal personality under international law and a special procedure for incorporation of decisions of MERCOSUR

⁷ Several Protocols thereafter complemented the Treaty of Asunción, namely the Protocol of Ouro Preto, the Protocol of Brasilia, the Protocol of Ushuaia and the Protocol of Olivos.

⁸ With the signing of the Protocol of Accession in July 2006.

⁹ *Supra* note 6, 27, para 58.

¹⁰ *Supra* note 3, Panel Report, para 4.388.

¹¹ See for further details: Nikolaos Lavranos, “An Introduction into the Regional Economic Integration Process of the Americas” 4 *Zeitschrift für Europarechtliche Studien* (issue 1, 2001), 145.

organs.¹² This special procedure essentially provides that before a MERCOSUR act can enter into force, it must first be incorporated in the national law of all member States (system of simultaneous implementation). This special mechanism excludes any supranational features of MERCOSUR law, such as primacy over the domestic law of member States or direct effect of MERCOSUR acts.¹³

Furthermore, it sets out the legal sources of the MERCOSUR, which are the Treaty of Asunción and its Protocols, agreements made in accordance with the Treaty and its Protocols, decisions of the Council of Common Market, Resolutions of the Common Market Group and Directives of the MERCOSUR Trade Commission.¹⁴

Protocol of Brasilia

More importantly for the purposes of our discussion is the MERCOSUR dispute settlement mechanism, which was first introduced by the Protocol of Brasilia.¹⁵ The Protocol came into effect in the same year as the Treaty of Asunción.¹⁶

As our dispute between Uruguay and Brazil was instigated on 17 September 2001 it fell within the rules of the Protocol of Brasilia, which I shall now briefly discuss even though it no longer is in use.

The Protocol of Brasilia could be divided in two procedures: complaints by States (Chapters I-IV) and complaints by private parties (Chapter V). The last Chapter, VI, set out the final dispositions, essentially being the mandatory nature of this Protocol to member States and a provision expressing the temporary nature of such dispute settlement mechanism, to be replaced by a permanent one at a later date.

In what concerns the dispute between Uruguay and Brazil, Chapters I-IV of the Protocol of Brasilia were relevant in the proceedings. The dispute settlement mechanism set out in the Protocol of Brasilia was automatic and of an expedited nature, taking a rapid 5 months to resolve a dispute. It provided for a mere 15 days negotiation period between the parties.¹⁷ If no agreement was found, the matter could be submitted to the Common Market Group for their consideration.¹⁸ The parties involved would have an opportunity to make submissions to the Common Market Group, whose members would have 30 days to make recommendations to the parties involved in order to settle the dispute.¹⁹

Failing satisfactory recommendations being made to resolve the dispute any of the parties could make known to the Administrative Secretariat its wish to rely on arbitral proceedings.²⁰ The jurisdiction of the Arbitral Tribunal was under the Protocol obligatory, *ipso facto* and without the need for any special agreement. Its jurisdiction would be called upon on a case by case basis.²¹ Once a decision was made by the three arbitrators forming the tribunal it would be final and binding. No

¹² Protocol of Ouro Preto, Articles 34 and 40 respectively.

¹³ Ulrich Wehner, *Der MERCOSUR* (1999).

¹⁴ *Supra* note 12, Article 41.

¹⁵ The later Protocol of Ouro Preto also provided for a dispute settlement mechanism, however, it entailed a longer procedure giving member States time to negotiate and exchange information. In a nutshell, the Protocol of Ouro Preto created the MERCOSUR Trade Commission, which was in accordance with Article 21 authorised to 'consider the complaints presented by the National Sections of the MERCOSUR Trade Commission originating with the State Parties or private parties...when falling under its jurisdiction'.

For a further detailed analysis of the procedures of dispute settlement in the Protocols of Brasilia and Ouro Preto see: Thomas O'Keefe, "Dispute Resolution in MERCOSUR", 3 *The Journal of World Investments* (2002), 507.

¹⁶ The Protocol of Brasilia was signed on 17 November 1991.

¹⁷ Protocol of Brasilia, Article 3.2.

¹⁸ *Ibid.*, Article 4.1.

¹⁹ *Ibid.*, Article 4.2.

²⁰ *Ibid.*, Article 7.1.

²¹ *Ibid.*, Article 8.

appeals were allowed under the Protocol.²² A party was only allowed to clarify the award, within 15 days of it being rendered.²³

This was in essence the mechanism under which Uruguay and Brazil resolved their dispute between the 17 September 2001 and 9 January 2002.

Protocol of Olivos

Since that date, the Protocol of Olivos brought some changes to MERCOSUR's dispute settlement mechanism, by replacing the Protocol of Brasilia on 1 January 2004. The rules stated above with respect to negotiation, including its 15 days time limitation, the 30 day involvement of the Common Market Group and the notification thereafter to the Administrative Secretariat for the formation of an Arbitral Tribunal remain much the same as in the Protocol of Brasilia.²⁴ What the Protocol of Olivos mainly changed is that the involvement of the Common Market Group is now no longer mandatory, parties to the dispute now have a choice of forum, it either being the WTO or the MERCOSUR itself, and the creation of a review procedure, inexistent at the time of the temporary Protocol of Brasilia now in place. The MERCOSUR therefore has since the 1 January 2004 a Permanent Review Court of 5 arbitrators.²⁵

MERCOSUR ruling

The MERCOSUR *ad hoc* Arbitral Tribunal was constituted on 17 September 2001 to adjudicate upon a dispute brought by Uruguay against, in particular, Brazilian legislation Portaria SECEX 8/2000. As explained above, this piece of legislation expressly provided for an import ban on used and retreaded tyres. In the retreaded tyres category is included remoulded tyres and this was the specific item Uruguay took issue with.

It should be noted at the outset that Uruguay and Paraguay are the only MERCOSUR countries that export remoulded tyres to Brazil. However, their production capacity is fairly limited. The parties' main submissions revolved around whether Brazil's legislation was a *new* restriction to trade prohibited by the MERCOSUR and whether Brazil was in any event estopped from bringing in a ban because of its previous conduct.

Uruguay's submissions

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

It further claimed that Portaria SECEX 8/2000 was incompatible with a decision of the MERCOSUR's Council of Common Market dated 29 June 2000, which came into effect a few months prior to Brazil's legislation. The decision of the Council of Common Market, known as decision no. 22/2000, obliges MERCOSUR member States not to introduce new *inter se* restrictions of commerce. In other words, MERCOSUR member States are prohibited from bringing in new measures that would restrict trade between the bloc after that date.

²² Ibid., Article 21.

²³ Ibid., Article 22.

²⁴ See Protocol of Olivos, particularly Chapters IV, V and VI.

²⁵ See for a detailed analysis: Daniel Pisctiello and Jan Schmidt, "In the Footsteps of the ECJ: First Decision of the Permanent MERCOSUR-Tribunal", 34(3) *Legal Issues of Economic Integration* (2007), 283; Raul Vinuesa, "The MERCOSUR settlement of disputes system", 5(1) *Law and Practice of International Courts and Tribunals* (2006), 77.

It also claimed that Brazil was in breach of article 1 of the Treaty of Asunción, which provides for free movement of goods within member States.

Uruguay moreover argued that Brazil's legislation was contrary to the spirit of the Vienna Convention on the Law of the Treaties, especially with respect to the principles of '*pacta sunt servanda*' and 'good faith'.²⁶

Brazil's submissions

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

Brazil also argued that Resolution no. 109/94 of the Common Market Group, passed on 15 February 2004, provided that the manner in which used goods were to be dealt with was to be left to the individual national legislation of member States, thus leaving it outside the scope of MERCOSUR law. Consequently, expressly putting retreaded and remoulded tyres together under the used tyre category as Brazil did in Portaria SECEX 8/2000, was not in its view arbitrary. It was simply due to its technical classification.

Furthermore, it objected to Uruguay's claim under the principle of estoppel because Portaria DECEX 8/1991 was never meant to allow the importation of retreaded tyres into Brazil. Consequently, Uruguay cannot now claim that Brazil has changed its conduct to Uruguay's detriment. Brazil added that the principle of estoppel cannot in any event be relied upon in fraudulent cases, which is in effect how so many retreaded tyres from Uruguay managed to get through Brazil's borders, by more precisely the erroneous filing of forms.

Accordingly, Brazil submitted that Portaria SECEX 8/2000 is compatible with its rights and obligations under the MERCOSUR.

The MERCOSUR *ad hoc* Arbitral Tribunal ruling

The *ad hoc* Arbitral Tribunal started its ruling by stating that the fundamental principles of the MERCOSUR are proportionality, sovereign limitation, reasonableness and commercial predictability. It found that there had been an important, continuous and growing commercial influx of remoulded tyres from Uruguay to Brazil in the 90's, during the time of Portaria DECEX 8/1991. The Tribunal concluded in the circumstances, and following perusal of several documents from different organs and authorities of the Brazilian government, that Portaria SECEX 8/2000 did modify the import ban to include retreaded tyres and hence did not merely clarify DECEX 8/1991. This modification affected the practice of State organs, as a result of which remoulded tyres from Uruguay were no longer being given access to the Brazilian market as guaranteed by the MERCOSUR.

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

²⁶ Article 26 of the Vienna Convention on the Law of Treaties 1969 provided that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

Finally, the Tribunal found that irrespective of being incompatible with Decision no. 22/2000, Portaria SECEX 8/2000 was contrary to the principle of estoppel, since Uruguay's uninterrupted export of remoulded tyres, while Portaria DECEX 8/1991 was in force, was cut short by the 2000 legislation of Brazil. In the Tribunal's view such a sudden change of attitude goes against the spirit of integration of the MERCOSUR.²⁷

In sum, the case before the MERCOSUR *ad hoc* Arbitral Tribunal was of a purely interpretative and procedural nature. It was not a case where Brazil conceded its legislation was flawed but defensible-it was simply a matter of analysis and interpretation as to the scope of Portaria SECEX 8/2000.

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

The WTO Dispute

Noticing the presumed incompatibility of Brazil's measures with international trade law, the EC made a request for consultations with Brazil in June 2005 on its imposition of a ban on retreaded tyres. Failing a mutually convenient agreement, the matter progressed to the establishment of a WTO Panel and thereafter to an appeal by the EC to the WTO Appellate Body. In order to more clearly separate the issues of the dispute, I first focus on the Panel and Appellate Body's findings regarding the main substantive issue, in particular Article XX GATT 1994. Second, I look at the institutional issue highlighted by the dispute, and more specifically the relationships between the MERCOSUR-WTO dispute settlement systems and also between the Panel-Appellate Body.

WTO Panel Report

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

Article XX GATT 1994

Article XX provides general exceptions to GATT obligations.²⁸ Hence, Brazil based its defence on Article XX of the GATT, and more particularly in sub-section (b) which provides a specific exception for the 'protection of human, animal or plant life or health'. In other words, it did not contest the EC on its claim under Article XI (general elimination of quantitative restrictions), choosing instead to justify its trade restrictive measures as provided for and in accordance with the exceptions in the GATT.

With respect to the MERCOSUR exemption, Brazil argued that it was justified by Articles XXIV as the MERCOSUR is a customs union and also by Article XX (d) as the exemption is not inconsistent with the GATT.²⁹

The Panel found that Brazil was in breach of Article XI:1 with respect to its import ban and the fines under the Presidential Decree. It further found that Brazil's measures were not justified either under Article XX (b) and (d). This was notwithstanding the Panel's conclusion that Brazil demonstrated that the alternative measures identified by the EC (i.e. land filling, stockpiling,

²⁷ According to Steen Christensen the MERCOSUR is after all "seen as the column of South American Integration". See further: Steen Christensen, "The Influence of nationalism in MERCOSUR and in South America-can the regional integration project survive?", 50(1) *Brazilian Journal of International Policy* (2007).

²⁸ See for a detailed analysis: Jochem Wiers, *Trade and Environment in the EC and the WTO* (2002), 178.

²⁹ Article XX (d) provides for an exception 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Agreement (i.e. GATT)...'.

incineration and recycling) did not constitute reasonably available alternatives to the import ban on retreaded tyres that would achieve Brazil's objective of reducing the accumulation of waste tyres on its territory and therefore that Brazil's import ban can be considered 'necessary' within the meaning of Article XX (b).

In effect, Brazil's defence under Article XX failed at the chapeau level.³⁰ The main cause was internal court injunctions obtained by Brazilian retreading companies, eager to obtain cheaper and better quality waste tyres from Europe. As a result the Panel found that these injunctions, in particular the import volume allowed, had significantly undermined the objective of the import ban and were thus a means of unjustifiable discrimination and a disguised restriction on international trade.³¹ It did, however, view the injunctions as not being the result of 'capricious' or 'random' action by the Brazilian authorities and consequently that the import ban was not being applied in a manner constituting arbitrary discrimination.³²

Having adjudicated on the above, the Panel decided to exercise judicial economy as to whether the MERCOSUR exemption was consistent with Articles I:1 and XIII:1 as requested by the EC. The Panel also did not rule on Brazil's defence to its MERCOSUR exemption under Articles XXIV and XX (d). Suffice it to say with respect to the MERCOSUR exemption that the Panel found that it had 'not resulted in the measure being applied in a manner that would constitute arbitrary or unjustifiable discrimination' and that it had 'not been shown to date to result in the measure at issue being applied in a manner that would constitute such a disguised restriction on international trade' within the chapeau of Article XX.³³ By reaching this conclusion the Panel took into account the volume of imports. In its view, the objective of the import ban had not been significantly undermined by the volume of imports from MERCOSUR members.

MERCOSUR-WTO Dispute Settlement Systems

The Panel was also of the view that the MERCOSUR exemption was not motivated by 'capricious or unpredictable reasons'.³⁴ The MERCOSUR exemption merely resulted from a decision by the Tribunal adjudicating a dispute amongst MERCOSUR members on the basis of MERCOSUR law, the results of which were legally binding on Brazil. The Panel then went further in noting that Article XXIV provides for preferential treatment to members of an agreement intended to liberalise trade such as a customs union, to the detriment of other countries. In its view, even though it did not pronounce the MERCOSUR as legally qualifying as a customs union in accordance with the GATT, discrimination between members of the MERCOSUR and members of the WTO under the umbrella of Article XXIV is not a priori unreasonable.³⁵

Finally, the Panel explicitly stated that it was not in a position to assess in detail the choice of arguments by Brazil in the MERCOSUR proceedings or to second-guess the outcome of the case in light of Brazil's litigation strategy in those proceedings.³⁶ Indeed, the Panel considered it inappropriate to engage in such an exercise.³⁷ Moreover, the Panel underlined that while the particular litigation

³⁰ The chapeau of Article XX of the GATT reads as follows: 'subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries, where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a)-(j)'.

³¹ *Supra* note 3, Panel Report at paras 7.306 & 7.349.

³² *Ibid.*, at para 7.294.

³³ *Ibid.*, at paras 7.289 & 7.355.

³⁴ *Ibid.*, at para 7.272.

³⁵ *Ibid.*, at paras 7.273 & 7.274.

³⁶ *Ibid.*, at para 7.276.

³⁷ *Ibid.*

strategy followed, in that instance by Brazil, turned out to be unsuccessful, it was not clear that a different strategy would necessarily have led to a different outcome.³⁸

In sum, although Brazil failed in its Article XX defence and hence substantially lost the case, the Panel did not make any negative findings against the MERCOSUR exemption, which was the main reason why the EC had brought the case. To the contrary, it was the only measure which complied with the chapeau of Article XX. Had Brazil had a better grip in enforcement of the import ban, the Panel may well have let it off the hook.³⁹

WTO Appellate Body Report

Article XX GATT 1994

Like the Panel, the Appellate Body found that the import ban was necessary to achieve Brazil's objective in accordance with Article XX (b) GATT 1994.

It also sided with the Panel in finding that Brazil's decision to act in order to comply with the MERCOSUR ruling could not be viewed as 'capricious' or 'random'.⁴⁰ However, it added that although discrimination can result from a rational decision it can still be arbitrary or unjustifiable if it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under Article XX GATT. In the Appellate Body's view the MERCOSUR *ad hoc* Arbitral Tribunal's decision bore no relationship to the objective to be achieved by the import ban and actually went against it.⁴¹ The Appellate Body further reiterated that the function of the chapeau is the prevention of abuse of the exceptions specified in the paragraphs of Article XX.⁴² It therefore concluded that the MERCOSUR exemption had resulted in the import ban being applied in a manner that constituted arbitrary or unjustifiable discrimination.⁴³ The Appellate Body further found that the Panel had erred in considering the significance of the import volume when deciding whether the discrimination would be unjustifiable.⁴⁴

In the same light and consequently the Appellate Body also found, contrary to the Panel, that the MERCOSUR exemption was applied in a manner that constituted a disguised restriction on international trade.⁴⁵

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

More particularly, in finding that the imports of waste tyres by way of the court injunctions had resulted in the import ban being applied in a manner that constituted arbitrary or unjustifiable discrimination, the Appellate Body observed that Brazil's explanation that its administrative authorities had to comply with the court orders bore no relationship to the objective of the import

³⁸ Ibid.

³⁹ Geert van Calster, "The World Trade Organisation Panel Report on Brazil Tyres-Advanced Waste Management Theory Entering the Organisation?", 16 *European Environmental Law Review* (2007), 304, 305.

⁴⁰ Supra note 3, Appellate Body Report, at para 232.

⁴¹ Ibid.

⁴² Ibid., at para 224. See also: Appellate Body Report, *US-Standards for Reformulated and Conventional Gasoline*, WTO Case no WT/DS2/AB/R, 21.

⁴³ Ibid., at para 228.

⁴⁴ Ibid., at para 233.

⁴⁵ Ibid., at para 239.

ban.⁴⁶ The same reasoning was used by the Appellate Body in finding that the imports of waste tyres through court injunctions had resulted in the import ban being applied in a manner that constitutes a disguised restriction on international trade.⁴⁷

MERCOSUR-WTO Dispute Settlement Systems

Then, the Appellate Body turned to Brazil's defence strategy before the MERCOSUR Arbitral Tribunal. It noted that Brazil could have sought to justify the challenged import ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo.⁴⁸ Brazil, however, decided not to do so. The Appellate Body went further than the Panel by explicitly stating that it would not be appropriate for it to second-guess Brazil's decision not to invoke Article 50(d), which serves a function similar to that of Article XX (b) of the GATT 1994. The Panel had chosen not to discuss Article 50 (d) of the Treaty of Montevideo, even though it had been raised by the EC.⁴⁹ In reality the Appellate Body discussed the defence strategy of Brazil before the MERCOSUR Arbitral Tribunal, contrary to the Panel, which simply stated that Brazil's litigation strategy did not seem 'unreasonable or absurd'.⁵⁰ A significant difference can therefore be noted as to the level of respect and deference given to the MERCOSUR Arbitral Tribunal by the Panel and Appellate Body.⁵¹

However and at the same time, the Appellate Body inferred from this that Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings, show that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT.⁵²

In sum, the Appellate Body reversed the Panel's application of the chapeau of Article XX of the GATT by rejecting the Panel's quantitative analysis and instead looking into the cause of the discrimination or the rationale put forward to explain its existence.⁵³ By doing so it found that the MERCOSUR exemption did infringe the chapeau.

Commentary

The commentary is divided in two parts. The first part analyses the substantive element of the dispute, i.e. the defence under Article XX of the GATT. The second part explores the institutional power struggle between the global WTO and a RTA such as the MERCOSUR from, in particular, the point of view of their dispute settlement systems. The second part also turns to the relationship between the Panel and the Appellate Body.

⁴⁶ Ibid., at para 246.

⁴⁷ Ibid., at para 251.

⁴⁸ Treaty of Montevideo, Instrument Establishing the Latin American Integration Association (ALADI), done in Montevideo, August 1980. Article 50(d) reads as follows:

"No provision under the present Treaty shall be interpreted as precluding the adoption and observance of measures regarding: [...]

d. Protection of human, animal and plant life and health."

⁴⁹ Supra note 3, Panel Report, at para 7.275.

⁵⁰ Ibid., at para 7.276.

⁵¹ Nikolaos Lavranos, "The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals", *Loyola of Los Angeles International & Comparative Law Review* (2008), 275.

⁵² Supra note 3, Appellate Body Report, at para 234.

⁵³ See further: Geert van Calster, "Faites Vos Jeux-Regulatory Autonomy and the World Trade Organisation after Brazil Tyres", 20 *Journal of Environmental Law* (2008), 121.

Substantive rights and obligations: Article XX GATT

Article XX may be invoked to justify a measure that would otherwise be incompatible with GATT obligations, such as Most-Favoured Nation Treatment or National Treatment, or the prohibition on quantitative restrictions.⁵⁴ It thus establishes an obligation to respect GATT principles when pursuing non-trade goals.⁵⁵

The analysis of a measure under Article XX is two-fold.⁵⁶ The first step is to examine whether the measure falls under one of the ten exceptions listed under (a)-(j) of the Article. This is followed by an analysis as to whether the measure at issue satisfies the requirements of the chapeau of Article XX. In other words, the non-trade goals of a member State have to comply, to a certain extent, with the trade goals of the WTO.

Further, WTO members are free to choose their own level of protection with regards to measures to protect public health or the environment.⁵⁷ That is what Brazil did.

Scope of Article XX GATT

Brazil used Article XX (b) GATT as a shield in the WTO proceedings. As we know, Article XX (b) relates to measures which are ‘necessary to protect human, animal or plant life or health’. The party invoking it has further to establish two elements (followed next with compliance with the chapeau of Article XX): (i) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or health; and (ii) that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objectives.⁵⁸ The first element is fairly easy to fulfil. This is because although the Panel and Appellate Body will check the necessity of the measure taken to achieve that goal, they will not check the necessity of a measure’s environmental policy goal as such. By way of examples, in the *US-Tuna-Dolphin II* case⁵⁹ the Panel accepted that a policy to protect the life and health of dolphins pursued by the US within its jurisdiction over its nationals and vessels fell within the range of policies covered by Article XX (b). The Panel also accepted, in the *Thailand-Cigarettes* case⁶⁰, that smoking constitutes a serious risk to human health and that measures designed to reduce the consumption of cigarettes fell within the scope of Article XX (b). In the *US-Gasoline* case⁶¹, the Panel concurred with the parties that a policy to reduce air pollution resulting from the consumption of gasoline was within the range of policies covered by Article XX (b). Finally, in *EC-Asbestos*⁶², both the Panel and the Appellate Body accepted that the French policy of prohibiting chrysotile asbestos fell within Article XX (b).⁶³

The second element, necessity, is harder to determine. The Panel neatly summarised the necessity test in its report by looking into previous Appellate Body cases.⁶⁴ It thus stated that the

⁵⁴ Supra note 28.

⁵⁵ Ibid., 180.

⁵⁶ Supra Note 3, Appellate Body Report, at para 139.

⁵⁷ Ibid., at para 140. See also supra note 42, Appellate Body in *US-Gasoline*, 33.

⁵⁸ Supra note 42, Appellate Body Report *US-Gasoline*, at para 6.20.

⁵⁹ *US-Restrictions on Imports of Tuna II*, unadopted (1994).

⁶⁰ GATT Panel, *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-37S200 (7 November 1990).

⁶¹ Supra note 42.

⁶² *EC-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R.

⁶³ Supra note 28, 184-185. See also for a further analysis: Jochem Wiers and James Mathis, “The Report of the Appellate Body in the Asbestos dispute” 28 *Legal Issues of Economic Integration* (2001), 211.

⁶⁴ *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS169/AB/R; *EC-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R; *US- Measures Affecting the Cross-Border Supply of Gambling*

necessity of a measure should be determined through ‘a process of weighing and balancing a series of factors’, which usually includes the assessment of three factors: (i) the relative importance of the interests or values furthered by the challenged measure; (ii) the contribution of the measure to the realization of the end pursued; and (iii) the restrictive impact of the measure on international commerce. This should be followed up by a comparison between the challenged measure and possible existent WTO-consistent or less WTO-inconsistent alternatives.⁶⁵ This examination process was found to be consistent by the Appellate Body as it upheld the Panel’s conclusion that Brazil’s import ban was ‘necessary to protect human, animal or plant life or health’.⁶⁶

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

The fundamental principle is the right that WTO members have to determine the level of protection that they consider appropriate in a given context. Another key element of the analysis of the necessity of a measure under Article XX (b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of end and means between the objective pursued and the measure at issue. To be characterised as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be *material*, not merely marginal or insignificant, especially if the measure at issue is as trade restrictive as an import ban. Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it. As a key component of a comprehensive policy aiming to reduce the risks arising from the accumulation of waste tyres, the import ban produces such a *material contribution* to the realization of its objective. Like the Panel, we consider that this contribution is sufficient to conclude that the import ban is necessary, in the absence of reasonable available alternatives.⁶⁷ [emphasis added]

The Appellate Body refers to weighing and balancing throughout its report, and with an inconclusive final tally. For instance, the material contribution reference under Article XX (b) GATT, referred to above, would seem to indicate a rather strict approach, whilst in actual fact the Appellate Body let the Panel get away with rather more theoretical musings on the impact of the Brazilian measures.⁶⁸

Chapeau of Article XX GATT

Once the import ban was satisfied under Article XX (b) of the GATT, its application had to undergo the scrutiny of the chapeau of Article XX. This is when one realises that this is such an archetypal trade and health case, like in other cases such as *US-Gasoline* and *EC-Asbestos*. On the one hand we have irrefutable evidence of the existence of risks to human, animal and plant life and health posed by mosquito-borne diseases and tyre fires.⁶⁹ On the other hand there are [alternatively we find] trade requirements as to the application of the measures, which WTO members have the right to determine in order to protect their population’s health in particular.

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and *Betting Services*, WT/DS285/AB/R; and *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R.

⁶⁵ Supra note 3, Panel Report, at para 7.104.

⁶⁶ Supra note 3, Appellate Body Report, at paras 182 and 183; see for a very interesting albeit controversial article on the necessity test: Donald Regan, “The Meaning of ‘Necessary’ in GATT Article XX and GATS Article XIV: the Myth of Cost-Benefit Balancing”, 6(3) *World Trade Review* (2007), 347.

⁶⁷ Ibid., Appellate Body Report, at para 210.

⁶⁸ Supra note 53, 133.

⁶⁹ Supra note 3, Panel Report, at para 7.108.

In the *Brazilian Tyres* case the Appellate Body clarified for the first time that the policy objective of the measure at issue should be considered in the chapeau analysis.⁷⁰

As previously explained, the Appellate Body rejected the Panel's quantitative analysis under Article XX on the basis that it was flawed. It therefore found that Brazil's decision to abide by the MERCOSUR *ad hoc* Arbitral Tribunal's award and its administrative authorities' decision to comply with injunctive orders from its judiciary were contrary to the chapeau of Article XX. This was, according to the Appellate Body, because they bore no relationship to the legitimate objective pursued by the import ban.

The Appellate Body further reiterated that the chapeau serves the purpose of ensuring that members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one member's obligations towards other WTO members.⁷¹

Interim conclusion: trade supersedes health

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

It has been argued that international tribunals need to pay greater attention to the potential environmental harm that can result from trade, and to the significant welfare gains that can be derived from allowing a proliferation of different environmental standards to be adopted by different governmental authorities. This is illustrated by the *Brazilian tyres* dispute where it has been shown that the trade impact of the import ban was relatively small but where the environmental/health risks were certain and significant.⁷²

So, Brazil's defence under Article XX failed because its enforcement of the import ban was not water tight and hence not compliant with the chapeau of Article XX. The Appellate Body, however, did not seem to have taken Brazil's situation at face value, focusing instead on a test which diminishes Brazil's obligation to abide by other judicial bodies' rulings and thus impacting on its sovereignty. It is clear from the Appellate Body's report that its main objective is to be the guardian of free trade, as opposed to Brazil's sole objective of protecting its population's health on this one occasion. Regulatory priorities are after all much in the eyes of the beholder, and not for the Panel or Appellate Body to ascertain. The WTO dispute settlement system's attempt to be a global arbiter of regulatory priorities is an awkward and potentially devastating task for it to undertake.⁷³

In the circumstances, it has been argued that the Appellate Body has left us with a truly *Byzantine* necessity test and a chapeau analysis much less focused on due process and more on substance (but without clear indication how far Panels have to go to review substance under the chapeau).⁷⁴

In sum, despite acknowledgement of the dire health circumstances in Brazil the Appellate Body refuted the Article XX defence on the basis that the MERCOSUR exemption and the court

⁷⁰ Supra note 3, Appellate Body Report, at para 227: 'the assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure'. See for a further analysis: Julia Ya Qin's blog at <http://worldtradelaw.typepad.com/ielpblog/page/7>.

⁷¹ Supra note 3, Appellate Body Report, at para 215.

⁷² Fabio Morosini, "The MERCOSUR and WTO Retreated Tyres Dispute: Rehabilitating Regulatory Competition in International Trade and Environmental Regulation", *Society of International Economic Law (SIEL) Inaugural Conference Paper* (2008), 6.

⁷³ Supra note 53, 132.

⁷⁴ *Ibid.*

injunctions were not in line with the objective pursued by the import ban. Consequently, by abiding to the WTO obligations imposed by the Appellate Body in this ruling, Brazil is back to becoming ‘the tyre dump of Europe’.

Institutional power struggle: WTO-MERCOSUR dispute settlement systems

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

It has been argued that there are two ways in which the WTO deals with an RTA. The first is so called ‘WTO monism’ because it in essence confers rights to its members to form an RTA but only so far as constituting a sub-system to the WTO. In other words, WTO law is supreme and therefore an RTA must be fully in compliance with. The second approach is so called ‘WTO dualism’, whereby the WTO and an RTA are independent in nature and hence operate within a dynamic of co-operation and complementarity on the one hand, and competition and conflict on the other.⁷⁵

We subscribe to the latter approach as nowhere in the DSU is it stated that the WTO DSB is supreme over an RTA dispute settlement mechanism. There should therefore be no formal hierarchy in practice between the WTO and an RTA and thus both should be on the same footing. Other authors, however, presuppose that the WTO dispute settlement is supreme. For some the WTO dispute settlement is viewed as more legitimate because it is less power-based and more rule-based than RTA dispute settlement.⁷⁶ Others are not surprised that many RTA provisions mimic WTO provisions and believe that this is beneficial.⁷⁷ And some are concerned that the emergence of diffuse and often conflicting RTAs are a threat to the future predictability and security of the WTO.⁷⁸

Furthermore, other than the ‘general exceptions’ found in Article XX, the GATT also provides for ‘regional economic integration’. Article XXIV of the GATT 1994 allows members of an RTA to offer each other more favourable treatment in trade matters than to other trade partners outside the RTA. This kind of discrimination is obviously inconsistent with the MFN treatment of the WTO and yet allowed in the pursuit of regional integration if justified under Article XXIV.⁷⁹ Therefore, since the MERCOSUR is a Free Trade Area/Customs Union within the meaning of Article XXIV GATT, a measure that benefits MERCOSUR members naturally discriminates against non-members.⁸⁰

The *Brazilian Tyres* case, however, could be taken to illustrate that there is a shift from a horizontal relationship between the WTO and a RTA such as the MERCOSUR towards a vertical relationship by supposedly putting the WTO legal order at the very top. This shift produces both external and internal effects.

⁷⁵ N’gunu Tiny, “Regionalism and the WTO: Mutual Accommodation at the Global Trading System”, 11(4) *International Trade Law and Regulation* (2005), 126, 127. See also Panel Report *Turkey-Restrictions on Imports of Textile and Clothing Products*, WTO case no WT/DS34/R, (31 May 1999); and Appellate Body Report, *idem*, WTO case no WT/DS34/AB/R (22 October 1999).

⁷⁶ William J. Davey, “Dispute Settlement in the WTO and RTAs: A Comment” in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (2006), 343.

⁷⁷ Locknie Hsu, “Applicability of WTO Law in Regional Trade Agreements: Identifying the Links” in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (2006), 525.

⁷⁸ Isabelle Van Damme, “What Role is there for Regional International Law in the Interpretation of the WTO Agreements?” in Lorand Bartels and Federico Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (2006), 553.

⁷⁹ See further: James Mathis, *Regional Trade Agreements in the GATT/WTO* (2002).

⁸⁰ Peter Van den Bossche, *The Law and Policy of the World Trade Organization*, (5th ed., 2007), 650; Nikolaos Lavranos, *supra* note 51.

External effect: supremacy of WTO over RTA

By external effect I mean the claim from within the WTO dispute settlement body towards RTAs that the WTO legal order is supreme. This judge made claim is not novel and can be compared to the ECJ's early approach, in for instance *Costa v. Enel*⁸¹. In *Costa v. Enel*, although there was no explicit reference to supremacy of Community Law in the Rome Treaty, the ECJ did not shy away from declaring it.⁸²

The same position seems to be taken by the Appellate Body in the present case. This is so because although the Appellate Body claimed to have stayed clear from reviewing the MERCOSUR Arbitral Tribunal's decision, it nevertheless rejected the logic of the Panel as argued by Brazil that the mere fact of being obliged to implement a ruling from a judicial or quasi-judicial body is *a priori* presumption of WTO law compatibility. Accordingly, the Appellate Body seems to suggest that even though Brazil was clearly obliged by the MERCOSUR Arbitral Tribunal to bring its measure in line with MERCOSUR obligations, Brazil was at the same time required to do it in a way that is compatible with its WTO law obligations. Thus, one can detect here a declaration of supremacy of WTO law and Appellate Body jurisprudence over a RTA and its dispute settlement mechanism.⁸³

Another sign of the Appellate Body's declaration of supremacy can be seen in its interference in Brazil's submissions before the MERCOSUR *ad hoc* Arbitral Tribunal. By discussing Brazil's litigation strategy before the MERCOSUR *ad hoc* Arbitral Tribunal and thus suggesting that Brazil ought to have argued a defence akin to that found in the GATT, the Appellate Body is in fact crowning itself as the ultimate authority in trade law. This self-proclaimed supremacy interferes in Brazil's sovereignty in defending its interest before other dispute settlement bodies, which are fully independent and free from any supervision by the Appellate Body. Whether this self-proclamation trend by the Appellate Body will escalate is something that we shall wait and see.

Internal effect: *Stare decisis* and the relationship between the Appellate Body and the Panel

Internally, i.e. within the WTO dispute settlement system itself, the effects of the Appellate Body's claim as the supreme leader of trade law can also be noted. At least internally the Appellate Body's role is defined, under Article 17 of the DSU. Its role is to 'hear appeals from Panel cases'. However, it seems to be doing more than simply hearing appeals from the Panel. The Appellate Body seems to be using its self-proclaimed supremacy in trade law to discipline the Panel by imposing a *stare decisis et non quita movere* policy on it.

In a striking recent WTO dispute, *US-Stainless Steel*,⁸⁴ a heated power struggle between the Panel and the Appellate Body arose, which illustrates how far the Appellate Body is taking its dominant position. Obviously, the Appellate Body has express authority to uphold, modify or reverse the legal finding and conclusions of the Panel.⁸⁵ Whether it is using its authority reasonably is a different story.

In *US-Stainless Steel* the Panel refused to take previous Appellate Body's *stare decisis* into account in its findings as it disagreed with the Appellate Body's reasoning.⁸⁶ It said that it was 'troubled by the fact that the principal basis of the Appellate Body's reasoning in the zeroing cases seems to be premised on an interpretation that does not have a solid textual basis in the relevant treaty provisions.'⁸⁷

⁸¹ Case 6/64 *Flaminio Costa v. Enel* [1964] ECR 585,593.

⁸² Paul Craig and Gráinne De Búrca, *EU Law-Text, Cases, and Materials* (4th ed., 2008), 344, 345.

⁸³ *Supra* note 51.

⁸⁴ Panel Report, *US-Final Anti-Dumping Measures on Stainless Steel from Mexico*, WTO Case no WT/DS344/R (20 December 2007); Appellate Body Report, *idem*, WTO Case no WT/DS344/AB/R (30 April 2008).

⁸⁵ DSU Article 17.13.

⁸⁶ *Supra* note 84, Panel Report, at para 7.115.

⁸⁷ *Ibid.*, at para 7.119.

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

162. We are *deeply concerned* about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. *The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system.* Nevertheless, we consider that the Panel's failure flowed, in essence, from its misguided understanding of the legal provisions at issue. Since we have corrected the Panel's erroneous legal interpretation and have reversed *all* of the Panel's findings and conclusions that have been appealed, we do not, in this case, make an additional finding that the Panel also failed to discharge its duties under article 11 of the DSU.⁸⁸ [emphasis added].

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

Furthermore, it has been argued that the security and predictability necessary to achieve the objectives of the WTO multilateral trading system requires that previously adopted reports be followed unless there are compelling reasons to the contrary. Such an approach, it has been added, provides the foundation for the development of a sound and credible jurisprudence that not only commands the respect of parties to a given dispute, but also the respect of all WTO members.⁸⁹

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

To sum up the commentary, Brazil's interests have not been protected by the Article XX GATT exception and nor has the WTO's power struggle helped in its need to protect its population's health. Although entitled to reconcile trade liberalisation with other societal values and interests through the wide-ranging exceptions to the basic WTO rules, Brazil was deprived of this benefit. This was because while the Appellate Body clarified that the policy objective of the measure at issue should be considered in the chapeau analysis, it has left the standards of 'arbitrary or unjustifiable' discrimination as vague and confusing as ever.⁹⁰

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

The totality of the Appellate Body's approach in this case has in my opinion undermined the use of the Article XX GATT exception in genuine cases such as this one and Brazil's sovereignty with respect to its dealings and deference to an RTA's dispute settlement and its own judiciary.

Conclusion

This dispute clearly showed that trade supersedes health and environmental issues. This was the case in both the MERCOSUR and WTO disputes. Their dispute settlement systems failed to take into account the actual economic impact of the import ban, the political situation that led to the adoption of

⁸⁸ Supra note 84, Appellate Body Report, at para 162.

⁸⁹ Adrian Chua, "The Precedential Effect of WTO Panel and Appellate Body Reports", 17 *Leiden Journal of International Law* (1998), 45, 61.

⁹⁰ Supra note 70.

the bans and the potentially negative consequences that these decisions have on the public's perception of the MERCOSUR and WTO.⁹¹

However, considering that the MERCOSUR's trade *versus* environment jurisprudence is far less developed than the WTO's⁹² and affects far fewer member States, the WTO should have set an example. In this dispute, the Appellate Body did the contrary. It used the MERCOSUR *ad hoc* Arbitral Tribunal's ruling against Brazil to reiterate that not only is trade supreme over non-trade issues but also that its jurisprudence is supreme over that of RTAs.

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

The MERCOSUR proceedings were solely based on trade arguments as opposed to health, as in the WTO. Brazil's case before the MERCOSUR *ad hoc* Arbitral Tribunal was not that its legislation (SECEX 8/2000) was defensible on health grounds. Brazil chose a more technical and what it thought to be a more bullet-proof argument; that the scope of its new legislation did not introduce new *inter se* restrictions of commerce. Once Brazil lost the case and without recourse to appeal it had to abide by the Tribunal's ruling. The Appellate Body's suggestion that Brazil could have raised Article 50 (d) of the Treaty of Montevideo in the MERCOSUR proceedings was rather unrealistic. This is because in a later very similar case brought by Uruguay against Argentina⁹³ the MERCOSUR Permanent Review Court rejected Argentina's defence under Article 50 (d) stating that the principle of utmost importance in an integration system such as the MERCOSUR is free trade. Non-trade issues have to undergo a rigorous test. If a problem such as the one posed by waste tyres does not pass the test then it is anybody's guess what does. It is therefore submitted that even if Brazil had raised the Article 50 (d) defence in the MERCOSUR proceedings that it would have lost.

In this context the most recent WTO decision under Article 21.3 (c) DSU in this dispute should be noted.⁹⁴ The Arbitrator was called upon to determine the reasonable period of time that Brazil should be granted for bringing its domestic legislation into conformity with the WTO Appellate Body ruling. The Arbitrator, Yusuhei Taniguchi, who was one of the WTO Appellate Body members who delivered the *Brazilian Tyres* ruling, also discussed the possibility of raising the Article 50 (d) of the Treaty of Montevideo defence in light of the decision of the MERCOSUR Permanent Review Court in the Uruguay versus Argentina dispute. The Arbitrator opined that, while it is not his task as arbitrator to discuss the substance of the dispute as determined by the WTO Panel and Appellate Body⁹⁵, he considered the ruling in the Uruguay versus Argentina case not binding on Brazil.⁹⁶ Moreover, according to the Arbitrator, even though Argentina's reliance on Article 50 (d) Montevideo Treaty was unsuccessful because of the disproportional nature of Argentina's measures, the invocation of Article 50 (d) was not excluded in principle by the MERCOSUR Permanent Review Court.⁹⁷ In other words, the Arbitrator seems to imply that Brazil could have – with some reasonable chance – relied on Article 50 (d) of the Montevideo Treaty as a justification for the import ban. This is a somewhat strange conclusion because there is no fundamental difference between Argentina's and Brazil's import ban. Therefore, it remains unclear why those two quite similar cases would have been treated differently in terms of the invocation of Article 50 (d). Even more puzzling is the Arbitrator's remark that the decision of the MERCOSUR *ad hoc* Arbitral Tribunal '[...] does not, and did not need

⁹¹ Supra note 72, 5.

⁹² Ibid., 64.

⁹³ MERCOSUR *ad hoc* Arbitral Tribunal, *Uruguay v Argentina-Import prohibition of remoulded tyres from Uruguay*, overturned on appeal by the MERCOSUR Permanent Review Court on 25 October 2005.

⁹⁴ Award of the Arbitrator, *Brazil-Measures Affecting Imports of Retreated Tyres*, WTO case no WT/DS332/16, (29 August 2008), available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm.

⁹⁵ Ibid., para. 82.

⁹⁶ Ibid., para. 82, explanation in footnote 141.

⁹⁷ Ibid.

to, reflect and interpret all rights and obligations under MERCOSUR law that are relevant to the manner in which Brazil may choose to implement the DSB recommendations and rulings'.⁹⁸ It seems as if the Arbitrator is suggesting that the MERCOSUR *ad hoc* Arbitral Tribunal did not properly and fully understand and apply MERCOSUR law in its *Brazilian Tyres* decision. Obviously, the question arises whether a WTO Arbitrator is in a position to openly challenge and criticize another tribunal's decision that has been established under another trade regime, and even more so whether this is appropriate in terms of comity and judicial respect. In any case, the WTO Arbitrator fully rejected Brazil's argument that the decision of the MERCOSUR *ad hoc* Arbitral Tribunal required a modification of its domestic legislation in order to implement that decision.⁹⁹

As for the court injunctions, Brazil did successfully appeal most of the cases at a rate of 92.5%¹⁰⁰ but of course there are always some big fish which manage to get through the net. The problem is that Brazil's legal system leaves much room for improvement.

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

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

In sum, a claim of Appellate Body supremacy and its attempt of uniformity in trade law matters can cause more injustice than justice. It is blatantly clear that the Appellate Body's interference with the MERCOSUR dispute settlement system was a veil masking the fact that the catastrophic problems associated with dengue fever do not really matter, what does matter is trade. This is bad news not only for Brazil but also to all members of the WTO. If the Appellate Body is not capable of balancing health and environment *versus* trade cases in an unbiased manner towards trade then perhaps it is time to seriously consider the creation of an organisation solely dedicated to these matters.¹⁰¹

⁹⁸ Ibid., para. 82.

⁹⁹ Ibid., para. 84.

¹⁰⁰ Supra note 3, Panel Report, Annex 11, question 15.

¹⁰¹ See for a further debate on this: Daniel Esty, *Greening the GATT: Trade, Environment and the Future* (1994).

The WTO *Brazil – Tyres* Case and GATT Article XXIV: One More Step To a Legal Regime?

Dr. James H. Mathis*

Introduction

The theme developed here is the gradual but inevitable ‘legalization’ of Article XXIV as a result of the WTO dispute settlement process. The term ‘legalization’ is used to not only suggest an increasing clarity in the provisions, but also the emergence of the Article’s legally ‘binding’ effect as forming a basis for WTO claims and responses. This view is taken mainly from the historical roots of the Article and its years in the ‘backwoods’ of the GATT legal system. To set that context, the article spends a short time recounting that era and its developments, and then coming forward into the WTO system with a brief review of the 1999 *Turkey – Textiles* case. One hopes this sets the stage for putting the 2007 *Brazil – Tyres* case in context. There are three aspects treated here as drawn from the case and its Panel and Appellate Body treatment. The first is the EC’s direct attack on the Article XXIV status of the MERCOSUR customs union and the components of that attack. The second is the interpretation of GATT Article XX’s relationship to Article XXIV and its position within the regional exception. The final aspect deals with implications for regime hierarchy raised by the Appellate Body’s treatment of the Article XX chapeau.

The old flexibility

At the outset, one recalls an old tension between the text of GATT Article XXIV and its earliest assessments that go back to Viner (1950, an economist) and Dam (1963, a lawyer).¹⁰² Both of them grappled with the apparent absurdity that a completed customs union (or free-trade area) that ‘eliminates duties’ on ‘substantially all the trade’ (SAT) can also (inevitably) be a highly trade-diverting arrangement that negatively affects the economic welfare of outsiders. After fifteen years of frustrated GATT working group reviews that tried to reconcile the SAT requirement with ‘incomplete’ EEC external Associations and other regional arrangements, Haight reviewed the institutional stalemate in 1972 and coined the ‘paradox of Article XXIV’. This is where non RTA members are expected to endorse only those regional trade agreements (RTAs) that discriminate against *more* of their trade.¹⁰³ The frustrating experience of working groups over that era was understandably accompanied by calls to establish more functional and sectoral approaches to remedy the harm done to the trade of non members. There was also some theoretical and systemic evolution toward views of the Article that would reinterpret the provisions to ultimately orient the Article to more of a ‘no harm done’ standard.¹⁰⁴ The essence of these reformulations would mean that when external trade was

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¹⁰² J. Viner (1950), *The Customs Union Issue*, Carnegie Endowment. K. Dam (1963), Regional Economic Arrangements and the GATT, the Legacy of a Misconception, *University of Chicago Law Review*, Vol. 30, No. 4, pp. 615-665. Viner also provided the rationale for such a high free trade requirement - that when regional members are free to pick and choose their preferences they will then tend to favor those preferences that divert external trade and forego those troublesome preferences that actually generate internal regional trade.

¹⁰³ F. Haight (1972), *Customs Unions and Free Trade Areas Under GATT: A Reappraisal*, *Journal of World Trade Law*, Vol. 6, No. 4, pp. 391-404.

¹⁰⁴ For example, J. McMillan, (1993), *Does Regional Integration Foster Open Trade? Economic Theory and GATT’s Article XXIV*, in K. Anderson & R. Blackhurst (eds.), *Ibid.*, pp. 292-310, at p. 293. He refers to the first expression of the proposition by Kemp (1964), and Vanek (1965), his note 2 at p. 307.

diverted by an RTA, then liberalization among RTA members would not be required. Dam had suggested essentially the same in calling for paragraph 4 of the Article to be read to permit a greater degree of flexibility in the SAT requirements.

In spite of an absence of any real progress to institutionalize the review criteria or its processes during the GATT Uruguay Round (1986-1994), GATT contracting parties nevertheless held to some idealistic notion that ‘completed’ RTAs were somehow less threatening to the system than ‘uncompleted’ RTAs. This can be seen in the Preamble to the ‘GATT - 1994 Understanding on the Interpretation of Article XXIV’. Here there is a restatement of the paragraph 4 sentiment that closer integration between free-trade area and customs union members contributes to the expansion of world trade, but then something added - that this contribution is increased when the elimination of duties and other restrictive regulations of commerce between RTA members ‘extends to all trade, and (is) diminished if any major sector of trade is excluded.’ Whether honoured more or less in the breach, this declaration at least recognized that the original-drafted concept of the Article, requiring an extensive elimination of duties between RTA members, retained systemic validity in the new WTO system. Economic considerations aside, if the trading system has to choose between a smaller number of highly trade diverting RTAs - or a larger number of lesser diverting RTAs - it apparently would choose for the first option.

Flexibility and the ‘development dimension’

So-called ‘north-south’ RTAs have been a major factor in the system that has fed the argument for a more flexible interpretation of Article XXIV and its SAT requirement. For the major EC – developing country arrangements from the Overseas Association (1958) through to the present implementation of the Cotonou framework, the desire to locate a legal basis for trade flexibility for the ACP members has been a constant and controversial element shading the Article’s interpretation by these proponents. When a more benign sense of the development perspective took hold in the late 1980’s, the EC was widely applauded for its revision of the Lome’ IV convention to specifically exempt developing countries from the rigors of Article XXIV’s SAT requirements - as ACP members were then allowed to re-introduce duties and other restrictions in accord with their trade and developmental requirements.

This led to a significant shock to the prevailing view of Article XXIV when in 1993 and 1994 the (unadopted) Bananas I and II Panels¹⁰⁵ found that they had an obligation, according to GATT Article XXIII, to at least ‘facially’ review the provisions of a free-trade area agreement that had been raised as an MFN violation. Moreover, both Panels ruled that the absence of an obligation on the part of the ACP territories to dismantle their trade barriers indicated that the arrangements set out in the Convention were ‘substantially different from those of a free trade area, as defined in the Article XXIV:8(b)’.¹⁰⁶

Prior to this ruling, it had been the established mantra (as ruled by the 1986 Citrus Panel) that a Panel had no capacity to review or substitute itself for the ‘special procedures’ provided for by Article XXIV, paragraph 7. This is to say that the compatibility of an RTA with GATT rules and the process of its qualification was essentially a political and diplomatic exercise. Here the contracting parties acting together had the legal capacity to form recommendations to regional members regarding the implementation of their arrangements. As stated in paragraph 7, regional members would refrain from implementing an agreement that was contrary to the recommendations of the contracting parties. However, in the absence of these consensus recommendations, the RTA members were fully free to implement their agreements as they determined, and importantly - without any risk of later challenges to the legal viability of their preferences. This is a position based on a theory of the ‘autonomous regime’ and as Jackson characterized Article XXIV in 1969, a regime essentially based upon self declaration.¹⁰⁷ Once an RTA was notified and made available for examination, the regional members

¹⁰⁵ *EEC - Member States' Import Regimes for Bananas*, DS32/R 3 June 1993, and DS38/R, 11 Feb. 1994, (Unadopted).

¹⁰⁶ DS38/R, para 159.

¹⁰⁷ J. Jackson (1969), *World Trade Law and the Law of GATT*, Mitchie Company, p. 582.

had done all that the GATT required. Any further actions or requirements to undertake (inevitably not forthcoming) were up to the contracting parties acting unanimously to determine and enunciate.

The development dimension in north-south RTAs still dominates the discussion in the Doha Round (2001). Paragraph 29 of the Declaration calls for a clarification of the provisions of Article XXIV and contains an express statement to take into account the ‘developmental aspects’ of regional trade agreements. ACP territories have invested significant energy into the negotiations in the Round to raise points where flexibility could be institutionalized for the benefit of the final Economic Partnership Agreements (EPAs) also being negotiated with the EC during the same period. Needless to say, many WTO Members (who are not in the ACP grouping) remain unsympathetic to a relaxation of the SAT requirements for developing country members in north-south RTAs.

While flexibility is still at the heart of the issue, one can also see that the legal context for this discussion has entirely changed over time. Instead of simply drafting trade agreements that visibly grant a developing country member an exemption from SAT, we find on the contrary the territories concerned working in the WTO to create a new framework text that would sanctify greater SAT flexibility. Even while we still cannot say with any precision what the SAT requirement might ultimately entail, we can say that SAT has become a recognized legal requirement in the Article. WTO Members initiating RTAs know now that they cannot avoid it.

Turkey – Textiles - ‘legalization’ arrives

This Doha ‘legislative’ track operates in the penumbra of the 1999 *Turkey – Textiles* case, which set the legal test for RTA members to meet if they relied upon Article XXIV as a defense to a GATT Article violation.¹⁰⁸ While it took a number of years for the implications of this case to sink into the delegate negotiations and the behaviour of members drafting their RTA formations, it has been occurring for certain and continues to evolve. For this, one notes the primary points of resonance as ruled by the Appellate Body in that case.

- Article XXIV is a ‘defense’ to violations of GATT obligations owed to other WTO Members. There is no ‘autonomous-regime’ theory. An Article XXIV arrangement is fully reviewable by a Panel to determine whether the conditions required by Article XXIV have been met and whether the exception can be successfully invoked by the RTA member.¹⁰⁹

- If an RTA member raises the Article XXIV defense, that party then has the burden to go forward to demonstrate that the regional agreement meets all the requirements of paragraphs 5 and 8 of the Article, including the SAT requirement. There is no deference to any special review procedures included in Article XXIV (at least when these have been inconclusive). Dispute resolution procedures are a distinct and independent track of action available to any WTO Member.¹¹⁰

- There is no implied ‘no harm done’ standard being expressed by Article XXIV. “Paragraph 4 contains ‘purposive’, and not ‘operative’, language. It does not set forth a separate obligation by itself but rather expresses the overriding and pervasive purpose for Article XXIV. This is then manifested in operative language within the specific obligations that are found elsewhere in Article XXIV.”¹¹¹

The term ‘substantially all trade’ was not directly at issue in the case. However, the Appellate Body did make remarks on the word ‘substantially’, noting that while flexibility was intended by the term, that this flexibility was limited.

¹⁰⁸ *WTO, Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of the Panel, 31 May 1999, WT/DS34/R, Report of the Appellate Body, 22 October, 1999, AB-1999-5, WT/DS34/AB/R.

¹⁰⁹ *Turkey – Textiles*, AB Report, paras 48, 58 and 59.

¹¹⁰ *Turkey – Textiles*, AB Report, paras 59 and 60.

¹¹¹ *Turkey – Textiles*, AB Report, para 57.

Yet we caution that the degree of “flexibility” that sub-paragraph 8(a)(i) allows is limited by the requirement that ‘duties and other restrictive regulations of commerce’ be ‘eliminated with respect to substantially all’ internal trade.¹¹²

The case has had a major impact on RTA practice in the WTO. By ruling that a respondent would carry the burden to establish – before the Panel – that the RTA in question fully complied with paragraph five and eight requirements, the AB changed the institutional rules of the game. Rather than benefiting from the lack of clarity for the formation requirements of Article XXIV, now that same lack of clarity and defective institutional review process works against regional members. They have no history of receiving any positive recommendations on the compatibility of their trade agreements and worse, no clear criteria available now to use as legal benchmarks if necessary to go before a Panel to argue that their RTA is qualified for the Article’s MFN exception. Moreover, it has also raised the prospect – frightening to some – that it will be a dispute settlement Panel and not the negotiation process that will ultimately frame the legal requirements for paragraph 8 and its SAT provision.

Doha and the transparency developments

The responsive developments to *Turkey – Textiles* have been slow but certain in the Doha Round where there has been a meaningful (albeit currently stalled) negotiation on the requirements for SAT, a term that never made it to the active agenda in the previous Uruguay Round.¹¹³ Along the way, the review procedures in the Committee on Regional Trade Agreements (CRTA) have also been changed to entirely drop the requirement of forming recommendations in favour of an independent Secretariat factual report based upon RTA transparency and notification requirements.¹¹⁴ The new transparency instrument is a pre-requisite to any further institutional progress on the treatment of RTAs in the WTO. It should provide legal support for actualizing any substantive criteria negotiated for SAT, if and when that occurs as a result of the Doha Round.

Brazil - Tyres

Except for the cases dealing with regional safeguard measures and the relationship between GATT Article XIX and XXIV, dispute cases concerning Article XXIV interpretations have been rare since the *Turkey – Textiles* case. Anecdotally, it has been suggested that a reason for the absence of Article XXIV cases is that no Member wants to be the first respondent to raise the issue and actually find out what a Panel and/or the Appellate Body might do to their RTA – at least until the *Brazil – Tyres* case.

Direct attack on an RTA

While the 2007 *Brazil – Tyres*¹¹⁵ case does not provide us with the final act of a Panel making the determinations necessary to qualify an RTA, one does get the best view to date of how RTAs can be attacked when Article XXIV is raised as a defense to a GATT violation. Here, Brazil raised Article XXIV to excuse its exemption of other MERCOSUR members from the challenged import prohibition of retreaded tyres. The EC challenged the import prohibition according to both GATT Articles XI and

¹¹² *Turkey – Textiles*, AB Report, para 48. See also para 50.

¹¹³ An optimistic description of the negotiation progress is found in the Chairman’s Report, TN/RL/15 of 30 November, 2005, paras 21 and 22. Later reports indicate that more specific member proposals are necessary in order to resume the discussion.

¹¹⁴ Transparency Requirement for Regional Trade Agreements, Decision of 18 December, 2006, WT/L/671. The mechanism indicates that the Secretariat factual report cannot be used in dispute settlement (paragraph 10). There is a question of whether this prohibition extends to the objective data contained in the report. This author thinks that the disclosed data would be available for a Panel proceeding even if the report itself could not be entered.

¹¹⁵ *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, 12 June 2007, WT/DS332/AB/R, 3 December, 2007.

XIII. This claimed exemption by Brazil for its fellow regional members raises a first aspect of interest in the case, which is the outline of the issues raised by the EC against the qualifications of the MERCOSUR customs union, all within the context of Article XXIV provisions. To summarize, the major submission issues raised by the EC to challenge MERCOSUR included:¹¹⁶

- a failure on the part of Brazil to carry its overall burden to establish the underlying qualification of the MERCOSUR arrangement. Mere submissions and statements made to the CRTA will not suffice as a form of proof in the absence of CRTA recommendations. An incomplete CRTA examination does not qualify as a recommendation for a regional trade agreement. Moreover, submissions made years before the present dispute to the CRTA did not provide an indication of the qualifying status of the customs union at the time of the exemption (the issue in the present case) and the treatment of the issue by the Panel;
- a challenge to the legality of the original MERCOSUR notification, which was notified according to the Enabling Clause rather than as an Article XXIV customs union;
- a failure on the part of MERCOSUR to eliminate duties on internal trade (exemption of the auto and sugar sectors in the customs union), and within a reasonable period of time (10 years) as required by Article XXIV;
- a failure on the part of MERCOSUR as a customs union to sufficiently harmonize its external tariff and commercial policy to the trade of non-members within a reasonable period of time.

Here one sees all the elements required for qualification of an Article XXIV customs union both as to paragraph 8 internal requirements and paragraph 5 external requirements. On internal coverage, if the Panel had addressed the issue, there would have likely been an assessment as to whether or not the failure to liberalize a major sector of trade can alone undermine the qualification of an RTA. One can imagine that while the Panel would wish to avoid setting any trade percentage of what constitutes SAT, it might have been difficult to avoid such a ruling in response to the following submission point that goes directly to the issue of quantitative coverage.

As the MERCOSUR member States have confirmed, the automotive sector alone accounts for approximately 29 per cent of intra-MERCOSUR trade. Accordingly, even without going into the further question of persisting internal non-tariff barriers, MERCOSUR does not seem to have achieved a liberalisation of "substantially all" intra-MERCOSUR trade as required by Article XXIV:8(a)(i).¹¹⁷

On the question of external tariff harmonization, Brazil's submission indicated that it was fully conformed for 90 percent of its external trade. If that claim was accepted by the Panel, then there would be a point for an additional ruling – for a customs union – as to whether this percentage is sufficient for the paragraph 8 requirement to apply substantially the same duties and other regulations of commerce to the trade of non members. A subplot to the paragraph 5 requirements was also raised by the EC in respect of MERCOSUR's non-tariff barriers and its non-conformed export measures. Since the *Turkey – Textiles* Panel provided a broad interpretation of what aspects should be considered as 'other regulations of commerce', one considers that these aspects could also be taken up to the extent they might affect the trade of non-RTA members.

These claims are an indicator of how far things have progressed as a result of the qualification criteria enunciated by the *Turkey – Textiles* Appellate Body report. That they are being made by the EC is also interesting and may say something about the prospective course of dispute settlement for RTAs. The EC is certainly capable of screening these arguments prior to submission to ensure that if - and when - it finds itself in the same position of defending on Article XXIV - that these points can all be adequately sustained. In short, with these submissions the EC appears to be putting other regional

¹¹⁶ *Brazil – Tyres*, Panel Report, generally from para 4.378.

¹¹⁷ *Brazil – Tyres* Panel Report, para 4.397.

systems on notice that it is prepared to both attack and defend on the basis of the substantive and procedural requirements of Article XXIV. If so, this is a most welcome development.

On the basis of judicial economy the Panel avoided assessing the MERCOSUR exemption or the EC's points of complaint on Article XXIV qualification. The Appellate Body took this point up at the end of its report noting, '... we have difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:1 directed at the MERCOSUR exemption.'¹¹⁸

That is wholly in accord with the earlier *Turkey – Textiles* ruling that Panels would be called upon to deal with the terms of Article XXIV if the defense is raised.

The AB ruling on Article XX

The second issue of importance was treated by the Appellate Body in reversing the Panel's rulings on the GATT Article XX chapeau and its requirement that an exceptional measure be not applied in a manner that would 'constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.' Here the Panel found that an earlier MERCOSUR Court ruling requiring Brazil to exempt its regional partners from the Tyre prohibition was not 'arbitrary discrimination' – essentially deferring to the ruling of the other arbitral body and the regional member's required compliance with it.¹¹⁹ The Appellate Body rejected this line entirely in ruling that the only discrimination allowable by the chapeau would be those actions that related to the objectives of the underlying qualified exception – in this case the Article XX(b) measures necessary to protect human health.¹²⁰

The Panel earlier determined that the existence of another court ruling (the MERCOSUR Court) was the primary indicator that the basis for Brazil's discrimination was neither arbitrary nor a form of unjustifiable discrimination. As the Appellate Body summarized the Panel ruling:

For the Panel, the MERCOSUR exemption "does not seem to be motivated by capricious or unpredictable reasons [as it] was adopted further to a ruling within the framework of MERCOSUR, which has binding legal effects for Brazil, as a party to MERCOSUR." The Panel added that the discrimination arising from the MERCOSUR exemption was not "a priori unreasonable", because this discrimination arose in the context of an agreement of a type expressly recognized under Article XXIV of the GATT 1994 that "inherently provides for preferential treatment in favour of its members, thus leading to discrimination between those members and other countries."¹²¹

The Panel appeared to agree with Brazil that GATT Article XXIV does not require the application of Article XX measures to be also imposed upon other regional members. This would flow from the text of Article XXIV:8(a)(i) that requires regional members to eliminate duties and other restrictive regulations of commerce, except where necessary, those permitted under GATT Articles XI-XV and XX.

The EC argued on appeal that permitting discrimination on this basis would undermine the Chapeau of Article XX. From the Appellate Body report, paragraph 220:

For the European Communities, allowing a Member's obligations under other international agreements to render discrimination consistent with the chapeau of Article XX would seriously undermine the effectiveness of the chapeau.

¹¹⁸ *Brazil – Tyres*, AB Report, para 257.

¹¹⁹ *Brazil – Tyres*, Panel Report, paras 7.270 to 7.283.

¹²⁰ *Brazil – Tyres*, AB Report, para 246. According to the AB, this ruling reiterated its own earlier interpretation of this chapeau requirement, as found in *US – Shrimps and US – Gasoline*.

¹²¹ *Brazil – Tyres*, AB Report, para 217. AB report footnotes are deleted.

The Appellate Body reversed the Panel but not necessarily on this reasoning alone. The Appellate Body found that the determination of whether or not discrimination (in the sense of the Chapeau) was arbitrary or unjustified had to take into account the ‘cause’ of the discrimination and whether this determined cause met the ‘objective’ of the listed exception (in this case, Art. XX(b), for human, animal or plant, life, health). The MERCOSUR ruling here was an insufficient rationale for permitting discrimination since it bore no relation to the objectives of Article XX(b). From the Appellate Body report at paragraph 228:

In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.

To clarify, the Appellate Body did not rule that the MERCOSUR ruling itself was arbitrary, or that the rulings of other arbitral bodies and a WTO Member’s compliance with them constituted arbitrary acts unto themselves. On the contrary, the Appellate Body stated that:

Like the Panel, we believe that Brazil’s decision to act in order to comply with the MERCOSUR ruling cannot be viewed as “capricious” or “random”. Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as a decision that is “capricious” or “random”.¹²²

Given this, the Appellate Body went on to note in paragraph 234:

This being said, we observe, like the Panel (442), that, before the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo. (443) Brazil, however, decided not to do so. It is not appropriate for us to second-guess Brazil’s decision not to invoke Article 50(d), which serves a function similar to that of Article XX(b) of the GATT 1994. However, Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defense in the MERCOSUR arbitral proceedings (444), show, in our view, that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994. (445)

The Appellate Body appears to recognize the legal conflict posed for a Member that is subject to conflicting arbitral rulings and the implications for compliance with GATT obligations. The Panel deferred in the sense of comity and recognized the facial validity of the other ruling as meeting the requirements of the Article XX chapeau. The Appellate Body rather emphasized that harmony was possible in that first, Brazil itself ‘could’ have sought a harmonious outcome in the MERCOSUR proceeding by seeking to invoke the similar exception available within the regional agreement for protection of human, animal, plant life or health.

This line of reasoning seems to miss the point raised by considering what would happen if Brazil and the MERCOSUR court had applied the regional health exception but then the resulting MERCOSUR ruling would vary in some manner from the outcome likely under WTO law – a differing outcome easily possible given that an RTA regime has its own developed body of law in the context of free movement and with possibly differing notions of necessity and proportionality. We then can ask whether this resulting divergence between the two outcomes would be taken into account by the AB in determining if the resulting discrimination was arbitrary or unjustified according to the Article XX preamble? By the Appellate Body’s reasoning above, the answer seems to be ‘no’ since the cause of any residual discrimination based upon the free movement provisions in MERCOSUR

¹²² *Brazil – Tyres*, AB Report, para 232.

would not likely be sufficiently linked to the objectives of the Article XX(b) exception (human health).

Since no regional treaty or arbitral ruling to the contrary on the basis of regional free movement commitments (or a regional treaty's own stated health and safety exceptions) would ever qualify as being directed to the substance of an Article XX exception in question, the Appellate Body has effectively ruled that the GATT Article XX chapeau establishes a hierarchy between this non-discrimination GATT obligation and whatever inconsistent provisions or rulings may occur under a regional system. The regional member has a choice to either comply with the regional findings and compensate its WTO partners accordingly, or to comply with the WTO ruling and disregard its own regional law. This would be the result whether or not the inconsistent arbitral ruling (or treaty provision) was based upon either a different reading of the free movement requirements, or a different reading of the underlying exceptional criteria - for example where the regional body took a more restrictive view of available alternative measures or applied a more strict balancing to determine whether the measure was proportional. Either way, the GATT Article XX preamble requirement appears to have the priority.

EC free movement and domestic national treatment implications

Although the EC made the argument (above) that allowing discrimination in the Article XX preamble as a result of other international agreements would undermine the effectiveness of the Chapeau, one wonders whether European law and the European Court of Justice might not also step over this same line. Free movement requirements in European law are strict. It is conceivable that EU member states would not be allowed to prohibit imports on the basis of an exception even while an individual member may be allowed to restrict the same imports from another WTO Member on the basis of WTO law. However, the mere divergence in the possible outcomes between the two regimes would raise the same situation as demonstrated in the *Brazil -Tyres* case. The resulting discrimination in favor of another EU member's trade could not be linked by causation to the health and safety objectives of the Article XX exceptions. Thus the EC trading regime would also be in final conflict with the WTO. The Article XX preamble would also be in the priority provision, just as ruled in the *Brazil* case by the AB.

One can consider whether this could be countered by a reference to Article XXIV's paragraph 1 territorial application provision. This states that the General Agreement's application is to 'customs territories' and indicates that 'each such customs territory shall, exclusively for the purpose of the territorial application of this Agreement, be treated as though it were a contracting party...' Since a customs union is by definition a customs territory, the point could be raised for both the MERCOSUR and the European Union examples that differential treatment within the customs territory as to its members cannot run afoul of the Article XX preamble requirements. This argument would be made on the basis that the discrimination is not being applied as 'between countries', a term that would be read here to refer to 'exporting' countries. Unfortunately for this view, the Panels and the AB have treated 'countries' to also permit the comparison between the country imposing the measure and the export country.¹²³ We can see by this interpretation of the chapeau that a single customs territory, customs union or otherwise will not succeed in differentiating between internal restrictions and external restrictions, unless there could be some other reason (not yet raised) why the resulting discrimination would not be considered arbitrary.

Interpretation of Article XXIV as to Article XX

A third issue from the *Brazil - Tyres* case considers the relationship between Article XXIV and XX. For this we start with footnote 445 from paragraph 234 of the AB report:

(445) In addition, we note that Article XXIV:8(a) of the GATT 1994 exempts, where necessary, measures permitted under Article XX from the obligation to eliminate "duties and other restrictive

¹²³ *US - Gasoline*, DS2/AB/R, para 590. See also, *US - Gambling*, DS285/AB/R, para 369.

regulations of commerce" with respect to "substantially all the trade" within a customs union. Therefore, if we assume, for the sake of argument, that MERCOSUR is consistent with Article XXIV and that the Import Ban meets the requirements of Article XX, this measure, where necessary, could be exempted by virtue of Article XXIV:8(a) from the obligation to eliminate other restrictive regulations of commerce within a customs union.

This is a bit of a ponderous construction. It is probably best to read it in light of Brazil's tacit argument that since Article XX resides in the listing of article exceptions within Article XXIV, that RTA members 'can' choose to retain or not retain those restrictive measures as to other RTA members. Before I discuss the relationship between Article XX and XXIV, let's review the relevant Article XXIV provision.

8. (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Article XI, XII, XIII, XIV, XV, and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union

...

Although this Appellate Body footnote and its view of Article XXIV is not essential for the ruling on the priority of the Article XX chapeau, which is based upon the AB's determination that justifiable discrimination must relate to the objectives of the individual exceptions, it is highlighted here as raising one of the possible interpretations of Article XX's role within Article XXIV. Here, the construction enunciated appears to be 'optional' – suggesting that RTA members need not eliminate those types of measures found in XI through XV and XX.

A different interpretation of the Article XXIV provision has been suggested. Hudec and Southwick¹²⁴ considered that the Article XXIV 'exceptional articles' listing may not pose an alternative 'optional' course for regional members to consider in eliminating barriers to trade. Rather, that these listed Articles - to the extent they permit the imposition of certain measures against other WTO Members at all – all have a 'multilateral' or MFN character that requires a restrictive measure (when permitted at all) to then be imposed upon *all* WTO members, including regional members. In this view the listed Articles are not optional as between RTA members. Those provisions with their MFN character control even as between RTA members, as for examples in GATT Article XIII where quantitative restrictions (when permitted) must be applied on a non-discriminatory basis, and of course, in the chapeau Article XX as discussed above.

This construction maintains that where a regional member invokes an Article XX exception in respect of all other GATT parties, that it *must* also apply the measure against its own regional members. It is not an option. The reason why the Articles are listed in the XXIV provision is to make it clear that the regional exception would not have priority over the multilateral provisions of those listed trade restrictions.

Hudec and Southwick suggested that this gives meaning to the term in Article XXIV that excludes Articles XI-XV and XX from the obligation to eliminate 'where necessary...'. From the perspective of Article XIII, this would be necessary to the extent that a restriction imposed for balance of payments problems would be unfairly born by other GATT parties even while the regional members (in free trade), may be a significant source of the BOP problem in the first place.

For Article XX the rationale may even be more clear. If a measure is 'necessary to protect human life', why would this measure then be 'less necessary' in respect of the free trade values of a regional partner? It is either necessary to protect human life or it is not.

While Article XX and XXIV are both considered as exceptions to GATT obligations, here the relationship of the two Articles as to each other is the main point at issue. The 'must' construction suggested by Hudec and Southwick clearly places Article XX in the superior position. Paradoxically, even while the AB appears to recite the 'optional' interpretation for Article XXIV in its footnote 445,

¹²⁴ R. Hudec and J. Southwick (1999), *Regionalism and WTO Rules*, in Rodriguez, Low, Kotschwar (eds.), *Trade Rules in the Making*, OAS and Brookings, pp. 47-80.

(that Brazil ‘could’ harmonize its Article XX measure without violating Article XXIV), the net effect of its ruling on relating the ‘cause’ of the discrimination to the specific listed exception has the same legal outcome as the Hudec / Southwick construction for Article XXIV. Either way, the Article XX non-discrimination requirement appears to wind up in the priority position.

Conclusion

From a treaty law perspective it is becoming easier to take the position that Article XXIV constitutes *the* constitutive legal expression of today’s WTO Members regarding the legal relationship between preferential trading systems and the General Agreement.

Most economic policy discussions on RTAs in the multilateral trading system dwell on the ‘friend or foe’ context. Are RTAs building blocks or stumbling blocks to the multilateral trading system? This relationship is expressed by paragraph 4 of Article XXIV which continues to acknowledge the desirability of increasing freedom of trade through the voluntary agreements of closer integration between the economies of regional parties, and that the purpose of a customs union or free-trade area is to facilitate trade between the regional parties and not to raise barriers to the trade of non-members. This remains the essence of the relationship.

It has taken a generation or two to figure out what this bifurcated expression means in the legal relationship between RTAs and the multilateral trading system. One hopes that the points made above begin to demonstrate that this type of evolution is not only possible but occurring in actual practice, thanks in major part to the WTO dispute settlement system.

As we move on to the next generation of RTAs contemplating the role of advanced domestic harmonization in Article XXIV arrangements and for preferential economic integration agreements in the GATS, we see much less institutional review practice to outline the possible scenarios. The term ‘other restrictive regulations of commerce’ and ‘other regulations of commerce’ for Article XXIV are on the active Doha rules committee agenda, but they are farther down the list than the SAT issue and may not receive treatment this time around. Similar for the GATS where few are willing to offer an educated guess as to what ‘substantial sectoral coverage’ may mean in a dispute settlement case, or pre-determine the MFN / exceptional relationship that is evident between GATS Article V (Recognition) and/or GATS Article VI (Domestic Regulation) as these relate to the exception found in GATS Article V.

But what has changed for even the ‘new issues’ is the larger legal context that has now been set. One does not expect to see future arguments that Panels have no ‘right’ to review the new variations of RTAs, or whether GATS Article V is an ‘exception’ or not to general GATS obligations. These issues are settled. This suggests that legal developments for the next generation of RTAs may not take as long to come forward as did the last.

Epilogue

What Lessons from the *Brazilian Tyres* case?

Roderick Abbott

I am a practitioner with experience in the GATT, as a delegate and negotiator for the EC from the early 1970s through to the WTO in 1995 and beyond. I am therefore neither an academic nor someone with legal training specialized in interpreting the confused texts which form the corpus of multilateral trade rules within the GATT 1994. But I have had to apply them as best as could be done.

In offering some observations on this workshop, therefore, it is likely that the reader will notice some differences in attitude compared with the other papers presented. That is to be expected.

Prior to the workshop I had in fact heard very little about the *Brazil – used tyres* case (WT/DS 332), beyond the bare fact that Brazil intended to offer a public health defence for a prohibition on imported tyres. This seemed to me inherently implausible in itself; and when I heard more – tyres when no longer useable are dumped, rainwater collects in them, mosquitoes breed in stagnant water and this is a major danger to public health - I was not much more convinced. Could this be the major cause of a disease? Were other solutions not available? Would such an argument stand up in the WTO dispute context?

It was a steep learning curve! I discovered a previous paper on the subject which analysed the case in some detail.¹²⁵ I discovered that Brazil had not used a public health defence in the context of the earlier MERCOSUR dispute but had simply argued that it was not a new barrier to trade among the parties. They lost their case; but serious health risks are associated with Dengue Fever, and the ‘*Aedes Aegyptii*’ mosquito causes a great deal of trouble in the tropics, responsible for thousands of deaths.

I also learned that there are differences between retreaded tyres and remoulded tyres, and not just in linguistics; and that dumped materials are classified as waste, either active or ‘inert’. Both my vocabulary and my medical knowledge were expanded, and I began to see that the specific case raised a series of contentious issues. And so it proved: after the WTO had heard the case a memorable headline was: “Trade supersedes health” – implying perhaps that anxieties about trade rules or trade practices could somehow reduce medical problems to an unimportant category. The balance between trade and health would be the subject of much debate.

The ‘supremacy of the WTO/Appellate Body’ argument

Two issues here: Art XXIV and its relationship to the core Articles I and III of GATT; and whether the Appellate Body, which is the supreme arbiter of disputes in WTO and the final appeal forum for matters of legal interpretation, is also the body to which regional courts/tribunals in FTAs should defer.

First things first. I recall, during the 1970s, that there were arguments among members as to whether Article XXIV GATT constituted an *exception* to Article I GATT, or was in some sense a policy direction permitted in contradiction to it. This was probably a sterile field of battle, because no member was ever prevented from signing and implementing a free trade area; but it mattered to the EC since if such agreements were exceptions to a general rule, it would be only a short time before they were regarded as provisional (much as a waiver was intended to be) and subject to regular review.¹²⁶

One argument against the ‘exception’ theory was indeed that Article XX contained the exceptions to the GATT 1947 and that preferential agreements (or Article XXIV) were not mentioned in that Article. On the other side, it was argued that the language in Art. XXIV, paragraph 5: “Accordingly,

¹²⁵ “Competing jurisdictions between MERCOSUR and WTO”, by N Lavranos and N Vielliard, published in the *Law and Practice of International Courts and Tribunals* 7 (2008), 205.

¹²⁶ It should be recalled that there is within Article XXIV a provision that envisages a waiver for cases which “do not fully comply” with the requirements of the Article: in paragraph 10. It has never been used !!

the provisions of this agreement shall not preventthe formation of” was an indication that Articles I and XXIV were of equal status or at least that the two Articles were intended to co-exist without neutralizing each other.¹²⁷ The language of paragraph 4, second sentence, makes a similar point.

As regards Article III GATT, the question had not arisen in my experience. This is perhaps because the typical problems were connected with the tariff levels and the trade coverage, and with restrictions or ‘regulations of commerce’ (later thought to cover also Rules of Origin). In other words, the focus was on *external* measures at the border rather than internal issues of taxation or domestic regulation.

On the second set of issues, two questions seem to be posed. Is the Appellate Body supreme in its relations with dispute Panels? And is it supreme vis-à-vis regional instances for dispute settlement (in MERCOSUR or elsewhere)?

To a practitioner, present in WTO in the early years after the DSU entered into force, and observing the way that the Appellate Body has worked, these appear to be odd questions. The new WTO system was designed to function in two or three phases: consultation, examination based on submissions by the parties, a first ruling and where desired an appeal. The appeal is explicitly on issues of legal interpretation and is referred to the Appellate Body which is composed of senior legal experts (former Supreme Court judges, academics in law). It can only be an appeal from the ruling issued by a Panel, and by definition the Appellate Body can disagree with Panel rulings, and has done so in a number of cases. (It is however rare for the Appellate Body to overturn a Panel ruling in its entirety – more usually it reverses one or more parts of it.)

In the case of relationships with a regional body, I have to admit that I had never come across such a problem before the Workshop. There are different methods for dispute settlement in different preferential trade agreements: in the EU case, it is internalized through consultation between the parties and if need be, referred up to the Association Council or similar body, whereas in the American example (e.g.in NAFTA) it is more formal, involving a tribunal with members from both sides and a neutral chair, and a ruling or decision is made. This process is not exclusive and reference of the same dispute to the WTO is permitted – and has often occurred.

Where the same dispute is examined at both the regional and global level, and a ruling given, there may be differences in the detail of the case, what violation is alleged and what defence is chosen (as seems to have happened in the Used Tyres case). There may also be differences in the commitment which the parties have accepted: the subsidy rules in NAFTA may well differ from those in the WTO Agreement. Nonetheless, there was never any doubt in my mind, and in the view of many colleagues, that the WTO would have the last word.

This follows, in a sense, from the fact that the relationship of the regional to the global is one of ‘subordinate’ status: members of a regional agreement are a sub-set of all WTO members. I never heard in practice the argument that a preferential agreement could be ‘self-contained’ and in some way separated from and alongside the multilateral rule. More specifically, in the dispute settlement context, if a matter of interpretation arises on a WTO rule, or on whether Article XXIV GATT permits an exemption from such a rule, it is finally the Appellate Body which arbitrates between various views. This is certainly the practice and it seems to follow from the duties which the Appellate Body is mandated to carry out.¹²⁸

Article XX GATT: balancing trade and non-trade factors

Article XX GATT has the heading “General exceptions”, and it goes with Article XXI GATT which covers exceptions in the field of national security. One might notice that while ‘essential security interests’ seem to be regarded as paramount – even to the point that a country is the sole judge of what it considers to be essential – the rights opened up in Article XX are much more nuanced. You may

¹²⁷ Compare the language in Article XX and XXI: “Nothing in this Agreement shall be construed to prevent

¹²⁸ Example: the *India v. Turkey* case which in reality was a case against the EC-Turkey customs union.

take exceptional measures subject to satisfying some fairly tough requirements, designed to limit the field of action and prevent abuse. This is very far from being a 'free ride'.

One of these tests is the 'necessity' test. In several cases the measure has to be necessary in order to achieve the objective – in (a), (b) and (d). This implicitly poses the question whether the objective could be achieved by other means – generally interpreted to mean proportionality: could a less restrictive type of measure achieve the same end? In other cases, the limitation stems from the definition of the products concerned (gold or silver, prison labour, national treasures) or from conditionality imposed on any measure taken - (g), (i) and (j).

The main trade/non-trade issues relate to measures necessary to protect public morals and human (and animal) life and health, and, more generally, to the conservation of exhaustible natural resources, which is now recognized to include fossil fuels, their effects on the environment and climate change. In its broadest form, it raises the question whether trade rules (especially exceptions to general rules) must be rigorously interpreted, limiting the range of actions in contradiction with fundamental systemic principles; or whether in some circumstances the rules should be adapted to take account of non-trade factors which are also important for societal reasons.

So, what do we learn from the Used Tyres case? Interestingly enough, there is an environmental issue here, as well as the public health case: the suggestion was made that used tyres dumped all over the country could be burned, thus eliminating the mosquitoes but creating an environmental hazard which was thought to be unacceptable. This however did not play any big part in either the MERCOSUR or WTO cases. Both the Panel and in turn the Appellate Body accepted that a measure limiting imports of used tyres (or specific categories of such tyres) was necessary, and that alternative suggestions were not 'fit for purpose'.

How were the various rulings made? In the MERCOSUR case the argument turned on whether the measure was in fact a new restriction – which would be illegal between the members after a certain date – or whether as Brazil argued there had always been a restrictive measure and its scope had simply been interpreted more broadly in the light of later circumstances (a regular growth of imports from Uruguay). This therefore turned on facts and on decisions taken by Brazil and by MERCOSUR bodies, with effectively no WTO provisions involved even if Article XI would be generally relevant. In the WTO case, on the other hand, Brazil invoked Article XX (b) but lost the argument because the measures did not apply to imports from other members (in line with the earlier MERCOSUR judgment) which resulted in them being ineffective as a means to protect public health. Nonetheless the basic issue, whether a situation of serious risk to public health could justify otherwise illegal restrictive measures, was clearly considered.

Where does this debate go next?

This issue is controversial and has become extremely topical because of legislation which is under discussion both in the EU and in the United States. In summary, the concerns arise out of the impact that measures to control/reduce emissions of greenhouse gases might have on domestic industries, leading to anxiety about competitiveness and 'the level playing field'. To explain further: country A that legislates to control emissions and enforce such measures strictly runs the risk that industries in other countries B or C, where there are no or looser controls, may start exporting to country A and because they bear a smaller cost burden in relation to pollution controls, will gain a price advantage. Fill in the blanks: where is China or India in this picture, where the EU and where the USA?

Against this background, legislators in both Brussels and Washington have begun to discuss ways in which the level playing field can be 'rebalanced' to offset the disadvantage faced by domestic industry. Various options are discussed, ranging from traditional trade measures (an additional tariff or even a quantitative limit applied to such imports) to border tax adjustments and to using variants of the Emission Trading Schemes that exist or are planned. Needless to say many of these ideas will probably be in conflict with trade rules, some blatantly so, others in more subtle ways. Is halting the

worst effects of climate change – or ‘saving the planet’ by protecting the environment – more important than observing the strict letter of the WTO rules?¹²⁹

Looking forward, it is hard to know how the WTO instances will deal with future cases. Public health will always be an important issue, and measures that are clearly designed to address such problems, and are implemented correctly, may in future be approved. Similarly, the global environment would be regarded by many as an even more important issue for mankind; and measures to protect it might be thought to have a better chance of approval as being ‘in the common good’. However, other observers think that the test will still be how measures are designed; if they afford protection for uncompetitive industries and do not lead to reduced emissions, they will probably be rejected. If on the other hand they are part of a series of measures to reduce emissions and enforce strict implementation of agreed commitments, they may be approved. As Chou En-Lai observed, in another context, it is too soon to tell.

¹²⁹ I am aware that in another recent case where exhaustible natural resources was at issue (Shrimp and Turtle) the Appellate Body has made observations which suggest that a more open attitude to the use of Article XX (g) might be possible. But each case is different in its details; and it is not clear where this may lead.

Summary of the Multilevel Judicial Governance Workshop
Villa La Fonte
28 November 2008

Nikolaos Lavranos

Introduction

This one-day workshop discussed the wider issues arising out of the multilevel judicial governance that is currently taking place in international trade law. The starting point was the *Brazilian Tyres* case that was adjudicated both at the MERCOSUR and WTO level as well as before Brazilian domestic courts.

The workshop was divided into two main parts: the first morning session dealt with the *institutional aspects*, in particular the dispute settlement architecture between the WTO and Regional Trade Agreements (RTAs) such as MERCOSUR, NAFTA etc. Subsequently, we moved on to discuss ways and methods for judicial dialogue between the various trade dispute settlement bodies.

The second afternoon session focused on the *substantive issues*, in particular the scope and limits of Art. XX and Art. XXIV GATT. This was followed by a more detailed discussion on the methods of balancing trade and non-trade interests such as health, environment, public policy.

The workshop was kicked off by a short general introduction, which placed the issues of this workshop in a more general framework. Essentially, the background for multilevel judicial governance is formed by the proliferation of international courts and tribunals in general and more specifically, the proliferation of RTAs and FTAs, which very often include some form of dispute settlement system.

While this trend should be applauded as it is an indication of the move from a power-based towards a more rule-based dispute settlement resolution between states, which was highlighted many years ago by John Jackson, the down side is that an overlap of jurisdiction between the various international (ad hoc) tribunals and courts is increasingly likely. As a result, divergent or even conflicting rulings regarding the same dispute and/or the same or similar legal issue are possible. Indeed, that has been the case in the *Brazilian Tyres* dispute, which served as an excellent example for the problems involved.

More specifically, regarding the relationship between the global and the regional dispute settlement systems, the tension between the two levels is further highlighted by on the one hand, the ‘supremacy claim’ of the WTO as the global trade system versus the claim that the regional trading regimes are self-contained. In the same vein, the internal divergence between the Panel and Appellate Body was also pointed out as another sign of the multifaceted dispute settlement resolution *problematique*.

In view of these competing and/or conflicting opinions and rulings, it was argued that there is a need and indeed an obligation by each and every dispute settlement body to take each others’ decisions fully into account and to show, where appropriate and possible, deference and comity. Of course, in this context reference was made to the *Solange-method*.

Regarding the substantive issues, the claim was put forward that Art. XX GATT is not able anymore to take non-trade interests sufficiently into account. More specifically, it was claimed that the Appellate Body is interpreting the chapeau of Art. XX GATT far too restrictively to allow WTO members to – at least try – to address their environmental and health problems. In the *Brazilian Tyres* case, the non-trade interest was the huge dengue problem that Brazil has faced for some time now and which it has tried to contain by imposing an import ban on retreaded tyres. However, Brazil was found to have violated both its MERCOSUR and WTO law obligations by introducing the ban.

The morning session

Based on these introductory remarks, the first session was introduced by Lothar Ehring.

The discussion started off by arguing that the divergent approach between Panels and Appellate Body resembles the situation in domestic systems. What else should be the task of the Appellate Body other than reviewing and if necessary correcting Panels? In general, regional dispute settlement bodies should get guidance from the WTO Appellate Body regarding the same legal rule(s). Another way to avoid multiple proceedings is the use of forum exclusion rules. Indeed, it was pointed out that it is often much more attractive to bring the case before the WTO dispute settlement body. First, there is the review possibility and second, the problem is elevated as a global issue.

This in turn of course feeds the supremacy claim of the WTO system.

Obviously, if the WTO system is seen as a monistic system it may be attractive to ‘in-source’ the regional systems into the WTO system. Alternatively, the establishment of reference proceedings would seem very fruitful.

In short, co-operation between the various courts and tribunals aiming to arrive at similar assessment of the dispute should be strived for. But this has its limits, if the quality of the regional dispute settlement system is not yet up to standard – as is apparently the case in the MERCOSUR system. Indeed, it was claimed that both the ad hoc MERCOSUR arbitral tribunal ruling as well as the MERCOSUR Review court ruling (on a similar but subsequent dispute between Uruguay and Argentina) were just wrong and thus had to be corrected at the WTO level.

Moving more towards the role and the function of the WTO Appellate Body, it was pointed out that Art. I and III GATT are the main pillars of the GATT and not Art. XXIV GATT. So the Appellate Body naturally is mainly concerned with the question whether or not Art. I, III GATT obligations have been violated. The relationship between Article XX and XXIV may well be exposed by considering a national treatment discrimination example rather than one based on MFN. The example of a US sale and import prohibition to address BSE as applied to Argentina and not to the state of Texas was raised on this point. Can Article XX survey for internal discrimination?

This approach raises the issue of evaluating exceptions, in particular in terms of the proportionality test. Here comparisons with the ECJ came in, but clearly the WTO system lacks Advocate Generals who can push the law. It should not be forgotten that the WTO is ‘member driven’, which apparently results in a hands-off approach by the Appellate Body – at least to some extent. Indeed, some pointed out that the Appellate Body is already showing too much judicial activism, which should rather be curbed than encouraged.

In sum, the views expressed differed substantially. Alas, no golden solution was found. But it seemed that many participants were rather satisfied with the way the Appellate Body handled its relationship with the MERCOSUR courts. Indeed, it seems that the natural supremacy claim of the WTO would induce regional courts and tribunals to follow it so that most if not all conflicts could be resolved in a decent way.

The afternoon session

The afternoon session on the relationship between Art. XX GATT, which sets out exceptions for trade restrictions, and Art. XXIV GATT, which allows the formation of RTAs, was introduced by Jim Mathis.

Mathis commenced by discussing the relationship between Article XXIV and XX GATT in regard to the ‘listed Articles exceptions’ contained in paragraph 8 for both customs unions and free-trade areas. Historically the focus has been on the role of the listed exceptions within the paragraph and the Article. We know they were introduced in the Havana negotiations, but there is no drafting history on why those Articles were included. For those Articles listed (XI through XV and XX GATT), the traditional questions have been – why are Articles VI and XIX GATT omitted from the list – and what does it mean that they are not on the list? And related to this, is the list ‘exhaustive’ in nature as being the only restrictions that could be maintained in a CU or FTA? While this is not resolved, what can be agreed upon by most if not all is that the restrictions permitted by the listed Articles – when imposed as between regional members – do not count AGAINST the ‘substantially all trade (SAT) requirement.

In light of the issue raised regarding Article XX GATT in the *Brazilian Tyres* case, the construction for the Articles listing should also be viewed in light of the Hudec / Southwick ‘may or must’ discussion. The question they addressed was whether the listing ‘allows’ regional members to maintain those restrictions when they are also invoked on other WTO Members? Or, does the listing ‘require’ regional members to also impose the restrictions upon each other when one regional member imposes them on any other WTO Member?

If the ‘must’ construction is correct, then Article XXIV GATT establishes its own priority in favor of the requirements of Article XX. Where the Article XX preamble says that the restrictions must be imposed on all Members where similar circumstances prevail, then this also includes regional members to a CU or FTA. Although the Appellate Body in the present case indicated at footnote 445 that regional members ‘could be exempted’ from the duty to eliminate trade barriers raised by Article XX measures, the more accurate statement would be that regional members don’t have this choice.

However, note that this becomes pedantic since the outcome of the Appellate Body ruling is the same where it determined that any Article XX preamble discrimination must relate to the actual listed objectives contained in the listed paragraph exceptions (within Article XX GATT). This effectively means that regional integration objectives in a CU or FTA either in the treaty text or as interpreted by a regional arbitral body cannot relieve regional members of Article XX type measures if those trade restrictions are imposed upon other WTO Members. While the Appellate Body does not take up the ‘may or must’ construction issue, Article XX GATT is given priority according to its own terms as the AB reads the non-discrimination requirement in the preamble. Article XX GATT is not read ‘in light of’ Article XXIV GATT objectives to liberalize trade between regional members.

Basically, it has been argued that Art. XX GATT controls Art. XXIV GATT. In short, RTAs/FTAs formed under Art. XXIV GATT must comply with Art. XX GATT. Looking more closely into Art. XXIV GATT, it appears that paras. 5 and 8 are problematic. In particular, it still remains unclear what the obligation to ‘abolish substantially all trade’ really means. In fact, Art. XXIV GATT only refers to the ‘formation’ but not the function or operation of RTAs/FTAs. The CRTA has not done its job properly, so perhaps some clearance by the WTO before going ahead with an RTA/FTA is needed. Others pointed out that RTAs are just a fact of life and that one should rather forget about any serious review of them. “Everybody does it, and nobody wants to throw the first stone,” seems to be the motto. Indeed, it has been doubted how Art. XXIV GATT could have been drawn up in view of Art. I, III GATT. Something must have gone wrong in the summer of 1948 in Havana...

Still the issue should be tackled in full after the Doha round in the sense of ‘WTO plus’ issues.

It was noted that the *Brazilian Tyres* case is not really an Art. XXIV GATT case, but rather an Art. XX GATT case. Regarding Art. XX GATT the focus was on the systemic dimensions. How far should external sources, such as MEAs, be included in the interpretation of Art. XX GATT? Here the issue of the *Solange*-method and ‘muted dialogue’ came up. Reference to the recent *IKEA* case, and the harmony of results that was achieved by the ECJ, served as an example of the how courts can achieve a good result without reference to the other courts jurisprudence.

While it was doubted whether the *Solange-method* could have been of any help, others have pointed out that the Appellate Body could have used the *Solange-method* to show more deference to the MERCOSUR bodies.

Yet others insisted that each system should stick to its own and should not comment on another system. Another point that was raised is that one needs to make a distinction between difference or convergence in *cases* versus *systems*. What is important is to ensure convergence in the systems, while divergence in individual cases can be accepted. Of course, a case is never only about a dispute but rather always has a general effect.

Nonetheless, in investor-state disputes, the lack of a coherent system or formal mechanism to achieve convergence does not affect the capacity of the courts involved to refer to other cases. This seems to work well.

As regards the WTO legal system, the question arises whether that system seeks to harmonize or bring about convergence. Similarly, the question arises are regional trading systems 'in' the WTO system or not? What about the use of the 'consistent application' principle in this context?

Moreover, a number of approaches were identified that are used by courts to avoid conflicts.

Either stay in your own system and protect it irrespective of the international consequences, or take the other court's decision into account in identical or similar cases. A third strategy would be to use the 'muted dialogue' approach of taking on board the other system's rules without explicitly saying so.

Still, it was also stressed that it must not be forgotten that judges must deliver justice and not only settle dispute. Here also the ICSID arbitrators were mentioned as examples that still need to internalize their systemic responsibility. In fact, inconsistencies in MFN ICSID cases were mentioned in particular.

But on the other hand, it should also be remembered that the task of the Appellate Body is to clarify and not to interpret the law, whereas the ECJ can shape and develop the law.

Nonetheless, the crucial question is: does the Appellate Body have a constitutional function?

This brings us to the final afternoon workshop topic dealing with the constitutional function and role of courts and tribunals and the balancing of interests.

It was underlined that the Appellate Body is much 'greener' than some admit. Indeed, in the *Brazilian Tyres* report even climate change was mentioned as a possible justification for trade restrictions. So, it was suggested there is enough room to make Art. XX GATT ready for 21st century concerns.

Moving more technically into the chapeau of Art. XX GATT, the main issue remains, what is the reason for discrimination? Is there a sufficient material contribution of the measure for actually reducing or eliminating the health or environmental problems?

Here Brazil was not fully prepared and failed to show why EC tyres should be banned while MERCOSUR tyres should continue to come in. If the problem was so serious, why did Brazil not invoke Art. 50 Montevideo Treaty which is equivalent to Art. XX GATT in the MERCOSUR proceedings? Indeed, does the dengue mosquito prefer one tyre above the other? Of course, it should be mentioned that the import of EC tyres is much higher than that of MERCOSUR tyres. But that should not matter in GATT law.

Still, it seems that dengue always has been acute in Brazil with or without the ban. The causality and the evidence remain shaky. But even if that is conceded, does that mean that the Brazilian measure was capricious or arbitrary? Shouldn't the Appellate Body also look at the specific needs and abilities of a WTO member? In fact, Argentina in a similar case was unsuccessful in invoking Art. 50. So why should this be of any relevance?

In any case, should the WTO Appellate Body be allowed to review the defence strategy of Brazil before another dispute settlement body? Maybe rather than exporting tyres to Brazil, the EC could also export recycling technology....

In sum, the opinion prevailed that the Appellate Body did a good job in balancing the trade and non-trade interests. Moreover, Art. XXIV GATT must be viewed from a pragmatic point of view: regional trade agreements are established by the day no matter whether or not they meet the criteria of Art. XXIV GATT – so why bother? In particular, since measures adopted under the guise of Art. XXIV GATT must comply with Art. XX GATT. Obviously, not all participants shared this view.

Conclusion

In conclusion, it can be said that the issues are complex and that there are no easy answers. The only thing that is certain is that more of this type of case can be expected. By way of case-law it will be seen to what extent a harmony between the global WTO system and the 'semi self-contained regional systems' can be achieved for the sake of systemic convergence.

Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit ‘Grave Injustice’?

*Prof. Dr. Ernst-Ulrich Petersmann**

Introduction: Justice in Multilevel Economic Adjudication?

In his contribution to this workshop on *Competing Jurisdictions between MERCOSUR and WTO*, Dr. Lavranos discusses the WTO Panel and WTO Appellate Body reports of 2007 in the *Brazil tyres* dispute and criticizes the Appellate Body findings as ‘committing grave injustice’, without explaining his conception of ‘principles of justice’.¹³⁰ Nor did Dr. Lavranos convincingly explain why it should have been incoherent for the Appellate Body to uphold ‘the Panel’s finding ... that the Import Ban can be considered “necessary” within the meaning of Article XX(b) and is thus provisionally justified under that provision’, but to overrule the Panel by deciding ‘that the MERCOSUR exemption’ and ‘the imports of used tyres under court injunctions have resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX’.¹³¹ The criticism that ‘the Appellate Body left us with a truly Byzantine necessity test’¹³² and ‘left the standards of “arbitrary or unjustifiable” discrimination as vague and confusing as ever’¹³³ appears no less exaggerated than the claim that the WTO Appellate Body findings reflect an ‘institutional power struggle between the global WTO and an RTA such as the MERCOSUR’.¹³⁴ Nor did the authors explain how they could ‘detect here a declaration of supremacy of WTO law and Appellate Body jurisprudence over an RTA and its dispute settlement mechanism’¹³⁵, or why this case did ‘clearly show that trade supersedes health and environmental issues.’¹³⁶

This contribution challenges – both on methodological as well as on substantive grounds -the authors’ harsh criticism that the Appellate Body did ‘end up committing... grave injustice in the *Brazilian Tyres* case’, and that ‘the Appellate Body’s interference with the MERCOSUR dispute settlement system was a veil masking the fact that the catastrophic problems associated with the dengue do not really matter.’¹³⁷ By discussing the diversity of views on how to define ‘principles of justice’ as relevant context for the interpretation of international law and dispute settlement, the contribution demonstrates that the almost 100 WTO Appellate Body reports since 1995 – including the Appellate Body report on *Brazil – Retreaded Tyres* - demonstrate a clear concern for ‘administering justice’ in the interpretation, clarification and judicial application of WTO rules for the settlement of disputes among the 153 WTO members. Yet, the criticism by Lavranos/Vieillard of the ‘Appellate Body’s interference with the MERCOSUR dispute settlement system’ suggests that their conception of

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¹³⁰ As the conference paper by Dr. Lavranos has been published by N. Lavranos/N. Vieillard, *Competing Jurisdictions between MERCOSUR and WTO*, in: *The Law and Practice of International Courts and Tribunals* 7 (2008) 205 ff (the citation is from page 234), my comment refers to the page numbers of this published article rather than to the pages of the identical conference paper included in this Working Paper.

¹³¹ WT/DS332/AB/R (adopted in February 2008), at pages 101-102.

¹³² Lavranos/Vieillard (note 130), at 226.

¹³³ Lavranos/Vieillard, (note 130), at 231.

¹³⁴ Lavranos/Vieillard (note 130), at 221.

¹³⁵ Lavranos/Vieillard (note 130), at 228.

¹³⁶ Lavranos/Vieillard (note 130), at 231.

¹³⁷ Lavranos/Vieillard (note 130), at 234.

'justice' goes beyond judicial protection of rule of law among WTO members, calling not only for more 'judicial comity' among the Brazilian, MERCOSUR and WTO dispute settlement bodies but also for more judicial deference of WTO dispute settlement bodies vis-à-vis national and regional courts so as to avoid mutually incoherent judicial decisions, as in the case of the Brazilian and MERCOSUR court findings authorizing importation of used tyres and the WTO dispute settlement rulings criticizing the unjustified discrimination undermining WTO rules as well as the effectiveness of health and environmental protection.

Systemic problems of multilevel judicial governance

Judicial settlement of disputes – at national and international levels - over the interpretation and application of rules, and the resulting clarification and continuous adaptation of legal systems to the needs of citizens, offer a distinct mode of 'multilevel judicial governance' complementing constitutional and legislative law-making, administration and policy-making as diverse modes of self-governance of citizens in constitutional democracies as well as in the multilevel governance of international economic cooperation among citizens.¹³⁸ As this case-study discusses just one, controversial example of conflicts among national, regional and worldwide dispute settlement findings, some of the fundamental problems underlying the inadequate cooperation among national, regional and worldwide courts and alternative dispute settlement mechanisms are being addressed only briefly. For example: does the judicial function of international economic adjudication require 'justice in robes'?¹³⁹ Is 'multilevel judicial governance' by national, regional and worldwide trade courts adequately regulated and coordinated (e.g. in WTO law, regional trade agreements and domestic laws)? As WTO law governs not only rights and obligations of WTO members but affects also trade transactions among private producers, investors, traders and consumers and defines the 'dispute settlement system of the WTO (as) a central element in providing security and predictability to the multilateral trading system' (Article 3 Dispute Settlement Understanding): do these citizen-oriented WTO functions and the WTO guarantees of private access to domestic courts (e.g. in GATT Article X, GATS Article VI) support claims that WTO dispute settlement bodies should cooperate with national and regional courts in promoting legal security in international trade for the benefit of citizens? How should 'member-driven governance' in the WTO be coordinated with 'multilevel judicial governance' in international trade law? What are the legitimate roles and 'inherent jurisdiction' of national and international trade courts? Was the lack of coordination among WTO, MERCOSUR and Brazilian dispute settlement proceedings concerning imports of retreaded tyres into Brazil due to incoherent legal arguments presented before these diverse courts by the Brazilian government? Or were the conflicting judgments due to judicial application of diverse rules of Brazilian, MERCOSUR and WTO law? Do 'the basic principles... underlying this multilateral trading system' (WTO Preamble) include principles of 'judicial comity' requiring national and international courts to coordinate multiple disputes pending in multiple jurisdictions and relating to overlapping claims?

Should legal practitioners shun 'principles of justice'?

Legal practitioners tend to insist that 'the legal craft requires, above all, competent and careful drafting, interpretation and application of texts.'¹⁴⁰ The now more than 300 investor-state arbitral

¹³⁸ Cf. C. Joerges/E.U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006). See also M. Shapiro/A. Stone Sweet, *On Law, Politics and Judicialization* (2004), chapter 4 (describing adjudication as a particular mode of governance, through which the legal structures of a legal community are continuously adapted to the needs and purposes of citizens and governments).

¹³⁹ Cf. R. Dworkin, *Justice in Robes* (2006); P.Hamburger, *Law and Judicial Duty* (2008); E.U.Petersmann, Judging Judges: From 'Principal-Agent Theory' to 'Constitutional Justice' in Multilevel Judicial Governance of Economic Cooperation among Citizens, in: *JIEL* 11 (2008) 827-884.

¹⁴⁰ D. Thürer, Boundaries of Justice? An International Law Approach, in: J. Buffard/J. Crawford/A. Pellet/S. Wittich (eds), *International Law between Universalism and Fragmentation. Festschrift in Honour of G.Hafner* (2008), 127.

awards since the 1980s, like the more than 250 WTO Panel, appellate and arbitral reports since 1995, hardly ever refer to ‘principles of justice’, notwithstanding the customary law requirement of settling international disputes ‘in conformity with the principles of justice’ and human rights (as recalled in the Preamble of the Vienna Convention on the Law of Treaties).¹⁴¹ The International Court of Justice (ICJ), by contrast, refers not only regularly to requirements of ‘proper administration of justice’ in clarifying procedural principles of due process of law (such as equality between the parties, specification of legal claims, effects of non-appearance in the court, inherent powers and duties to indicate provisional measures);¹⁴² the Court also takes it for granted that:

Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable.¹⁴³

Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it.¹⁴⁴

This contribution agrees with the views expressed by an increasing number of supreme court judges – like former US Supreme Court judges O.W. Holmes and B.N. Cardozo, Lord Denning in the United Kingdom, and Supreme Court judge A. Barak¹⁴⁵ in Israel – that ‘principles of justice’ can be of crucial importance for interpreting and applying incomplete legal rules and for ‘administering justice’ in the judicial settlement of disputes. Yet, clarifying ‘principles of justice’ remains a daunting task for legal practitioners and judges, especially in the settlement of international economic disputes in WTO dispute settlement bodies and investor-state arbitration.¹⁴⁶ As WTO law and international investment law include rules referring to ‘equity’, ‘public order’ and ‘public morals’, prohibiting ‘denial of justice’, and prescribing ‘due process of law’ and standards of ‘fairness’, also arbitrators in investor-state disputes and WTO judges are often confronted with questions of procedural and substantive justice, e.g. in their clarification of incomplete dispute settlement procedures and their ‘judicial balancing’ of private and public interests in investment disputes, or of international market access commitments and national public interest regulation in trade disputes (e.g. on protection of public health and public morals).

The Customary Law Requirement of Settling Disputes ‘in Conformity with Principles of Justice’ and Human Rights

Is the criticism justified that ‘a claim of Appellate Body supremacy and its attempt of uniformity in trade law matters can cause more injustice than justice’?¹⁴⁷ Does the mandate of WTO dispute settlement bodies include ‘administering justice’ in the settlement of disputes?

¹⁴¹ Cf. E.U. Petersmann (eds), Introduction and Summary: Administration of Justice in International Investment Law and Adjudication?, in: P.M. Dupuy/F. Francioni/E.U. Petersmann, *Human Rights in International Investment Law and Arbitration* (2009), 3-39.

¹⁴² For references to the relevant ICJ jurisprudence see, e.g., G. Ziccardi Capaldo (ed), *Repertory of Decisions of the International Court of Justice 1947-1992, Vol II* (1995), at pp.777, 781, 825, 855, 935.

¹⁴³ North Sea Continental Shelf, Judgment ICJ Reports 1969, pp. 48-49, para. 88.

¹⁴⁴ Continental Shelf (Tunisia v Libyan Arab Jamahiriya, Judgment ICJ Reports 1982, p.60, para. 71.

¹⁴⁵ For references see: Thürer (note 140).

¹⁴⁶ On diverse conceptions of ‘economic justice’ and ‘ecological justice’ see, e.g., G. Chartier, *Economic Justice and Natural Law* (2009) (examining legal questions of ownership, production, distribution and consumption on the basis of a natural law theory of ethics). For a recent explanation of the need for making the global economy work better for all by enhancing its contribution to promotion and protection of human rights see: D. Kinley, *Civilising Globalisation. Human Rights and the Global Economy* (2009). See also: Petersmann, Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade Law, in: *University of Pennsylvania Journal of International Economic Law* 27 (2006), 273-366

¹⁴⁷ Lavranos/Viellard (note 130), at 234.

Article 1 of the UN Charter defines ‘the purposes of the United Nations’ as, *inter alia*, promoting international cooperation and the peaceful settlement of disputes ‘in conformity with the principles of justice and international law’, including ‘promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.’ The 1969 Vienna Convention on the Law of Treaties confirms that ‘disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law’, including, *inter alia*, ‘respect for, and observance of, human rights and fundamental freedoms for all’ (Preamble, VCLT). Arguably, this Preamble language, and its linkage of ‘principles of justice and international law’ and human rights¹⁴⁸, codifies a customary requirement of interpreting treaties in conformity with the international human rights obligations of the contracting parties, which also follows from the customary rules of treaty interpretation codified in Article 31.3(c) VCLT as well as from the judicial function of courts of justice in a world where all 192 UN member states have treaty and customary law obligations to respect, protect and promote ‘inalienable’ human rights.¹⁴⁹ Why is it that WTO dispute settlement bodies and economic lawyers so rarely specify the ‘principles of justice’ relevant for international law, treaty interpretation and dispute settlement?

Both *ad hoc* arbitrators and WTO Panellists often perceive themselves as ‘agents’ of the disputing parties mandated, *inter alia*, to ‘give them adequate opportunity to develop a mutually satisfactory solution’ (Article 11 DSU). In view of their limited mandates, and in contrast to members of ‘courts of justice’, *ad hoc* arbitrators and WTO Panellists do not wear traditional ‘robes of justice’ and may not perceive themselves as ‘judges.’¹⁵⁰ Their legitimate reluctance to refer to ‘principles of justice’ appears also to be related to the fact that governments and reasonable citizens with diverse preferences and different constitutional traditions will often disagree on the interpretation of ‘principles of justice’ and of human rights at international levels, just as they tend to disagree on ‘principles of justice’ and economic and social rights inside constitutional democracies.¹⁵¹ Hence, *ad hoc* arbitrators and WTO Panellists often prefer promoting mutually agreed dispute settlements by deciding only on incontrovertible points of dispute (e.g. over procedural rights and obligations), without risking controversies about ‘principles of justice.’ *Ad hoc* arbitrators and Panellists may also have professional self-interests in helping the parties to settle their dispute without addressing justice-related claims of adversely affected third parties concerning broader public interests (e.g. *amici curiae* asserting adverse social, environmental and human rights impacts of foreign investments and of international trade). Yet, if democratic legitimacy of law depends on legal, political and social equality of opportunity in democratic decision-making processes¹⁵², ‘deliberative democracy’ and the legitimacy of international economic regulation may require promoting public discourse and legal as well as judicial clarification of how international economic law can protect human rights, legal

¹⁴⁸ Arguably, the Preamble language - ‘Having in mind the principles of international law embodied in the Charter of the United Nations, such as ...universal respect for, and observance of, human rights and fundamental freedoms for all’ – refers not only to ‘conditions under which justice and respect for the obligations arising from treaties can be maintained’, but also to ‘principles of justice and international law’ in the preceding-sub-paragraph, in conformity with the recognition in numerous legal systems that human rights constitute not only individual rights, but also corresponding obligations of governments and ‘principles of law’ to be taken into account in legislation, administration and adjudication.

¹⁴⁹ Cf. M.T. Kamminga/M.Scheinin (eds), *The Impact of Human Rights Law on General International Law* (2008).

¹⁵⁰ Cf. W. Park, Private Disputes and the Public Good: Explaining Arbitration Law, in: *20 American University International Law Review* 20 (2004-2005), 903, 905 (acknowledging that ‘to some extent, arbitrators are expected to behave like judges in their concern for the public interest’).

¹⁵¹ Even inside the USA, there is – as explained by R.Dworkin, *Is Democracy Possible Here?* (2006) – pervasive disagreement among conservatives and democrats on human rights and democracy. Dworkin argues for basing constitutionalism on two basic principles of human dignity, i.e. first, that each human life is intrinsically and equally valuable and, second, that each person has an inalienable personal responsibility for realizing her unique potential and human values in her own life. According to Dworkin (at 97), ‘a legitimate government must treat all those over whom it claims dominion not just with a measure of concern but with *equal* concern.’

¹⁵² On these constituent elements of legal and democratic legitimacy in majoritarian political processes see: W.Sadurski, *Equality and Legitimacy* (2008).

equality and respect for ‘principles of justice’ more effectively. The global financial and environmental crises, like the failures of the UN system and of the WTO’s Doha ‘Development Round negotiations’ since 2001 to reduce the unnecessary poverty of more than one billion of poor people in less-developed countries, suggest an urgent need for reconsidering why international economic law so often fails to protect human rights and ‘social justice’ more effectively.¹⁵³

Claims about alleged ‘injustice’ of WTO dispute settlement findings should clarify which ‘principles of justice’ are included among ‘the basic principles ... underlying this multilateral trading system’ (WTO Preamble); how such principles should be defined and applied by WTO bodies; and in which ways WTO dispute settlement procedures and rulings might have violated such principles. These legal questions have so far been neglected.¹⁵⁴ Taking into account ‘principles of justice’ as relevant legal context for interpreting international treaties (pursuant to the Preamble and Article 31 of the VCLT) may also be of systemic importance for promoting reforms of, and public support for, WTO law and WTO dispute settlement rulings by civil society, parliaments, governments and by other dispute settlement bodies. Yet, clarifying ‘principles of justice’ and their legal relevance for international economic adjudication (e.g. in the WTO and in investor-state arbitration¹⁵⁵) will inevitably remain controversial in view of the legitimate diversity of moral, social and political conceptions of reasonable people for a good life and for the legitimate role of national and international adjudication in international economic law. Acknowledging this legitimate diversity of competing conceptions of procedural and substantive justice in international dispute settlement, as well as the need for ‘deliberative democracy’ clarifying the controversial boundaries between democratic governance and ‘judicial governance’ through public discourse, offer useful starting points for clarifying ‘principles of justice’ in international adjudication, for example whenever judges have to justify judicial decisions on ‘administration of justice’.

Conservative and Reformative Conceptions of Justice

Law as an instrument of governance needs justification. Since antiquity, justice has been recognized as the main guiding principle and objective of law and of judicial settlement of disputes. The independent, impartial judge applying rules of law in fair procedures in order to settle disputes peacefully belongs to the oldest paradigms of justice, as illustrated by instructions in the Old Testament to set up courts of law (‘Justice, and justice alone, you shall pursue’) as well as by judicial settlement of disputes in Greek city republics (e.g. in the court of Areopagus in ancient Athens), inspired by much older ideals of judicial dispute settlement as discussed in ancient Athenian tragic drama.¹⁵⁶ The judicial acquittal of *Orestes* in the third part of *Aeschylus’ Oresteia* offers an early example for the task of impartial judges to apply not only existing rules of law (like the ancient ‘golden rule’ of retaliation: ‘what you do shall be done to you’, e.g. a killer like Orestes deserves to be killed himself); in addition to this ‘conservative function’ of judges to uphold ‘legality’ by applying existing rules of law, judges also have to review whether the particular circumstances of a dispute may require ‘equitable’ dispute settlements, for instance by judicial ‘filling of gaps’ in existing rules of law based on judicial justification and clarification of new interpretations of customary rules and principles of law (e.g. justifying rectification of past injustices so as to avoid a ‘miscarriage of justice’, or identifying particular merits or needs of the parties to the dispute calling for ‘equitable’ interpretations of general or too rigid rules of law by judgments based on meritorian or needs-based conceptions of

¹⁵³ On these questions see: E.U. Petersmann, *Human Rights, Multilevel Constitutionalism and International Economic Law in the 21st Century* (2010).

¹⁵⁴ See, e.g., A.D. Mitchell, *Legal Principles in WTO Disputes* (2008), who focuses on principles of good faith, due process, proportionality and special and differential treatment, without relating these principles to ‘principles of justice.’

¹⁵⁵ See note 141 above and, e.g., A.Jaksic, *Arbitration and Human Rights* (2002); G. Van Harten, *Investment Treaty Arbitration and Public Law* (2007).

¹⁵⁶ On justice in the Bible and in Greek tragedies and Greek philosophy see D.D. Raphael, *Concepts of Justice* (2001).

justice). By reviewing political ‘rule by law’ and ‘giving reasons’¹⁵⁷, courts of justice contribute to the clarification of ‘public reason’¹⁵⁸, to its piecemeal adaptation to changing public conceptions of justice, as well as to ‘rule of law.’

Over the past 15 years, the almost 100 Appellate Body reports and additional arbitral awards by Appellate Body members pursuant to Article 21.3(c) of the Dispute Settlement Understanding (DSU) have progressively developed WTO law in numerous areas.¹⁵⁹ The Appellate Body report of December 2007, like the arbitration award by Appellate Body member Taniguchi of August 2008, on *Brazil-Measures Affecting Imports of Retreaded Tyres*, contribute to ‘reformative interpretations’ of WTO rules in important ways. For example, in conformity with the Appellate Body case-law since *Korea-Various Measures on Beef*, the term ‘necessary’ in Article XX(b) GATT (‘necessary to protect human, animal or plant life or health’) is no longer limited to what is ‘indispensable’; the Appellate Body clarified that ‘necessary’ may also mean ‘making a contribution to’, depending on ‘a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.’¹⁶⁰ Based on this more flexible interpretation of the right of WTO members to restrict trade for non-economic reasons, the Appellate Body found that Brazil’s import ban on retreaded tyres ‘can be considered “necessary” within the meaning of Article XX(b) and is thus provisionally justified under that provision’.¹⁶¹ Arguably, this judicial change from the ‘conservative justice’ in the dispute settlement practice under GATT 1947 (i.e. insisting on a more rigid interpretation of the ‘necessity requirement’ of Article XX(b) GATT) to judicial respect for more flexible, sovereign rights of WTO members to restrict trade for non-economic reasons reflects a judicial concern for ‘reformative justice’, even if the Article XX prohibition of ‘arbitrary or unjustifiable discrimination’ in the administration of such trade restrictions remains subject to independent, impartial and ‘principle-oriented’, judicial review at national and international levels.

Universal and Particular Conceptions of Justice

Plato’s *Republic* (*Politeia*) and Aristotle’s *Nicomachean Ethics* offer early efforts at systematizing different dimensions of justice. Plato’s citation of the Greek poet Simonides’ conception of justice as ‘rendering to every man his due’ became the standard definition of justice in the Roman law tradition (*justitia est suum cuique tribuere*), referring to justice not only as a personal virtue but as being dependent on the whole system of law aimed at – as defined in the Justinian Code – *honeste vivere, neminem laedere, suum cuique tribuere* (to live uprightly, to harm no one, to render to each person what is his). Yet, as explained by Perelman, what exactly is ‘due’ to each person beyond the principle of ‘formal justice’ (e.g. in the sense of ‘beings of the same essential category must be treated in the same way’), has always remained contested.¹⁶² Aristotle’s distinctions between moral and legal

¹⁵⁷ Cf. F. Schauer, Giving Reasons, in: *Stanford Law Review* 47 (1995), 633 ff.

¹⁵⁸ On principles of ‘reasonableness’ in law and adjudication see: G. Bongiovanni/G. Sartor/ C. Valentini (eds), *Reasonableness and Law* (2009). On the changing ‘rules of recognition’ for determining ‘reasonableness’ in international law see my contribution in this book: Petersmann, From State-Centered towards Constitutional ‘Public Reason’ in Modern International Economic Law, at pp. 421-458.

¹⁵⁹ Cf. E.U. Petersmann, WTO Dispute Settlement Practice 1995-2005: Lessons from the Past and Future Challenges, in: Y. Taniguchi/A. Yanovich/J. Bohanes (eds), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations and Regionalism in Asia* (2006), 38-97.

¹⁶⁰ Appellate Body Report, *Korea-Various Measures on Beef*, WT/DS169/AB/R, para. 164.

¹⁶¹ Cf. note 131 above.

¹⁶² Cf. C. Perelman, *The Idea of Justice and the Problem of Argument* (ed. by J. Petrie, 1963), who distinguishes (at 7) the following six ‘most current conceptions of justice’: (1) to each the same thing; (2) to each according to his merits; (3) to each according to his works; (4) to each according to his needs; (5) to each according to his rank; (6) to each according to his legal entitlement. Perelman defines ‘formal justice’ as ‘a principle of action in accordance with which beings of one

justice, universal justice (e.g. in terms of the ‘lawful’) and particular justice (e.g. in terms of distributive justice based on conceptions of ‘proportionate equality’ and fairness, commutative exchange justice, corrective justice, or equity as a ‘rectification of legal justice’) introduced distinctions among different branches of justice that remain important to date, notwithstanding the emergence of additional conceptions of justice like ‘social justice’ and ‘egalitarian justice’ as defined by human rights.

In its report on *EC-Conditions for the Granting of Tariff Preferences to Developing Countries*¹⁶³, the Appellate Body reversed the Panel’s reasoning and found that not every difference in tariff treatment of beneficiaries under the Generalized System of Tariff Preferences (GSP) necessarily constituted discriminatory treatment. The Appellate Body clarified the particular contexts for determining ‘non-discrimination’ and ‘distributive justice’ in WTO law, for example in its finding that granting different tariff preferences to products originating in different GSP beneficiaries is allowed under the term ‘non-discriminatory’ (‘Enabling Clause’, paragraph 2, footnote 3) provided that the relevant tariff preferences respond positively to a particular ‘development, financial or trade need’ and are made available on the basis of objective standards to ‘all beneficiaries that share that need.’ Issues of ‘particular justice’ and ‘distributive justice’ arise in many WTO dispute settlement proceedings even if the parties and WTO judges do not explicitly refer to the term ‘justice.’ For example, the arbitral award on *Brazil-Retreaded Tyres* emphasized that the ‘reasonable period of time’ for implementing WTO dispute settlement rulings pursuant to Article 21.3 DSU ‘should be the shortest period possible within the legal system of the [implementing] Member’; the implementing member has ‘a measure of discretion in choosing the *means* of implementation’ that it deems most appropriate.¹⁶⁴ In examining Brazil’s claim that a proceeding before Brazil’s Federal Supreme Court concerning preliminary court injunctions ‘constitutes the only effective means to prevent lower courts from granting further preliminary injunctions authorizing used tyre imports’, the arbitrator acknowledged that implementation through the judiciary cannot be *a priori* excluded from the range of permissible compliance measures, notwithstanding the lack of government control over the outcome of such judicial proceedings. Yet, noting that the government of Brazil had already asked the Federal Supreme Court to expedite proceedings and to take note of the WTO decision, the arbitrator considered it ‘reasonable to expect that the ... proceeding before the Federal Supreme Court can be completed within a significantly shorter period of time than the 21 months suggested by Brazil’¹⁶⁵; the reasonable period of time for Brazil to implement the dispute settlement rulings in this dispute was determined to be 12 months from the date of adoption of the Panel and Appellate Body reports.

Procedural and Substantive Conceptions of Justice

The ancient institution of ‘courts of justice’ reflects the idea that – since rules cannot specify all the conditions of their own application and the determination of the meaning and applicability of a rule in a particular situation may be biased by the self-interests of the law-applier – the settlement of a dispute may be finally recognized as ‘just’ only if the decision-making process is administered by independent, impartial ‘judges’ clarifying and applying the disputed facts, applicable rules, precedents or general principles in transparent, adversarial procedures after hearing all parties involved. The rule *audi alteram partem* – hear the other side – was already part of the judicial oath in ancient Athens¹⁶⁶ and can be understood in terms of distributive justice, requiring judges to listen equally to all parties (possibly including third parties affected by the dispute and its judicial settlement), offering them the

(Contd.) _____

and the same essential category must be treated in the same way’ (at 16). Yet, there is no agreement on how to define the ‘essential characteristic’ justifying equal or different treatment in the administration of justice.

¹⁶³ WT/DS246/AB/R (adopted 20 April 2004)

¹⁶⁴ WT/DS332/16, paras. 46, 67.

¹⁶⁵ WT/DS332/16, para. 74.

¹⁶⁶ Cf. J. Kelly, *Audi Alteram Partem*, in: *Natural Law Forum* 9 (1964), 103 ff.

same procedural rights.¹⁶⁷ The definition, in Article 38 of the Statute of the ICJ, of the applicable international law to be applied by the ICJ includes the ‘general principles of law’ (to be applied alongside international treaties and customary law) which – in the *travaux préparatoires* of the Statute – were referred to as the ‘general principles of law and justice’.¹⁶⁸ The explicit power of the ICJ to decide disputes ‘*ex aequo et bono*’ if the parties agree thereto (Article 38:2 ICJ Statute), likewise reflects the judicial task of ‘administering justice’ not only by formal rule-following and precedent-following, but by also taking into account broader considerations of fairness.

Judicial clarification of principles of WTO law

Principles of WTO law (such as non-discrimination, necessity, reciprocity, special and differential treatment of less-developed countries, ‘sustainable development’), of customary law (e.g. on interpretation of treaties like ‘*in dubio mitius*’, effectiveness) and ‘general principles of law’ (such as due process of law, proportionality, prohibition of abuse of rights, interpretative principles like *lex specialis* and *good faith*) have played a crucial role in the dispute settlement practice of the Appellate Body, notably in its judicial clarification of the incomplete DSU rules on Panel and appellate procedures (such as inherent jurisdiction of WTO dispute settlement bodies, burden of proof, third party rights, admission of *amicus curiae* briefs, opening of Panel and appellate procedures to the public).¹⁶⁹ The Appellate Body has also often been confronted with the ancient problem (as discussed already by Aristotle¹⁷⁰) that procedural justice in judicial adjudication may be contextually dependent on the ‘political justice’ of the legal system concerned, i.e. the particular dispute resolution procedures are often only a subset of the broader problem of justice in dealing with disagreement in society and assigning political power for resolving disputes confronting the community.

For example, rule-following and Rawls’ ‘justice as regularity’ presuppose judicial recognition of rules that are valid, applicable and just. Yet, WTO law often fails to specify how, for instance, ‘a reasonable period of time’ (Article 21 DSU) for implementing WTO dispute settlement rulings, or how a ‘level of the suspension of concessions or other obligations ... equivalent to the level of the nullification or impairment’ (Article 22 DSU), should be determined by WTO dispute settlement bodies. The already more than 10 WTO arbitrations on the calculation and design of trade sanctions in response to non-compliance with WTO dispute settlement rulings used diverse methods for calculating damages in order to determine an adequate level of compensation for WTO breach (as was done in the *US-Copyright* case) or the maximum level of countermeasures that victims of WTO violations may impose (as was done in the *Bananas* and *Hormones* arbitrations against the EC and the *FSC*, *Byrd Amendment*, *Gambling* and *Cotton* arbitration procedures against the US).¹⁷¹ The findings by the arbitrators in *US-Byrd Amendment* – that ‘it is not completely clear what role is to be played by the suspension of obligations in the DSU, and a large part of the conceptual debate that took place in these proceedings could have been avoided if a clear object and purpose’ were identified¹⁷² – explain the diversity of arbitral findings on the clarification of the unclear DSU provisions in the light of their multiple objectives (e.g. compensation by means of ‘rebalancing’ of reciprocal concessions or damages, sanctions in order to induce compliance and deter non-compliance with WTO rules) and

¹⁶⁷ Cf. T. Ralli, *Justice through Legal Dispute* (doctoral thesis defended at the European University Institute, Florence, in February 2009), chapter 6.

¹⁶⁸ D. Degan, *Sources of International Law* (1997), at 50.

¹⁶⁹ Cf. Mitchell (note 154).

¹⁷⁰ Cf. Aristotle, *The Politics and the Constitution of Athens* (ed. by S. Everson, 1996), book III, parts xii-xiii.

¹⁷¹ Cf. J. Pauwelyn, *Optimal Protection of International Law* (2008), who analyses the WTO arbitral awards and legal literature on whether the ultimate objectives of ‘compensation and suspension of concessions’ (Article 22 DSU) are to rebalance the original bargain, to compensate the victim, to induce compliance with WTO obligations and/or to punish the violator, and compares these DSU rules with other WTO rules on suspension of concessions (e.g. pursuant to GATT Articles XIX and XXVIII).

¹⁷² *US-Byrd Amendment*, WT/DS217, 234/ARB, para.6.4.

underlying principles (e.g. of reciprocity, 'security and predictability', proportionality). The arbitration award, pursuant to Article 21.3 DSU, by WTO Appellate Body member Y.Taniguchi in the *Brazilian Tyres* dispute also clarifies disputed interpretative questions such as the request by Brazil to implement the WTO dispute settlement rulings through judicial injunctions by Brazil's Federal Supreme Court.¹⁷³

Reluctance of WTO bodies to clarify the human rights dimensions of WTO law

Human rights have hardly ever been invoked in GATT and WTO dispute settlement proceedings since 1948. Hence, neither the contextual relevance of the human rights obligations of WTO members for interpreting WTO rules (e.g. on intellectual property rights and compulsory licensing) nor other questions of 'egalitarian justice' in terms of human rights (e.g. of access to food, health services and education) have so far been addressed by WTO dispute settlement bodies. For example, when the UN Special Rapporteur on the human right to food, Prof. De Schutter, presented his report on the human right to food in the WTO Committee for Agriculture in July 2009, he had the same experience as the UN Special Rapporteur on the human right to health, Prof. Paul Hunt, during his previous mission to the WTO: WTO governments disagree on whether, and how, WTO rules (e.g. on trade in agriculture and sanitary standards) should be designed and interpreted in terms of human rights and food security.¹⁷⁴ Adam Smith's *Inquiry into the Nature and Causes of the Wealth of Nations* (1776) was already 'centrally concerned with the issue of justice, with finding a market mechanism capable of reconciling inequality of property with adequate provision for the excluded'.¹⁷⁵ In the field of economic law, this tension between unequally distributed property rights and social claims of the poor (as formulated by L.Blanc in 1839: 'from each according to his ability, to each according to his needs') continues to be often decided by the courts in favour of acquired property rights recognized by legislation¹⁷⁶, or of 'trading rights'¹⁷⁷, or by judicial deference to parliamentary economic regulation aimed at maximizing national welfare (or utilitarian happiness of domestic citizens, notwithstanding the frequent arbitrariness of governmental distribution of economic benefits and 'protection rents' in favour of powerful interest groups to the detriment of general consumer welfare). The fact that the 2009 WTO Panel report on 'trading rights' was the first GATT/WTO dispute (after more than 400 GATT and WTO Panel reports over the past 60 years) in which the respondent invoked the 'public morals defence' under GATT Article XX(a), confirms the reluctance of WTO members to request GATT/WTO dispute settlement Panels to override trade rules by vague 'principles of justice' (like respect for 'public morals' and human rights) that risk being interpreted differently by different countries.

The 'UN Special Representative on the issue of human rights and transnational corporations and other business enterprises', J.Ruggie, began his 2008 report on 'Protect, Respect and Remedy: a Framework for Business and Human Rights'¹⁷⁸ by recalling the obvious facts that markets are no gifts of nature - their functioning depends on appropriate legal regulation:

¹⁷³ Cf. WT/DS332/16 of 29 August 2008, section III.B.

¹⁷⁴ Cf. Bridges Weekly Trade News Digest of 8 July 2009 and UN document A/HRC/10/5/Add.2 of 4 February 2009 on 'Report of the Special Rapporteur on the right to food, O. De Schutter, Addendum on Mission to the WTO'.

¹⁷⁵ I. Hont/M. Ignatieff, Needs and Justice in the Wealth of Nations, in: Hont/Ignatieff (eds), *Wealth and Virtue* (1983), 2, 42.

¹⁷⁶ R. Nozick, *Anarchy, State and Utopia* (1974), conceives rights of justice as historical entitlements resulting from either just, direct acquisition by the rights holder or just transfer from some other person through voluntary exchanges or gift. He recognizes rectification of holdings arising from past injustice as a third principle of justice (in addition to the two principles of just acquisition and just transfer). But Nozick opposes a welfare state in view of the individual responsibility to better one's condition and the need for protecting innocent individuals against the inevitable, continuous interferences by welfare state governments with people's lives.

¹⁷⁷ Cf. the WTO Panel report of 12 August 2009 on *China- Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WT/DS363/R), which recognized, however, that 'China's right to regulate trade in a WTO-consistent manner takes precedence over China's obligation to ensure that all enterprises in China have the right to trade' (at pp. 271 ff).

¹⁷⁸ UN doc. A/HRC/8/5 of 7 April 2008.

Markets function efficiently and sustainably only when certain institutional parameters are in place. The preconditions for success generally are assumed to include the protection of property rights, the enforceability of contracts, competition and the smooth flow of information. But a key prerequisite is often overlooked: curtailing individual and social harms imposed by markets. History demonstrates that without adequate institutional underpinnings markets... may even become socially unsustainable.¹⁷⁹

EC law, the European Economic Area (EEA), the EC's external free trade agreements and WTO law illustrate that – just as the interrelationships between economic and legal orders may be designed in different ways in the context of the current 'globalization' and 'judicialization' of economic law'¹⁸⁰ – also the 'dispute settlement models' and 'social models' for facilitating economic and legal adjustments and related social transformations may legitimately vary. It remains to be seen whether – as in other fields of law (like human rights, labour and social law, European integration law) where different conceptions of social structures led to the emergence of different conceptions of rights-based justice (e.g. as defined by human rights, social and labour rights, consumer rights, fundamental rights protected by EC law)¹⁸¹ – the explicit WTO objectives (e.g. of 'sustainable development) and implicit WTO requirements (e.g. of settling disputes 'in conformity with principles of justice' and the human rights obligations of WTO members) may prompt WTO dispute settlement bodies to follow the example of other international trade courts (like the EC and EFTA Courts) to interpret and 'balance' trade rules with more regard to 'administering justice' in conformity with the human rights obligations of states.

Judicial Respect for the Legitimate Diversity of National Conceptions of Justice

Limitation and separation of powers (e.g. between *gubernaculum* and *jurisdictio*), like 'mixed constitutions' with mutual 'checks and balances' among monocratic, oligocratic and democratic governance structures, have been used since antiquity in order to prevent monopolization and abuses of power and constrain 'rule by men' through 'rule of law'.¹⁸² The designation - in many languages - of judges as 'Mr. Justice', and of tribunals as 'courts of justice', reflects these ancient interrelationships between law (*jus*), judges (*judex*) and justice (*justitia*). Many national constitutions emphasize that their objectives include, *inter alia*, to 'establish Justice' (Preamble of the US Constitution); and that 'the judicial power shall extend to all cases, in law and equity' (Article III.2 US Constitution). Whereas it remains contested in many common law countries whether judicial powers of review and common law duties of judges to decide disputes in accordance with the 'law of the land' include judicial duties 'to do justice'¹⁸³, the history of supreme courts in continental Europe reveals, since the late Middle Ages (e.g. the inauguration of the *Sacra Rota Romana* in 1331 as first European court which still operates to date as the highest ecclesiastical court), longstanding traditions of judicial 'administration of justice' by independent and impartial judges (e.g. in the Imperial Chamber Court - 'Reichskammergericht' - created in 1495 with a jurisdiction covering more than 20 of today's European countries).¹⁸⁴

¹⁷⁹ UN doc. A/HRC/8/5 of 7 April 2008, para. 1.

¹⁸⁰ Cf. D. Kennedy, Three Globalizations of Law and Legal Thought: 1850-2000, in: D.M. Trubek/A. Santos (eds), *The New Law and Economic Development. A Critical Appraisal* (2006), 19-73.

¹⁸¹ Cf. S. Giubboni, *Social Rights and Market Freedom in the European Constitution* (2009).

¹⁸² On the ancient legal ideal of 'rule of law', and its dialectic development on the basis of constitutional rights and principles of justice restraining the instrumental 'governance by law', see already Aristotle (note 41), book III, para.16, at 1287 a-b. On the history of separation and constitutional limitation of powers see: C. McIlwain, *Constitutionalism: Ancient and Modern* (1947); A. Riklin, *Machtteilung. Geschichte der Mischverfassung* (2006).

¹⁸³ Cf. the books by Dworkin and Hamburger cited above (note 139).

¹⁸⁴ Cf. L. Lesaffer, *European Legal History: A Political and Cultural Approach* (2009).

Judicial functions of the WTO dispute settlement system

The diplomats negotiating the WTO Agreement and its DSU avoided explicit references to ‘justice’ and to ‘judicial adjudication’. Yet, many WTO Appellate Body reports refer to ‘adjudication through Panel proceedings’¹⁸⁵ and the ‘adjudicative function of the Appellate Body’¹⁸⁶ in view of the quasi-judicial features of many WTO provisions, for example

- the required independence and impartiality of WTO Panelists and of WTO Appellate Body members;
- the DSU requirement of applying the ‘customary rules of interpretation of public international law’ which, as codified in the VCLT, refer to ‘principles of justice’ as relevant context for the interpretation of treaties and the settlement of disputes;
- and the DSU provisions on quasi-judicial procedures and quasi-automatic adoption of dispute settlement reports.

Since the beginning of modern political philosophy with T. Hobbes – whose *Leviathan* (1651) identified justice with *pacta sunt servanda* (‘That men perform their Covenants made’)¹⁸⁷, applying the term ‘justice’ to the system of law as a whole -, constitutional conceptions of justice and of ‘courts of justice’ continue to differ enormously, even among constitutional democracies. The ‘human rights revolutions’ since the 18th century, inspired by J. Locke’s claims of natural rights to ‘life, liberty and estate’, led to constitutional recognition – in America, France and ever more countries - of egalitarian conceptions of justice in terms of ‘inalienable’ human rights to be free and equal, thereby challenging positivist conceptions of justice (e.g. in terms of conformity to legislation). The delimitation of constitutional, legislative, executive and judicial powers differs among countries; yet, the case law of many supreme courts and ‘constitutional courts’ includes cases where ‘new’ judicial interpretations of constitutional rules protecting human rights - like the US Supreme Court judgment of 1954 in *Brown v Board of Education* that segregated schools for children of different colour denied ‘equal protection of the laws’ in violation of the Fourteenth Amendment in 1868 - were accepted by citizens and governments even if the judicial interpretations of the rules ran counter to the historical intentions of the law-makers. Hence, also in constitutional democracies with judicial review at national and international levels, legislation is no guarantee that a legal right, legislative rule or administrative regulations are in conformity with constitutional principles of justice of a higher legal rank.

Inherent jurisdiction and judicial deference in the WTO dispute settlement system

As the effectiveness of international trade and investment rules depends on their domestic enforcement, WTO law includes many guarantees of private access to domestic courts.¹⁸⁸ The comprehensive WTO ‘exceptions’ (e.g. Articles XVIII-XXI GATT) and other ‘public interest clauses’ (e.g. Articles III, XVII GATT) acknowledge the priority of sovereign rights to non-discriminatory regulation of ‘public interests’ over WTO market access commitments. This deferential attitude of WTO law vis-à-vis national conceptions of justice may be limited in case of countries without effective constitutional democracies: the WTO Protocol on the accession of China, for example, provides for ‘WTO plus commitments’ to protect individual freedoms to import and export, property rights and individual access to independent courts offering effective judicial remedies.¹⁸⁹ The WTO

¹⁸⁵ Cf. WT/DS320/AB/R (United States-Continued Suspension of Obligations in the EC-Hormones Dispute), para. 340.

¹⁸⁶ Cf. WT/DS320/AB/R (United States-Continued Suspension of Obligations in the EC-Hormones Dispute), at p.320.

¹⁸⁷ T. Hobbes, *Leviathan* (ed. by C.B. Macpherson 1968), chapter 15, p.202.

¹⁸⁸ Cf. E.U. Petersmann, *The GATT/WTO Dispute Settlement System* (1997), at 194 ff.

¹⁸⁹ Cf. the 2001 WTO Protocol on the Accession of the People’s Republic of China, WT/L/432 of 23 November 2001. For a comprehensive analysis of the impact of WTO law on the introduction of independent courts and judicial protection of

Protocol on the Accession of China illustrates thereby that perceived deficiencies in national legal and economic systems may be compensated by international agreements and institutions (such as the WTO and its dispute settlement bodies) committing countries to adjust their domestic legal and economic systems to the requirements of WTO law.

The WTO Appellate Body case law admitting *amicus curiae* submissions to WTO Panels and to the WTO Appellate Body, and admitting the opening of Panel and Appellate Body proceedings to the public if both parties to the dispute agreed, offers examples for the ‘constitutional independence’ of the WTO Appellate Body in interpreting and justifying WTO dispute settlement procedures notwithstanding the declared opposition by many WTO members to such unforeseen clarifications of WTO rules.¹⁹⁰ The Panel and Appellate Body findings that the DSU leaves Panels no discretion to decline exercising their jurisdiction in a case that had been properly brought before a Panel, like the refusal by WTO Panels and by the WTO Appellate Body to make legal findings on claims based on regional trade agreements¹⁹¹, offer additional examples for the prudence of WTO dispute settlement bodies in defining their ‘jurisdiction over WTO claims’ autonomously, without trespassing the boundaries of their limited jurisdiction. Like other international courts, the Appellate Body confirmed that WTO dispute settlement bodies have ‘inherent jurisdiction’ for applying general principles of law needed to achieve ‘a satisfactory settlement of the matter’ or a ‘positive solution to a dispute’ (Article 3 DSU):

WTO Panels have certain powers that are inherent in their adjudicative function. Notably, Panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that “it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it.” Further, the Appellate Body has also explained that Panels have a “margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated.”¹⁹²

The statement of the Appellate Body in the *EC-Sugar* dispute – that ‘it is far from clear that the estoppel principle applies in the context of WTO dispute settlement’¹⁹³ – illustrates the prudence of the Appellate Body in examining whether general international law principles are part of the inherent jurisdiction of WTO dispute settlement bodies and consistent with the applicable WTO law. The recent Appellate Body review of whether the WTO Director-General had properly exercised his discretion in his composition of a WTO dispute settlement Panel¹⁹⁴ suggests that the inherent jurisdiction of WTO dispute settlement bodies may cover not only measures by WTO members, but also by other WTO organs. In *Brazil-Retreaded Tyres*, the Appellate Body refrained from ‘judicial comity’ vis-à-vis the Brazilian court injunctions allowing imports of used tyres, as well as vis-à-vis the MERCOSUR arbitral award allowing imports of retreaded tyres under the ‘MERCOSUR exception’, in view of the Appellate Body findings that these national and regional decisions justified trade discrimination on economic grounds without referring to the health and environmental dangers invoked by Brazil in the WTO dispute settlement proceedings. As judicial endorsement of such ‘economic protectionism’ could have aggravated the health and environmental risks of used and retreaded tyres in Brazil, and as the border discrimination was unjustifiable under the WTO rules protecting human health and the environment (Article XX,b GATT), there were good reasons for the Appellate Body to

(Contd.) _____

freedoms of trade and intellectual property rights in China see: Chien-huei Wu, *The WTO Memberships of China, Taiwan, Hong Kong/China and Macau/China: Their Contribution to Judicial Settlement of Trade Disputes*, doctoral thesis defended in the European University Institute in June 2009.

¹⁹⁰ Cf. L. Ehring, Public Access to Dispute Settlement Hearings in the WTO, in: *JIEL* 11 (2008), 1021 ff.

¹⁹¹ Cf. WT/DS308/AB/R, Mexico – Taxes on Soft Drinks (adopted on 24 March 2006).

¹⁹² WT/DS308/AB/R (note 191), para. 45.

¹⁹³ WT/DS265/AB/R, EC-Export Subsidies on Sugar (adopted on 19 May 2005), para. 310.

¹⁹⁴ WT/DS294/AB/RW, *US-Laws, Regulations and Methodology for Calculating Dumping Margins* (adopted in July 2009), section V.

refrain from ‘judicial comity’ in this WTO dispute ‘as long as’ national and regional courts, as well as the Brazilian pleadings in these court cases, disregarded the health and environmental risks of the imports concerned.

Contribution of Courts to ‘Constitutional Justice’ as Institutionalized ‘Public Reason’ Limiting ‘Rules of Recognition’

The reasoning and justifications of independent, impartial judges, drawing conclusions from transparent judicial procedures after all parties have been heard, tend to be more ‘principle-oriented’ than political compromises in majoritarian rule-making and instrumental reasoning of periodically elected politicians and administrations. Hence, John Rawls’ theory of justice argues that ‘in a constitutional regime with judicial review, public reason is the reason of its supreme court’; it is of constitutional importance for the ‘overlapping, constitutional consensus’ necessary for a stable and just society among free, equal and rational citizens who tend to be deeply divided by conflicting moral, religious and philosophical doctrines.¹⁹⁵ The separation of legislative, executive and judicial powers, like the hierarchies between ‘courts of justice’ and judges at different levels of national and international governance (e.g. ‘chief justices’ in Supreme Courts, WTO appellate review of WTO Panel reports), reflect the historical experience that ‘rule by men’ and their ‘rule by law’, and also judgments of first-instance courts, may be contested as being unjust. Institutionalized dialogues inside and among legislative, executive and judicial powers at national and international levels offer the most reasonable way for resolving such disputes by promoting ‘public reason’, ‘deliberative democracy’ and regular review of past interpretations and progressive development of ‘rule of law.’ Just as - in common law systems - judges and ‘courts of equity’ could temper the rigor of the law by recourse to principles of ‘equity’, appellate review in regional trade agreements and in the WTO can help avoiding a ‘miscarriage of justice’, for example by reconciling ‘general justice’ with requests for ‘particular justice’, or by responding to requests to adapt past interpretations of rules to new conceptions of democratic governance, human rights and ‘principles of justice.’

The WTO dispute settlement system as institutionalized ‘public reason’?

One of the unique features of the WTO dispute settlement system is the regular discussion, criticism, quasi-automatic approval, follow-up and – if necessary – collective enforcement of all WTO Panel, appellate and arbitral reports by WTO members in the Dispute Settlement Body of the WTO. These ‘institutionalized dialogues’ and ‘checks and balances’ among the ‘legislative and adjudicative branches’ of trade governance in the WTO promote not only ‘public reason’ in the dynamic evolution of WTO law and WTO dispute settlement practices.¹⁹⁶ They also enhance the ‘constitutional legitimacy’ of WTO dispute settlement practices, and of the ‘rules of recognition’ underlying the dynamic evolution of WTO law, by acknowledging the necessary limitation of intergovernmental rule-making by judicial review, especially in case of international rules (including WTO law) regulating the conduct of *private* producers, investors, traders and consumers protected by constitutional rights.¹⁹⁷ In European and worldwide economic law, national and international courts (like the EC

¹⁹⁵ J. Rawls, *Political Liberalism* (1993), at 231 ff.

¹⁹⁶ Cf. E.U. Petersmann, From ‘Member-Driven Governance’ to Constitutionally Limited ‘Multilevel Trade Governance’ in the WTO, in: G.Sacerdoti *et alii* (eds), *The WTO at 10: The Role of Dispute Settlement* (2006), at 86-110.

¹⁹⁷ International investment law remains more strongly influenced than international trade law by rights-based conceptions of justice such as those of R. Nozick (note 176), who conceives rights of justice as historical entitlements resulting from either just, direct acquisition by the rights holder, just transfer from some other person through voluntary exchanges or gift, or just rectification of holdings arising from past injustice. On the longstanding European constitutional traditions of protecting ‘market freedoms’ and trading rights, and the different Anglo-Saxon constitutional traditions, see: E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law. International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community and Switzerland* (1991).

Court, the EFTA Court, WTO dispute settlement bodies, investor-state arbitration) have taken the lead in interpreting intergovernmental guarantees of freedom, equality, human rights and ‘rule of law’ for the benefit of citizens and of their individual rights.¹⁹⁸ Even if legal and judicial protection of individual rights in WTO law (e.g. of intellectual property rights in the TRIPS Agreement, of individual trading rights and rights of access to courts in the 2001 WTO Protocol on China’s Accession to the WTO) remains inadequate in many ways, the central role of the WTO dispute settlement system in the progressive development of WTO law has constitutional significance (e.g. in the sense of H. Hart’s ‘concept of law’ as consisting of ‘primary rules’ of conduct and ‘secondary rules’ about the recognition, amendment and enforcement of rules¹⁹⁹): WTO law is no longer shaped only by (inter)governmental decisions and ‘member-driven governance’; as explained by the ‘Yale School’ (founded by M. McDougal and M. Reisman), the authoritative decision-making processes constituting and interpreting international law rules are increasingly determined also by domestic constitutional systems, parliaments, national and international adjudication, non-governmental organizations (e.g. influencing government positions in WTO negotiations and WTO dispute settlement proceedings) and civil society committed to protection of human rights and transparency in WTO governance.²⁰⁰

The WTO dispute settlement system as multilevel constitutional protection of equal freedoms and of sovereign rights to non-discriminatory regulation?

The WTO dispute settlement reports in the *Brazilian Tyres* case illustrate the advantages of multilevel judicial governance in the WTO as a constitutional limitation of intergovernmental rule-making. For instance, WTO Panel, appellate and arbitral reports have promoted a worldwide, transparent discourse among governments, courts and civil society on ‘the basic principles... underlying this multilateral trading system’ (WTO Preamble). Today, it is no longer disputed by WTO member governments, WTO dispute settlement bodies, domestic courts and civil society that – in the interpretation and application of WTO rules – trade- and non-trade values have to be carefully ‘balanced’ and ‘weighed’ in transparent, non-discriminatory and ‘proportionate’ ways, based on, *inter alia*,

- the sovereign right of each WTO member to restrict trade for non-economic reasons (e.g. pursuant to Articles III and XX GATT), including the right to determine autonomously the national level of health and environmental protection;
- the principles of ‘good faith’, ‘reasonableness’ and prohibition of ‘abuse of rights’ which, as clarified by the Appellate Body, underlie Article XX GATT; the mutual balancing of the competing rights of WTO members (e.g. market access rights versus rights to restrict trade for non-economic reasons) and of the ‘line of equilibrium may move as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ’²⁰¹;
- even though all WTO dispute settlement reports agreed that Brazil’s import ban could be ‘considered necessary within the meaning of Article XX(b) and is thus provisionally justified under that provision’, import restrictions undermining the health and environmental objectives of the measures concerned by discriminatory imports remain subject to multilevel judicial review and may be unjustifiable under WTO law; this WTO prohibition of ‘arbitrary or unjustifiable discrimination’ (Article XX GATT) does not

¹⁹⁸ E.U. Petersmann, Multilevel Judicial Governance as Guardian of the Constitutional Unity of International Economic Law, in: *Loyola International and Comparative Law Review* 30 (2008/2009), 101-152.

¹⁹⁹ Cf. H.L.A. Hart, *The Concept of Law* (2nd ed. 1994).

²⁰⁰ Cf. E.U. Petersmann (note 153). On WTO Appellate Body judge F.P. Feliciano as one of the leading exponents of the ‘Yale School conception’ of international law as a dynamic process of authoritative decision-making processes see: W.M. Reisman, A Judge’s Judge: Justice Florentino P. Feliciano’s philosophy of the judicial function, in: S. Charnovitz/D. Steger/P. van den Bossche (eds), *Law in the Service of Human Dignity* (2005), at 3-10.

²⁰¹ Appellate Body report on *Brazil Tyres* (note 131), para. 224.

unduly limit the sovereign right of each WTO member to give priority to health and environmental protection over trade;

- WTO dispute settlement bodies are likely to consider national and regional trade adjudication ‘as long as’ these judgments take into account the WTO obligations of the governments concerned rather than contribute to undermining WTO law;
- similarly, the WTO Appellate Body will review the exercise of ‘judicial economy’ by WTO Panels, for instance on the ground that ‘the principle of judicial economy allows a Panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute’²⁰²; but, as emphasized by the Appellate Body in the *Brazil Tyres* dispute, ‘a Panel’s discretion to decline to rule on different claims of inconsistency adduced in relation to the same measure is limited by its duty to make findings that will allow the DSB to make sufficiently precise recommendations and rulings “in order to ensure effective resolution of disputes to the benefit of all Members”’.²⁰³

Multilevel Constitutional Justice: ‘Judicial Constitutionalization’ of Multilevel Judicial Trade Governance

According to a widely shared view, the justice and ‘coherence of the judicial system of the European Union (do) not rest solely on the Community courts, but rather on the interlocking system of jurisdiction of the Community courts and the national courts which is cemented together by the principle of upholding the “rule of law” in the Union legal order.’²⁰⁴ Not unlike European integration, the ‘globalization’ of economic, environmental, political and legal relations, and its ever larger impact on the role of courts and social stability of societies, transform national constitutions into ‘partial constitutions’ that can no longer effectively protect general citizen interests in ever more areas of social life without international law and international organizations as essential instruments for ‘multilevel governance’ for the collective supply of ‘international public goods’ (like international rule of law, a mutually beneficial division of labour, human rights and ‘sustainable development’). As conceptions of ‘international justice’ in transnational relations among individuals as well as among states tend to be even more controversial than inside countries, Article 2:3 of the UN Charter enjoins all UN member states to ‘settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

The changing functions of modern law and justice (e.g. compared with the Westphalian system of ‘international law among states’ from 1648 to 1945) are explicitly recognized in modern international law, for example in the codification of the customary law requirement of settling ‘disputes concerning treaties, like other international disputes, ... in conformity with the principles of justice and international law’, including ‘universal respect for, and observance of, human rights and fundamental freedoms for all’ (Preamble VCLT).²⁰⁵ Yet, this ‘constitutional function’ of international courts to protect human rights, ‘justice’ and rule of law for the benefit of citizens continues to be often neglected by WTO dispute settlement bodies as well as by many other, state-centred international courts.

²⁰² Appellate Body report *Brazil Tyres* (note 131), para. 257.

²⁰³ Appellate Body report *Brazil Tyres* (note 131), para. 257; the Appellate Body acknowledged ‘that we have difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:1 directed at the MERCOSUR exemption. We emphasize that Panels must be mindful, when applying the principle of judicial economy, that the aim of the dispute settlement mechanism under Article 3.7 of the DSU is to secure a positive solution to the dispute.’

²⁰⁴ K. Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, in: *CMLR* 44 (2007), 1625, at 1659.

²⁰⁵ See note 148 above and the related text.

The Kantian conception of multilevel ‘constitutional justice’

Immanuel Kant was the first legal philosopher who extended his constitutional conceptions of law (as ‘the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom’²⁰⁶) and of ‘rule of law’ to international law. In his proposals for *Perpetual Peace: A Philosophical Sketch* (1795), Kant explained why - in order to institute lasting peace among rational, antagonistic egoists with limited reasonableness and ‘unsocial sociability’ (I.Kant) –

‘all men who can at all influence one another must adhere to some kind of civil constitution’ of the three following types:

‘(1) a constitution based on the civil rights of individuals within a nation (*ius civitatis*);

(2) a constitution based on the international rights of states in their relationships with one another (*ius gentium*);

(3) a constitution based on cosmopolitan right, in so far as individuals and states, coexisting in an external relationship of mutual influence, may be regarded as citizens of a universal state of mankind (*ius cosmopoliticum*).

This classification, with respect to the idea of a perpetual peace, is not arbitrary, but necessary. For if even one of the parties were able to influence the others physically and yet itself remained in a state of nature, there would be a risk of war, which it is precisely the aim of the above articles to avoid.²⁰⁷

The Kantian conception of multilevel constitutionalism as a morally necessary ‘categorical imperative’ for protecting human dignity and equal freedoms of individuals in all their social interactions at national, transnational and international relations reflects not only moral self-limitation by rules of a higher rank. Kantian multilevel constitutionalism also rests on Kant’s insight that – since rules cannot specify all the conditions of their own application – the application of every rule requires interposition of an authority determining what the rule should mean in a particular situation, and whether applying the rule might be better than resorting to an exception.²⁰⁸ Hence,

(a) constitution allowing the greatest possible human freedom in accordance with laws which ensure that the freedom of each can coexist with the freedom of all the others (not one designed to provide the greatest possible happiness, as this will in any case follow automatically), is at all events a necessary idea which must be made the basis not only of the first outline of a political constitution but of all laws as well.²⁰⁹

Kant was also the first legal philosopher emphasizing that the ‘problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved.’²¹⁰ Kant’s proposals for separating and limiting representative legislative, executive and judicial powers by multilevel constitutional restraints aim at institutionalizing and promoting ‘public reason’ (e.g. in the sense of political support for the moral judgments of law-appliers in determining what equal freedoms and other ‘principles of justice’ might require in real word conflicts and contestation). For, according to Kant, it is only through antagonistic, historical learning processes that individuals and states can be expected to progressively transform the

²⁰⁶ I. Kant, *The Metaphysics of Morals*, in: I. Kant, *Political Writings* (ed. by H. Reiss, 1977), at 133. Kant follows from his moral ‘categorical imperative’ that ‘every action which by itself or by its maxim enables the freedom of each individual’s will to co-exist with the freedom of everyone else in accordance with a universal law is *right*’ (at 133).

²⁰⁷ Cf. I. Kant, *Perpetual Peace: A Philosophical Sketch* (note 206), at 98.

²⁰⁸ Cf. I. Kant, *Critique of Pure Reason* (ed. by V. Politis, 1991), at 140 f.

²⁰⁹ Cf. I. Kant, Appendix from ‘The Critique of Pure Reason’, in: Kant (note 206), at 191.

²¹⁰ Cf. I. Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in: Kant (note 206), at 47.

lawless state of nature into law-governed national, transnational and international relations protecting ‘conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.’²¹¹ Like human rights, such multilevel constitutional restraints not only provide for ‘principles of justice’ as constitutional restraints on ‘rule by law’; they also promote ‘rule of law’ by empowering and protecting individuals and law-appliers to interpret and apply indeterminate rules in reasonable ways respecting equal freedoms and universal ‘principles of justice’. The progressive extension of rule of law thus depends not only on the ‘justice’ of national and international rules and on ‘reasonable judgments’ in applying them; there is also a need for multilevel constitutional and judicial guarantees enabling ‘public reason’ to prevail in the inevitably antagonistic rivalries and ‘struggles for rights’ among rational individuals and states and their instrumental conceptions of law and intergovernmental ‘legal regimes.’²¹²

Constitutional limits of jurisdiction and of ‘judicial comity’

The judicial duty of deciding disputes by applying the applicable law is limited by the competing jurisdictions of national and international courts. The WTO Panel, appellate and arbitral reports in the *Brazil tyres* dispute include critical remarks (as *obiter dicta*) on the national court injunctions in Brazil, as well as on the related MERCOSUR arbitrations, concerning their judicial protection of imports of used and retreaded tyres into Brazil without any judicial consideration of the health and environmental problems caused by such imports, as they were demonstrated by Brazil in the WTO dispute settlement proceedings. Is it justifiable to criticize this reluctance on the part of the WTO Appellate Body as an ‘institutional power struggle between the global WTO and a RTA such as the MERCOSUR’?²¹³ Does the Appellate Body finding justify the criticism that ‘the WTO dispute settlement system’s attempt to be a global arbiter of regulatory priorities is an awkward and potentially devastating task for it to undertake’?²¹⁴ Is it true that the Appellate Body – by ‘discussing Brazil’s litigation strategy before the MERCOSUR *ad hoc* Arbitral Tribunal and thus suggesting that Brazil ought to have argued a defence akin to that found in the GATT... is in fact crowning itself as the ultimate authority in trade law’?²¹⁵ Does another ‘recent WTO dispute, *US-Stainless Steel*’ likewise reflect ‘a heated power struggle between the Panel and the Appellate Body’²¹⁶, entailing a ‘lack of flexibility for both the Panel and the Appellate Body to be able to depart from *stare decisis*’ with ‘tragic consequences to WTO members’ best interests, in particular with respect to non-trade interests’?²¹⁷ Why should the Appellate Body’s recognition of Brazil’s right to restrict imports of retreaded tyres under Article XX(b) GATT – subject to the prohibition of ‘arbitrary or unjustifiable discrimination’ - be criticized as ‘grave injustice’ rather than be acknowledged as an act of ‘judicial comity’ clarifying the constitutional conditions (e.g. of non-discrimination, respect for national sovereignty regarding health and environmental protection) for multilevel cooperation and legal coherence among national, regional and worldwide trade courts?

When I joined the GATT Secretariat in 1981 as the first ‘legal officer’ ever employed by the GATT, GATT 1947 dispute settlement Panels still perceived GATT dispute settlement procedures in terms of ‘managing intergovernmental disputes’ on the basis of narrow, textual interpretations of

²¹¹ I. Kant, *The Metaphysics of Morals* (ed. by M.Gregor, 1996), at 230.

²¹² On ‘constitutional approaches’ as ways for reducing ‘fragmentation’ of international legal regimes and limiting instrumental, managerial conceptions of ‘rule by law’ see: Petersmann (notes 153, 197 and 198); M. Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, in: *Theoretical Inquiries in Law* 8 (2007), 9-36; A. van Aaken, *Defragmentation of Public International Law through Interpretation: A Methodological Proposal*, in: *Indiana Journal of Global Legal Studies* 16 (2009), at 483-512.

²¹³ Lavranos/Viellard (note 130), at 221.

²¹⁴ Lavranos/Viellard (note 130), at 226.

²¹⁵ Lavranos/Viellard (note 130), at 228-229.

²¹⁶ Lavranos/Viellard (note 130), at 229.

²¹⁷ Lavranos/Viellard (note 130), at 230.

GATT rules, frequently without independent legal advice, without recourse to the customary methods of international treaty interpretation, and without thorough judicial analysis of explicit requirements of reasonableness, equity or fairness in the application of GATT rules (e.g. the requirement of a 'reasonable basis' and 'fair comparison between the export price and the domestic price' in anti-dumping calculations, or the prohibition of export subsidies resulting 'in that contracting party having more than an equitable share of world export trade in that product'). It was only in the *EC Bed Linen case* that the Appellate Body clarified the explicit requirement (in Article 2 of the 1979 and 1994 Agreements on Implementation of Article VI GATT) of a 'fair comparison' in order to find that, in the EC's calculation of anti-dumping duties, the EC should have 'compared the weighted average normal value with the weighted average of all comparable export transactions.'²¹⁸ In *US-Softwood Lumber V (Article 21.5-Canada)*, the Appellate Body insisted once again that 'the use of zeroing under the transaction-to-transaction methodology is difficult to reconcile with the notions of impartiality, even-handedness and lack of bias reflected in the 'fair comparison' requirement in Article 2.4' because it 'distorts' certain export price calculations and thereby 'inflates' dumping margins.²¹⁹

As international treaty obligations are presumed to apply cumulatively and do 'not create either obligations or rights for a third state without its consent' (Article 34 VCLT), it makes little sense to impute to the WTO or to WTO dispute settlement bodies – as suggested by Lavranos/Vielliard – 'supremacy claims' vis-à-vis regional trade agreements and regional dispute settlement bodies. In the *Brazil tyres case*, the Appellate Body observed

like the Panel, that, before the arbitral tribunal established under MERCOSUR, Brazil could have sought to justify the challenged Import Ban on the grounds of human, animal, and plant health under Article 50(d) of the Treaty of Montevideo. Brazil, however, decided not to do so. It is not appropriate for us to second-guess Brazil's decision not to invoke Article 50(d), which serves a function similar to that of Article XX(b) of the GATT 1994. However, Article 50(d) of the Treaty of Montevideo, as well as the fact that Brazil might have raised this defence in the MERCOSUR arbitral proceedings, show, in our view, that the discrimination associated with the MERCOSUR exemption does not necessarily result from a conflict between provisions under MERCOSUR and the GATT 1994.²²⁰

Similarly, Appellate Body member Taniguchi – in his arbitral award pursuant to Article 21.3(c) – demonstrated reasonable deference to Brazil's proposition to implement the WTO dispute settlement rulings through adjudication in Brazil's Federal Supreme Court. The arbitrator also referred to the above-quoted *obiter dictum* of the Appellate Body regarding the MERCOSUR arbitration and noted 'that the arbitrator in *EC-Chicken Cuts* found that "where the Panel and the Appellate Body have expressed one view on issues relating to the substance of the dispute", an arbitrator, in fulfilling his limited mandate, is "not free... to express another".'²²¹

²¹⁸ WT/DS141/AB/R, para. 55, adopted in March 2001. This interpretation of the 'fair comparison' requirement, which was subsequently confirmed by the Appellate Body in 5 additional rulings, had been rejected by an earlier GATT Panel report (*EC-Audio Cassettes*, ADP/136 of 28 April 1995, not adopted) on the basis of the argument that 'if the existence and extent of dumping and the imposition of duties had been conducted on a transaction-to-transaction basis, the EC would have been entitled to impose a duty with respect to dumped transactions, where injury existed, irrespective of the prices at which other un-dumped transactions occurred' (para. 356). Such narrow, textual interpretations of rules without regard to their underlying principles (such as the requirement of a 'fair comparison' in the inevitable aggregation and averaging of multiple price comparisons) was characteristic of many 'bureaucratic interpretations' of GATT 1947 and the 1979 Tokyo Round Agreements at the insistence of GATT diplomats and GATT officials who, even after the establishment of a GATT Legal Division in 1983, often continued to prevent GATT Panelists from receiving independent legal advice.

²¹⁹ WT/DS264/AB/RW, paras. 138-140, adopted in September 2006.

²²⁰ Appellate Body report (note 131), para. 234.

²²¹ WT/DS332/16 of 29 August 2008, para. 82.

Does 'justice' require judicial respect for 'precedents'?

International courts are neither formally bound by their own judicial precedents nor by the jurisprudence of national and other international courts, with exceptions regarding hierarchically organized judicial systems. The WTO Appellate Body, for instance, insists that WTO Panels must take into account legal precedents so as to promote legal security: even if 'Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties', 'the legal interpretation embodied in adopted Panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system'.²²² The criticism by Lavranos/Vieillard of this Appellate Body case-law²²³ does not convince. For, the DSU objective of 'providing security and predictability to the multilateral trading system' – for instance, by using the WTO dispute settlement system 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (Article 3 DSU) - cannot be realized if, as was argued by the USA in response to the large number of WTO complaints challenging the 'zeroing methodologies' applied by the US Department of Commerce in its calculation of anti-dumping duties, the legal effects of WTO dispute settlement rulings would be limited to the specific measures reviewed in the specific WTO dispute settlement findings. In its report of February 2009 on *US-Continued Existence and Application of Zeroing Methodology*, the Appellate Body clarified that – in addition to WTO complaints challenging a measure 'as such' (e.g. an anti-dumping law or regulation) or 'as applied' (e.g. the use of the regulation in a particular circumstance) – WTO members may also challenge a third type of justiciable measures: the Appellate Body saw 'no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement'.²²⁴ In a rare concurring opinion, one unnamed Appellate Body member emphasized that – after three prior Panels all found zeroing during reviews to be permissible and had been overruled on appeal on this issue - the ongoing disagreement between WTO Panels and the Appellate Body on zeroing must now end:

In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes....²²⁵

In yet another report on *US-Zeroing (EC)* of May 2009, the WTO Appellate Body confirmed, once again, that the USA had failed to implement previous WTO dispute settlement rulings by its continued use of 'zeroing' in administrative reviews of anti-dumping orders.²²⁶ Without good faith cooperation by domestic governments and courts, rule of WTO law for the benefit of citizens engaged in international trade cannot be effectively secured. Arguably, the WTO requirements (e.g. in GATT Articles X, XXIII) of judicial remedies at national and international levels should be construed as requiring 'courts of justice' to protect rule of law not only in relations among governments, but also for the benefit of citizens engaged in international trade, for example by interpreting and applying intergovernmental guarantees of equal freedoms, of non-discriminatory conditions of competition and rule of law in international trade among private producers, investors, exporters, importers and

²²² Cf. the WTO Appellate Body Report of 30 April 2008 (WT/DS344/AB/R, paras. 160-161), as criticized by Lavranos/Vieillard on p.229, footnote 84.

²²³ The Appellate Body noted that Panel reports (which were drafted by the WTO's 'Rules Division' administering WTO rules on antidumping) continued 'to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues' (i.e. the illegality of the use of 'zeroing' during reviews of anti-dumping orders), corrected the Panel's 'misguided understanding of the legal provisions at issue' and affirmed, for the third time, that zeroing during reviews is illegal.

²²⁴ WT/DS350/AB/R, *US-Continued Existence and Application of Zeroing Methodology* (adopted in April 2009).

²²⁵ WT/DS350/AB/R, at 119-120.

²²⁶ See the report in note 194 above.

consumers for the benefit of the citizens concerned and their constitutional rights of ‘access to justice.’²²⁷

Networks and Communities of Judges as Guardians of Peace across Frontiers

The transformation of the power-oriented GATT dispute settlement system into the quasi-judicial WTO dispute settlement system was aimed at transforming intergovernmental power politics (with regular ‘trade wars’ under GATT 1947) into a rules-based trading system with compulsory jurisdiction for the peaceful settlement of disputes at national and international levels (e.g. through WTO Panel, appellate and arbitral procedures).²²⁸ The inscription on the main façade of the Hague Peace Palace, seat of the ICJ, - i.e., *pacis tutela apud judicem* – recalls this historical function of the judge as guardian of peace and of impartial justice, as it emerged in the history of the European legal and court systems.

The emergence of a European community of judges as guardians of peace

The about 80’000 court cases registered in the Imperial Chamber Court (*Reichskammergericht*) over a period of more than 300 years (since its creation in 1495) with jurisdiction covering more than 20 of today’s European countries, the supranational system for the settlement of disputes (including governmental and private complaints) under the Rhine Navigation Convention of 1868, the establishment of the Permanent Court of Arbitration by the Convention on the Peaceful Settlement of International Disputes concluded at the International Peace Conference of 1899, like the post-war creations of the Permanent Court of International Justice and of the ICJ illustrate the persistent, international efforts at ‘transnational peace through enforceable law’ and judicial protection of international rule of law.²²⁹ These ongoing efforts at transforming weak ‘international law among states’ into enforceable ‘rule of law’ for the benefit of citizens have turned out to become most effective in European and international economic law, similar to the citizen-driven emergence of enforceable *lex mercatoria* and judicial protection of contract law and property rights in common law systems long before the emergence of constitutional democracies.

In EC law, EEA law as well as in the context of the European Convention on Human Rights (ECHR), the EC Court, the EFTA Court and the European Court of Human Rights (ECtHR) interpreted the international EC and EEA agreements, as well as the ECHR, as ‘constitutional instruments’ that were progressively transformed – in close cooperation with national courts and with subsequent approval by national parliaments and civil society – into effective, multilevel legal and judicial guarantees of equal freedoms, human rights and rule of law for the benefit of some 500 Million EU citizens and other citizens in the 47 ECHR member states.²³⁰ Peaceful settlement of disputes based on ‘rule of law’ – protected by the EC Court, the EFTA Court, the ECtHR and by national courts throughout Europe for the benefit of citizens and their constitutional rights²³¹ - is among the most important achievements of this ‘European constitutional law’. In conformity with the Kantian conception of multilevel constitutional protection of human rights as the most effective safeguard of ‘democratic peace’ inside and among republican states, the multilevel European legal and court system has evolved into an effective ‘guardian of peace, offering European citizens more

²²⁷ Cf. F. Francioni (ed), *Access to Justice* (2007).

²²⁸ Cf. Petersmann (note 188), chapters 1 and 5. On the long-standing US opposition to submitting to compulsory jurisdiction of international courts see: M. Pomerance, *The United States and the World Court as a ‘Supreme Court of the Nations’: Dreams, Illusions and Disillusion* (1996).

²²⁹ Cf. G. Clark/L. Sohn (eds), *World Peace through Law* (third edition 1966). But see also P. Sands, *America and the Making and Breaking of Global Rules. From FDR’s Atlantic Charter to George W. Bush’s Illegal War* (2006).

²³⁰ Cf. E.U. Petersmann, Human Rights, International Economic Law and ‘Constitutional Justice’, in: *European Journal of International Law* 19 (2008), 769-798.

²³¹ Cf. Lenaerts (note 204), at 1625-1659.

economic and social welfare, rule of law and transnational, individual rights than citizens ever enjoyed before. Are there lessons from the ‘constitutional functions’ of European judges for the judicial functions in international economic law beyond Europe?

Emergence of communities of judges in international criminal law, human rights law and economic law

The creation of the International Criminal Tribunal for Yugoslavia in 1993, the International Criminal Tribunal for Rwanda in 1995, the International Criminal Court in 1998 and of several more recent, hybrid criminal courts in Sierra Leone, Kosovo, East Timor, Cambodia and Lebanon has led to the emergence of networks of national and international criminal courts with complementary jurisdictions and common functions of restoring peace and bringing justice for victims, triggering an increasing number of international criminal law cases also in the ICJ.²³² The more than 300 investor-state disputes in national courts, investor-state arbitration, regional economic and human rights courts as well as in the ICJ have likewise, over the past thirty years, contributed to the emergence of networks of judicial cooperation contributing to the progressive reforms and ‘rule of law’ in international investment law.²³³ Similarly, the increasing number of regional human rights courts has given rise to ever more national and international judges calling for citizen-oriented re-interpretations of traditional rules of ‘international law among states.’²³⁴ The *Brazil Tyres case* suggests that – in international trade law outside the EC and EEA legal systems – the multiplication of overlapping jurisdictions of international courts has not yet led to the emergence of a multilevel ‘judicial system’ with common applicable rules (e.g. WTO law) and coordinated procedural approaches (e.g. of judicial comity). Is the lack of commitment to common conceptions of ‘justice in international trade law’ to be welcomed in view of the controversies over the selection of judges and their ‘judicial functions’? Would judicial dialogues among national and international economic judges – as in the *Brazil Tyres* cases (e.g. in the Brazilian Supreme Court at the explicit request of the Brazilian government) - help the courts to ‘gain legitimacy by linking (themselves) to a larger community of courts’?²³⁵

In the UN Charter, all 192 UN member states reaffirmed – on behalf of ‘We the peoples of the United Nations’ – their ‘faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’ so as ‘to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained’ (Preamble). Yet, as long as UN human rights conventions do not provide for effective judicial remedies and only about one third of UN member states submit to the compulsory jurisdiction of the ICJ and of other worldwide courts (such as the International Tribunal for the Law of the Sea), the UN objective ‘to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes’ (Article 1 UN Charter) is not effectively secured. Due to this power-oriented nature of UN law, most constitutional democracies distrust ‘rule of international law’ and prefer the ‘realistic’ view that governments should pursue ‘international rule of law’²³⁶, submitting to ‘rule of international law’ only ‘as long as’ international law rules remain consistent with the constitutional guarantees of human rights, democracy and justice in domestic jurisdictions.²³⁷ Due to the diversity of domestic constitutional traditions, of democratic preferences and of international ‘bargaining power’ among

²³² Cf. W.W. Burke-White, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, in: *Harvard International Law Journal* 49 (2008), 53 ff; A. Cassese, The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, in: *EJIL* 18 (2007), 649 ff.

²³³ Cf. Dupuy/Francioni/Petersmann (note 141).

²³⁴ Cf. Kamminga/Scheinin (note 149).

²³⁵ The citation is from A.M. Slaughter, A Real New World Order, in: *Foreign Affairs* 76 (1997), 183, 187.

²³⁶ Cf. G.J. Ikenberry/A.M. Slaughter, *Forging a World of Liberty under Law: U.S. National Security in the 21st Century* (Princeton Project Paper September 2006).

²³⁷ Cf. Petersmann (note 230), at 780 ff.

states, national conceptions of ‘international rule of law’ often differ among the 192 UN member states and fail to protect ‘rule of international law’ in many UN member states.²³⁸ For similar reasons, WTO law and also MERCOSUR law fail to protect ‘rule of international law’ for the benefit of producers, investors, traders and consumers as long as governments and domestic courts insist that citizens should have neither rights to rely on ‘rule of WTO law’ and MERCOSUR law in domestic courts in order to hold trade politicians and trade administrations legally accountable for their often arbitrary violations of WTO law for the benefit of ‘rent-seeking’ interest groups. The WTO Appellate Body’s references to the Brazilian and MERCOSUR judgments on imports of used and retreaded tyres, like the domestic implementation of the WTO dispute settlement rulings by means of injunctions of the Brazilian Supreme Court, are welcome reminders that multilevel judicial cooperation depends on respect for international law as the common basis for an emerging ‘epistemic community’²³⁹; it cannot become effective as long as national and regional courts disregard legitimate WTO rules, and national, regional and WTO judges perceive each other as representatives of different legal cultures (e.g. in view of the different constitutional and judicial traditions in common law and civil law countries) rather than as ‘fellow professionals’ in their common efforts at promoting rule of law, peaceful settlement of disputes and ‘principles of justice’ across national frontiers.

Is Multilevel Judicial Protection of International Rule of Law Constitutionally Justifiable?

According to the ECtHR, ‘the Court’s obligation is to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings and its role, as set out in Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties.’²⁴⁰ Similarly, the EC Court, the EFTA Court and investor-state tribunals emphasize their judicial function of protecting rule of international law with due regard to the rights of producers, investors, traders, consumers and other citizens against arbitrary interferences by governments and other abuses of public and private power. Just as the idea of ‘rule of law’ has always been related to justice²⁴¹, so do human rights instruments emphasize ‘that human rights should be protected by the rule of law’.²⁴² ‘Rule of law’ beyond states protecting mutually beneficial cooperation among citizens cannot become effective unless national and international courts respect and apply the customary law requirement of settling ‘disputes concerning treaties, like other international disputes, ... in conformity with the principles of justice and international law’, including ‘universal respect for, and observance of, human rights and fundamental freedoms for all’ (VCLT, Preamble). Just as recognition of ‘inalienable’ human rights entails an ‘invisible constitution’²⁴³ complementing written constitutions, so does the universal recognition of inalienable human rights by all 192 UN member states limit the ‘rules of recognition’ in international law and requires judges to promote and protect human rights and rule of law also in transnational relations among citizens.²⁴⁴

²³⁸ In the *Kadi et al.* cases C-402 and 415/05P (judgment of 3 September 2008), the *FIAMM* and *Fedion* cases C-120 and 121/06 P (judgment of 9 September 2008), as well as in the *Intertanko* case C-308/06 (judgment of 3 June 2008), also the ECJ refused to enforce obligations of the EC under UN law, WTO law and the Law of the Sea Convention, respectively.

²³⁹ Cf. P.M. Haas, Introduction: Epistemic Communities and International Policy Coordination, in: *International Organization* 46 (1992), 1 ff, who defines an epistemic community as a ‘network of knowledge-based experts’ with a ‘shared belief or faith in the verity and the applicability of particular forms of knowledge or specific truths’ (at 2-3).

²⁴⁰ ECtHR, Grand Chamber, *Bankovic and Others against Belgium and Others*, inadmissibility decision of 12 December 2001.

²⁴¹ On the ancient Greek concept of ‘law as participation in the idea of justice’, and the need to relate justice not only to the value of equality, see: C.J. Friedrich, *The Philosophy of Law in Historical Perspective* (1963), chapters II and XX.

²⁴² Universal Declaration of Human Rights (1948), Preamble.

²⁴³ Cf. L.H. Tribe, *The Invisible Constitution* (2008).

²⁴⁴ Cf. E.U. Petersmann, Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution, in C.Breining/T.Cottier (eds), *International Trade and Human Rights* (2006), at 29-67.

The ever more comprehensive, national and international regulation of human rights, economic law, environmental law and international organizations with legislative, executive and judicial functions requires adapting national constitutional theories to the new realities of 'globalization' and international law. The abuses of foreign policy powers under the Westphalian system of 'international law among states' suggest that - as inside many states and in European integration law - courts must take the lead in protecting citizen rights (e.g. EU citizen rights pursuant to Arts. 17 ff EC Treaty, investor rights, trading rights, social, labour and other human rights) and transnational 'rule of law' against abuses of discretionary governance powers, thereby reinforcing constitutional democracy so that it protects rule of law also in the ever more important, transnational cooperation among citizens. International human rights law tends to prescribe only *minimum standards* respecting the freedom of states to protect higher standards of civil, political, economic, social and cultural rights and to interpret their international legal obligations in conformity with their domestic constitutional guarantees of human rights. Many international trade and economic agreements, by contrast, commit countries to *higher standards* of freedom, non-discrimination and rule of law than are provided for in their autonomous economic laws.²⁴⁵ As intergovernmental treaties often leave the meaning of human rights, the scope of judicial powers and the underlying 'principles of justice' indeterminate, 'international rule of law' depends on judicial clarification of contested rules and on conditional, judicial cooperation and 'judicial dialogues' among national and international courts in the protection of 'rule of law', based on 'judicial comity' and reciprocal respect for their respective jurisdictions and constitutional limits.

Justice Requires Multilevel Judicial Protection of 'Rule of Law' in Transnational Economic Cooperation among Citizens

The emergence of 'rule of law' in European economic law and in international trade and investment law is due to multilevel constitutional restraints of abuses of power and multilevel judicial protection of 'constitutional justice', for example in the judicial review and recognition of foreign arbitral awards and court judgments, in international annulment proceedings challenging arbitration awards (e.g. pursuant to the procedures of the International Centre for the Settlement of Investment Disputes), in the ever more comprehensive appellate review of dispute settlement rulings in the WTO and their enforcement through arbitral awards on the 'reasonable period of implementation' and alternative sanctions, in the review of first-instance judgments by the EC Court as well as in the close cooperation among the EFTA Court and national courts in EFTA countries. Also other areas of international law – like human rights law, international criminal law²⁴⁶ and the international law of the sea²⁴⁷ - are increasingly shaped by cooperation among national and international courts in their settlement of disputes and judicial clarification and progressive development of international law rules. Public review and discussion of this 'multilevel judicial governance' and cooperation among national and international courts are preconditions for strengthening rule of law beyond state borders.

The need for more comprehensive 'constitutional theories' of transnational adjudication²⁴⁸ and of 'rule of law' is illustrated by the variety of alternative dispute settlement *fora* for international investment disputes – like private commercial arbitration, national courts, investor-state arbitration based on bilateral investment treaties (BITs) or regional agreements (like Chapter 11 of NAFTA), regional economic and human rights courts, worldwide courts (like the ICJ) and alternative dispute settlement bodies (e.g. in the WTO), whose 'administration of justice' and occasionally incoherent

²⁴⁵ On these diverse functions of multilevel human rights law and multilevel market integration law see: E.U. Petersmann, Multilevel Constitutionalism and Judicial Protection of Freedom and Justice in the International Economic Law of the EC, in: A. Arnulf (ed), *Continuity and Change in EU Law. Liber amicorum Francis Jacobs* (2008), 338-353.

²⁴⁶ Cf. note 232 above.

²⁴⁷ P. Gautier, Urgent Proceedings before the International Tribunal for the Law of the Sea, in: *Issues in Legal Scholarship* 2009, Article 5.

²⁴⁸ Cf. E.U. Petersmann, Constitutional Theories of International Economic Adjudication and Investor-State Arbitration, in: Dupuy/Francioni/Petersmann (note 141), 137-194.

jurisprudence often remain contested.²⁴⁹ In order to reduce the risks of legal and jurisdictional fragmentation in international law – as in the Brazilian, MERCOSUR and WTO *Brazil tyres cases* – national and international courts should review their textual, contextual and teleological interpretations of international treaties more thoroughly from the constitutional perspective of the judicial task of settling disputes ‘in conformity with principles of justice’ and the universal human rights obligations of governments. As in European integration law, international ‘rule of law’ may be advanced most effectively beyond Europe by means of multilevel judicial cooperation and comprehensive ‘judicial balancing’ in international economic adjudication of individual rights and legal obligations of governments.²⁵⁰

International ‘Rule of Law’ and ‘Judicial Comity’ Depend on Respect for the Legitimate Diversity of Multilevel ‘Constitutional Pluralism’

Public international law has historically evolved as a decentralized coercive order respecting state sovereignty over domestic affairs and the power-oriented realities of national as well as international legal systems.²⁵¹ While rulers have invoked, applied and enforced rules of ‘international law’ since legal antiquity (e.g. international trade agreements in the Mediterranean), the changing structures and ‘legal system’ of international law are shaped no longer only by (inter)governmental decisions; the authoritative decision-making processes constituting international norms are influenced ever more by domestic constitutional systems, parliaments, courts, non-governmental organizations and civil society committed to protection of human rights. Even though ‘the need for universal adherence to and implementation of the rule of law at both the national and international levels’ is recognized in a few UN resolutions²⁵², neither the UN Charter nor other UN treaties constitute an effective ‘rule of law’ system as a constitutional restraint on ‘the rule of men’ and their ‘rule by law’.²⁵³ As national law and international law rely on each other for the collective supply of international ‘public goods’ (like international rule of law), the effectiveness of international rules depends on their consistency with, and respect for, the legitimate diversity of domestic constitutional laws. Just as international law cannot be effective without its good faith implementation inside domestic legal systems, so are domestic legal systems risking to become ineffective in a globally interdependent world without international legal coordination of their often adverse ‘external effects’ on other polities and legal systems.²⁵⁴ While European integration law reflects the recognition that

²⁴⁹ Cf. Petersmann (note 141).

²⁵⁰ On ‘rationality tests’ and ‘reasonableness tests’ in the ‘proportionality balancing’ of European and other international courts see Petersmann (note 153), Sections 22-25.

²⁵¹ On Kelsen’s unified conception of national and international law as deriving from the same basic ‘Grundnorm’ see: H. Kelsen, *The General Theory of Law and State* (1945), at 325 ff; *idem*, *Principles of International Law* (1952), where Kelsen formulated the basic customary norm of the national and international legal order as follows: ‘The states ought to behave as they have customarily behaved’ (at 417-418), allowing revolution and the principle of effectiveness to be law-creating facts.

²⁵² The quotation is from paragraph 134 of UN General Assembly Resolution A/60/L.1, adopted during the 2005 World Summit meeting on 25 October 2005 (in the same paragraph, UN member states also ‘reaffirm our commitment... to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States’).

²⁵³ Cf. Petersmann (note 153) and I. Brownlie, *The Rule of Law in International Affairs* (1998), at 214 ff.

²⁵⁴ American international lawyers focusing on ‘state interests’ (as defined by the state’s political leadership) openly admit that their power-oriented international law approaches are ‘not necessarily, or even usually, the policy that would maximize the public good within the state’ or ‘collective international public goods’ among states, cf. J.L. Goldsmith/E.A. Posner, *The Limits of International Law* (2005), at 6-7, 17; in view of the ‘democratic process pathologies such as interest group capture’ and ‘collective action problems in performing cosmopolitan duties’, the ‘absence of democratic support’ for the collective supply of international public goods is viewed as ‘an inherent feature of democratic process’ and insurmountable ‘hurdle to cosmopolitan action’: ‘Information and power asymmetries, as well as the absence of a centralized enforcement mechanism, make international collective action problems difficult to

national constitutions have become ‘partial constitutions’ that can no longer unilaterally ensure many ‘public goods’ demanded by citizens, most countries outside Europe continue to focus on ‘constitutional nationalism’ and intergovernmental power politics limited by ‘international law among states.’

The effective supply of international public goods (like the EC’s common market based on rule of law) through European integration law - like the increasing ‘globalization’ of human rights, of market integration, market regulation and judicial protection of ‘international rule of law’ since the fall of the Berlin wall (1989) - offer empirical evidence that multilevel judicial cooperation can succeed in transforming power politics into rule of law systems beyond state borders. European lawyers and courts increasingly focus on common constitutional principles of justice (as defined in Article 6 EU Treaty) and on multilevel parliamentary, governmental and judicial cooperation for limiting ‘governance failures’ at national levels, with due respect for the reality of ‘constitutional pluralism’ in diverse national and international legal regimes.²⁵⁵ In its *Kadi* judgment of 3 September 2008, the European Court of Justice rightly concluded that UN Security Council sanctions against alleged terrorists can be implemented inside the EC only in conformity with European constitutional guarantees of fundamental rights (e.g. rights to be heard, rights to effective judicial protection, rights to respect for private property) and with due respect for judicial remedies.²⁵⁶

Conclusion: Need for Multilevel Judicial Protection of ‘Public Reason’ and ‘Rule of Law’ beyond the State and beyond International Economic Law

The *Brazil tyres* case confirms that - rather than relying on formal ‘monist claims’ of supremacy of international law (e.g. based on Articles 103 UN Charter, Article 27 VCLT) or ‘dualist claims’ of the legal autonomy of domestic legal systems - national and international courts should clarify, and reconcile, the complex legal interdependencies among national and international legal systems in more differentiated ways. Just as the EC Court’s judgment in the *Kadi* case aimed at reconciling EC constitutional law (e.g. its requirement that ‘the European Community must respect international law in the exercise of its powers’) with the EC’s international obligations under UN law by requiring the EC to implement UN sanctions in conformity with the EC’s human rights obligations²⁵⁷, so can national and international courts reconcile also other national and international legal obligations through mutually coherent interpretations. UN human rights law confirms that, in the absence of adequate guarantees of human rights and judicial review at the UN level, UN member states and European courts remain entitled to judicially protect, and comply with, higher, national and regional human rights guarantees. Hence, ‘rule of law’ may legitimately differ in domestic and international jurisdictions depending on their often diverse constitutional and international legal obligations and democratic and judicial conceptions of the ‘rule of law prevailing in this jurisdiction’, as illustrated also by the 2006 US Supreme Court judgment in *Hamdan v Rumsfeld*.²⁵⁸

It is so far only in the field of international trade and investment law that most UN member states have been willing to submit to multilevel judicial protection of international rule of law on the

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overcome even when there is a plausible argument that the international regime, if successful, would enhance the welfare of every participating state’ (at 206-217).

²⁵⁵ Cf. M.P. Maduro, Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism, in: J.L. Dunoff/J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009), 356-379.

²⁵⁶ Cf. Joined Cases C-402/05P & C-415/05P, *Kadi v Council of the EU*, in: [2008] Common Market Law Reports 41, 1207, 1240 ff. On the EC as a ‘community of law’ based on ‘rule of law’, the conceptual independence of rule of law from democracy and its content-dependent, constitutional assessment see also G. Palombella/N. Walker (eds), *Relocating the Rule of Law* (2008).

²⁵⁷ For a critical review of the implications of the *Kadi* judgment for ‘international rule of law’ see: G. de Burca, The European Court of Justice and the International Legal Order after *Kadi*, *Jean Monnet Working Paper 01/2009*.

²⁵⁸ *Hamdan v Rumsfeld*, 548 U.S. 557 (2006), where the Supreme Court defined the ‘rule of law in this jurisdiction’ in conformity with the ‘judicially enforceable’ Geneva Conventions on the law of war and Article 21 of the US Uniform Code of Military Justice (Opinion of the Court at p.635).

basis of more than 2'500 Bilateral Investment Treaties (BITs), regional trade and investment agreements (like EC and NAFTA law), WTO law and other agreements on international judicial cooperation (e.g. under the 1958 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards) and international judicial remedies (e.g. under the 1965 ICSID Convention on the Settlement of Investment Disputes between States and Nationals of other States). In European economic law, the treaties establishing the EC and the EEA, like many EC free trade agreements with third countries, are based on common constitutional 'principles of freedom, democracy, respect for human rights, fundamental freedoms and rule of law' (Article 6 EU), justifying their provision for effective legal and judicial safeguards not only of sovereign rights of states but also of the individual rights of their citizens. Just as UN human rights conventions explicitly recognize 'that these rights derive from the inherent dignity of the human person', so does the EU Charter of Fundamental Rights base the human rights approach to European economic law, and the rights-based conception of the EC's international 'market freedoms' as fundamental freedoms of individuals to be protected by national and European courts, on 'the indivisible, universal values of human dignity, freedom, equality and solidarity' as well as 'on the principles of democracy and the rule of law.'²⁵⁹

This successful, constitutional as well as judicial protection of 'rule of law' and of democratic citizen rights in EC law, EEA law and in the ECHR refutes the prevailing North American view that rule of law, democracy and justice can be effective only inside nation states. 'Constitutional nationalism' and power-oriented foreign policies neglect that collective supply of international public goods depends on multilevel judicial protection of international rule of law, as universally recognized in the customary law requirement of settling 'disputes concerning treaties, like other international disputes, ... in conformity with the principles of justice and international law', including 'universal respect for, and observance of, human rights and fundamental freedoms for all' (VCLT, Preamble). As the 'fragmentation' and 'systemic crisis' of modern international law have been caused by intergovernmental power politics disregarding international law obligations of states and their 'constitutional functions' for protecting human rights and rule of law for the benefit of citizens, the 'systemic unity' of national and international legal systems can be re-asserted only by stronger legal and judicial protection of human rights and rule of law in mutually beneficial cooperation beyond states. Rather than relying on UN law as 'the gentle civilizer of nations'²⁶⁰, citizens, parliaments and courts should insist on legal and judicial respect for domestic constitutional guarantees of human rights and rule of law, including compliance with the WTO obligations of states as long as they remain consistent with domestic constitutional guarantees of human rights and democratic self-governance. Lavranos/Viellard are right that 'principles of justice' require national, regional and worldwide courts to cooperate in protecting rule of law, human health and the environment in transnational cooperation among citizens; yet, rather than criticizing the WTO Appellate Body ruling in the *Brazil tyres* case for committing 'grave injustice', it would have been more appropriate to criticize the disregard – in the Brazilian and MERCOSUR judgments - for the health and environmental problems caused by judicial protection of imports of used and retreaded tyres and of their ineffective, discriminatory regulation in Brazil.-

²⁵⁹ The quotation is from the Preamble to the Charter of Fundamental Rights of the European Union, as adopted first in December 2000 and incorporated into EU law by the 2007 Lisbon Treaty.

²⁶⁰ Cf. M. Koskeniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (2004).

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