Australian Cases before International Courts and Tribunals Involving Questions of Public International Law 2007

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Human Rights

Right of equality before the courts — whether defendant has right to attend appellate hearing

Lucy Dudko v Australia
Communication No 1347/2005
UN Doc CCPR/C/90/D/1347/2005 (2007)
Human Rights Committee
Views adopted on 23 July 2007

The author of the communication was convicted of offences in connection with the hijacking of a helicopter on a tourist flight over Sydney in order to secure the escape of an inmate of Silverwater prison. In her appeal to the New South Wales Court of Criminal Appeal the author alleged that she was not the hijacker and that pre-trial publicity had created prejudice in the minds of some of the jurors and resulted in a miscarriage of justice. The Court of Criminal Appeal dismissed the appeal, finding that appropriate directions were given to the jury at the author's trial to ensure that the jury could perform its duty in assessing the evidence before it.[1] The author unsuccessfully applied for legal aid in support of her application to the High Court of Australia for leave to appeal from the decision of the Court of Criminal Appeal. The author did not pursue an appeal to the Legal Aid Review Committee in relation to the decision to deny legal aid, as was her right. The author prepared her own special leave application which was refused by the High Court, on the grounds that whatever may have been the extent of the adverse pre-trial publicity the evidence of identity was so overwhelming that there could not be shown to have been a miscarriage of justice. The author was not permitted to attend the hearing of her special leave application, in accordance with the practice in New South Wales in relation to appellants in custody (which differed from the practice in other states where personal appearance was permitted).

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1 *R v Dudko* [2002] NSWCCA 336.

Before the Committee the author alleged violations of Articles 7, 9, 10, 14 and 17 of the 1966 International Covenant on Civil and Political Rights.[2] In relation to the denial of legal aid the Committee found that the alleged violation was inadmissible as the author had failed to exhaust domestic remedies by declining to pursue an appeal to the Legal Aid Review Committee. In relation to the claim that the author's trial was unfair on account of pre-trial publicity the Committee considered that the impact of the publicity had been considered by the trial and appeals court, and the judgment of these courts on the matter was not arbitrary, nor a denial of justice. As a result the author's claim on this point was found to be inadmissible.

In relation to the author's inability to appear in person at the special leave application, the Committee found that the author's claim was inadmissible, and was substantiated on the merits. The Committee noted its previous jurisprudence that the disposition of an appeal does not necessarily require an oral hearing. However the High Court in this case did conduct an oral hearing at which a solicitor representing the New South Wales Director of Public Prosecutions was present and who made arguments to the Court. The Committee observed that at the hearing of the special leave application Kirby J questioned the solicitor for the Director of Public Prosecutions, asking whether a telecommunications link could be established to the prison in which the author was detained so that she would have the same right as other citizens to appear. The Committee concluded that there was a violation by Australia of Article 14(1) of the Covenant:

> [W]hen a defendant is not given an opportunity equal to that of the State party in the adjudication of a hearing bearing on the determination of a criminal charge, the principles of fairness and equality are engaged. It is for the State party to show that any procedural inequality was based on reasonable and objective grounds, not entailing actual disadvantage or other unfairness to the author. In the present case, the State party has offered no reason, nor does the file reveal any plausible reason, why it would be permissible to have counsel for the State take part in the hearing in the absence of the unrepresented defendant, or why an unrepresented defendant in detention should be treated more unfavourably that [an] unrepresented defendant *not* in detention who can participate in the proceedings.[3]

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2 [1980] ATS 23.

3 UN Doc CCPR/C/90/D/1347/2005 (2007), [7.4].

Right to liberty and security of person — whether lengthy immigration detention arbitrary; whether detention subject to proper review by court

Saed Shams and others v Australia
Communications Nos 1255,1256,1259,1260,1266,1268,1270,1288/2004
UN Doc CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004 (2007)
Human Rights Committee
Views adopted on 20 July 2007

The authors of the communications were Iranian nationals, all of whom arrived in Australia from Iran by boat. Upon arrival, the authors were classified as 'unlawful non-citizens' and placed in immigration detention until they received visas to remain in Australia. The authors remained in immigration detention for at least three, and in some cases over four, years before receiving either a permanent humanitarian visa or a temporary protection visa.

Before the Committee the authors alleged that the circumstances and conditions of their detention gave rise to violations of Articles 7, 9(1), 9(4) and 10(1) of the 1966 International Covenant on Civil and Political Rights.[4] In relation to Article 7 (inhuman and degrading treatment) and Article 10(1) (right of persons deprived of their liberty to be treated with humanity), the authors alleged that their rights under this Article were violated both by the mandatory nature of their detention and by the conditions in which they were held while in detention (including alleged assault, incommunicado detention, denial of medication and denial of regular exercise). On the issue of whether mandatory detention in itself could violate Articles 7 and 10(1), the Committee found that the authors had failed to substantiate their claims that this was the case, and that this part of the communications was therefore inadmissible. On the issue of whether the conditions in which the authors were held violated the relevant Articles, the Committee found, with respect to all of the authors except for Mr Shams, that the claims were inadmissible for failure to exhaust domestic remedies. In relation to Mr Shams, the Committee found that the claims were not sufficiently substantiated and were therefore inadmissible. The Committee did, however, note that it did not agree with Australia's view that incommunicado detention occurs only where the outside world is ignorant of a detainee's whereabouts. In doing so, the Committee effectively indicated that if a detainee cannot contact those outside the detention facility, this would be sufficient to amount to incommunicado detention, even if the detainee's whereabouts were known to those 'outside'.

The Committee considered the authors' claims under Articles 9(1) and 9(4) to be admissible. Considering the merits of these claims, the Committee agreed with the authors' argument that the prolonged duration of their detention rendered such detention 'arbitrary', in violation of Article 9(1). The Committee reaffirmed its views in *A v Australia*[5] that detention should not extend beyond the period for

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4 [1980] ATS 23.
5 UN Doc CCPR/C/59/D/560/1993 (1997).

which the state can provide appropriate justification, and noted that, in this case, Australia had not given reasons which would justify the authors' detention for such prolonged periods of time. In particular, Australia had not demonstrated that 'there were no less invasive means' of dealing with the authors' situation.[6] Accordingly, the Committee found that Article 9(1) had been violated.

The Committee also agreed with the authors' argument that, contrary to Article 9(4), they were deprived of the opportunity to contest their detention before a court with the power to order their release if the detention was unlawful. Taking account of the fact that the migration legislation rendered detention mandatory in the case of 'unlawful non-citizens', and the fact that the High Court in the *Al-Kateb Case*[7] had upheld the constitutionality of the mandatory detention legislation, it was clear that the courts could not review the decision to place the authors in detention, once it was established that the authors were 'unlawful non-citizens'. The Committee again reaffirmed its views in *A v Australia*,[8] noting that any court review of lawfulness under Article 9(4) is not limited to lawfulness under domestic law. Rather, the court must also be empowered to order release if the detention is incompatible with Article 9(1) or any other provision of the Covenant. As a result, in the authors' cases, the Committee considered that 'the inability of the judiciary to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4'.[9]

Right to a fair hearing — whether delay in review of case by Refugee Review Tribunal constitutes violation

Olga Dranichnikov v Australia
Communication No 1291/2004
UN Doc CCPR/C/88/D/1291/2004 (2007)
Human Rights Committee
Views adopted on 20 October 2006

The author of the communication was a Russian national, who, together with her husband and daughter, arrived in Australia in January 1997 on a tourist visa. In April 1997, the author's husband lodged an application for a protection visa on behalf of the family with the Department of Immigration and Multicultural Affairs (DIMA). The application was based on the fact that the author and her husband had been actively involved in the defence of human rights in Russia, as a result of which they had received threats. The application was rejected by DIMA, and, on review, by the Refugee Review Tribunal (RRT). However, an appeal to the High Court was successful and in May 2003 the matter was remitted to the RRT for reconsideration.

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6 UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 (2007), [7.2].
7 *Al-Kateb v Godwin* (2004) 219 CLR 5.
8 UN Doc CCPR/C/59/D/560/1993 (1997).
9 UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 (2007), [7.3].

In August 2000, following the initial rejection of her husband's application by the RRT, the author sought to lodge an application for a protection visa in her own right. DIMA refused to register the application, which it considered invalid on the basis that the author's previous claim for a protection visa (under her husband's application) had been finally determined. On appeal, the Full Federal Court found that the author should be entitled to make her own application, and DIMA advised that her application would be considered valid as of the date of the Full Federal Court judgment, provided that the author paid the required fee of $30. The author did not pay the fee, as she preferred to await the final determination of her husband's application, which had by then been remitted to the RRT for reconsideration. The RRT subsequently found in favour of the husband's application, and as a result, in February 2005, the author, her husband and their daughter were granted a protection visa.

Before the Committee the author alleged violations of Articles 2, 6, 7, 9, 14, 23 and 26 of the 1966 International Covenant on Civil and Political Rights.[10] Her claims fall into several categories. First, the author claimed that she was the victim of discrimination on the basis of gender and marital status, in violation of Article 26 of the Covenant, because she was not allowed to make an application for a protection visa in her own right. The Committee found that this claim was inadmissible on the basis of non-exhaustion of domestic remedies: following the Full Federal Court decision in her favour, the author's application for a protection visa would have been accepted if she had paid the $30 fee, but she chose not to, thereby failing to avail herself of the remedy that was offered to her. The author also claimed that she was the victim of discrimination because amendments introduced to the Migration Act 1958 (Cth) in 2001, which preclude applications for a protection visa by individuals who have previously applied for protection as a family member of an applicant, would have had the effect of preventing her from making an application for a protection visa in her own right. In relation to this claim, the Committee noted that these provisions of the Migration Act were not, in fact, applied to the author. This claim therefore amounted to an *actio popularis* and was accordingly inadmissible.

Secondly, the author claimed that Australia's policy in relation to spouses and dependants who are included in a family member's protection visa application 'encourages the breaking up of families',[11] in violation of Article 23 of the Covenant (rights to family life). In relation to this matter, the Committee noted that 'the facts presented by the author do not show how she is a victim in this respect', and accordingly found that this claim was inadmissible as an *actio popularis*.[12]

Thirdly, the author alleged violations of Articles 6, 7 and 9 of the Covenant (rights to life, freedom from torture, and liberty and security) on the basis that if her husband's application for a protection visa had been refused, she would have been deported to Russia, where her rights under these Articles were at risk of being

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10 [1980] ATS 23.
11 UN Doc CCPR/C/88/D/1291/2004 (2007), [6.4].
12 Ibid.

violated. The Committee found this part of the communication inadmissible, as the claims were moot in light of the fact that the author had been granted a protection visa.

Finally, the author alleged that the procedures before the RRT violated the right to a fair hearing under Article 14(1) of the Covenant. She made this argument on three bases. The first was that the RRT was not independent of the Minister of Immigration. The second was that a member of the RRT had shown 'arrogance'[13] towards the family (and was, presumably, therefore perceived to be biased). The third was that there had been undue delay in the hearing of the author's husband's application by the RRT. In relation to the first two of these bases, the Committee found that the author's claims were 'not substantiated for the purposes of admissibility'.[14] The Committee therefore found those parts of the communication inadmissible. In relation to the allegation of undue delay, the Committee found the claim admissible and proceeded to consider the merits. The Committee indicated that while it was 'concerned about the delay in the determination of the author's husband's refugee claim',[15] it did not consider that this amounted to a violation of Article 14(1) of the Covenant, as:

> this delay was caused by the totality of the proceedings – including the Federal Court (22 months) and the High Court (27 months) – and not just by the Refugee Review Tribunal (14 months for the first review, 15 months for the second). The Committee concludes that the information before it does not show that the author has been the victim of a lack of independence of the Tribunal in this respect.[16]

Trade Law

World Trade Organization — TRQ utilization — Agreement on Agriculture Article 4.2 — national treatment

Turkey — Measures Affecting the Importation of Rice, WTO Doc WT/DS334/R (2007) (Report of the Panel).

The *Turkey – Measures Affecting the Importation of Rice* case, brought by the United States, concerned various restrictions imposed by Turkey on the importation of rice. Turkey's Schedule of Concessions on Goods provided for a 45 per cent import tariff on rice (the 'out of quota tariff rate') and also provided for separate bindings at lower rates for three categories of rice (the Tariff Rate Quotas). The United States complaint related to alleged restrictions on imports within the TRQs and also to alleged restrictions on imports of out of TRQ rice.

In its Request for Consultations dated 2 November 2005, the United States challenged various restrictions allegedly maintained by Turkey on the importation

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13 Ibid [6.7].
14 Ibid.
15 Ibid [7.2].
16 Ibid.

of rice, including the following measures: (i) Turkey's alleged denial of, or failure to grant, licences ('Certificates of Control') to import rice outside of the TRQs; (ii) Turkey's alleged requirement that importers were required to purchase specified quantities of domestic rice, in order to be allowed to import specific quantities of rice within the TRQs ('the domestic purchase requirement'); (iii) Turkey's administration of tariff-rate quotas for reduced tariff duty imports of rice; (iv) the combined effect of the measures identified under (i) and (ii); and (v) Turkey's administration of its import regime for rice, more generally.[17]

Based on these allegations, the United States submitted that Turkey was in violation of the following provisions of WTO covered agreements:

- The alleged denial or failure to grant Certificates of Control to import rice outside the TRQs constituted a breach of Article XI(1) of the GATT 1994, as it was an unlawful prohibition or restriction on imports; a breach of Article 4(2) of the Agreement on Agriculture, because it was a measure that was required to have been converted into ordinary customs duties; a breach of Article 1(4) of the Import Licensing Agreement and Articles X(1) and X(2) of the GATT 1994, because Turkey had not published the measure; and a breach of Articles 3.5 of the Import Licensing Agreement, because Turkey had not specified a timeframe for handling import licence applications, and no reasons were provided for a rejection.
- The alleged requirement that importers were required to purchase specified quantities of domestic rice was a breach of Article III(4) of the GATT 1994, because Turkey was according imported rice less favourable treatment than that accorded to domestic rice; a breach of Article XI(1) of the GATT 1994, as it was an unlawful prohibition or restriction on imports; and a breach of Article 2(1) of the TRIMS Agreement and Article 4(2) of the Agreement on Agriculture, because it was a measure of the kind that was required to have been converted into ordinary customs duties.
- Turkey's administration of tariff-rate quotas for reduced tariff duty imports of rice was inconsistent with Article 3.5 of the Import Licensing Agreement, because Turkey was administering the tariff-rate quotas in such a way that discouraged the full utilisation of quotas.
- Turkey's domestic purchase requirement, in conjunction with its alleged failure to provide Certificates of Control for import of rice outside the TRQs, was a breach of Article XI(1) of the GATT 1994, because it was an unlawful restriction on imports; a breach of Article 4(2) of the Agreement on Agriculture, as it was is a measure of the kind that was required to have been converted into ordinary customs duties; and a breach of Article 1.6

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17 *Turkey — Measures Affecting the Importation of Rice*, WTO Doc WT/DS334/1, (2005) 1 (Request for Consultations by the United States); see also *Turkey — Measures Affecting the Importation of Rice*, WTO Doc WT/DS334/R (2007) [3.1] (Report of the Panel).

of the Import Licensing Agreement, on the basis that applicants had to approach more than one administrative body in connection with their applications.

- Turkey's administration of its import regime was inconsistent with Articles 3(5), 5(1), 5(2), 5(3) and 5(4) of the Import Licensing Agreement, because Turkey had failed to provide information on, and failed to notify, its import licensing regime.[18]

The United States requested consultations with Turkey on 2 November 2005, and on 16 November 2005, Australia and Thailand requested to join the consultations. Those consultations were not successful in resolving the dispute, and on 6 February 2006, the United States requested the establishment of a panel. The Dispute Settlement Body established a panel on 17 March 2006, and Australia (along with a number of other members of the WTO), reserved its third-party rights. On 31 July 2006, the Director-General of the WTO composed the panel. On 21 September 2007, the panel report was circulated to Members.

In its Report, the panel concluded that the Turkish government had made a decision to 'deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota'[19] and that such decision constituted a 'quantitative import restriction', as well as a practice of 'discretionary import licensing', within the meaning of Article 4(2) of the Agreement on Agriculture.[20] Even if the Turkish measures were not to be considered as a 'quantitative import restriction' or as a practice of 'discretionary import licensing', the panel considered that they at least qualified as 'a measure that had sufficient likeness or resemblance, so as to be similar to quantitative import restrictions or to practices of discretionary import licensing.'[21] Accordingly, the panel concluded that this conduct was 'a measure of the kind which have been required to be converted into ordinary customs duties and [was] therefore inconsistent with Article 4(2) of the Agreement on Agriculture.'[22]

As for the other claims made in relation to Turkey's alleged denial or failure to grant Certificates of Control to import rice at or below the bound MFN rate of duty, the panel considered that, for reasons of judicial economy, it was not necessary to

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18 *Turkey — Measures Affecting the Importation of Rice*, WTO Doc WT/DS334/R (2007) [3.2] (Report of the Panel).

19 Ibid [7.89]–[7.101].

20 Ibid [7.87] (on the United States' establishment of a presumption), [7.96–7.97] (on Turkey's failure to provide relevant evidence), [7.103] (on Turkey's failure to request any special procedures for the handling of confidential information), [7.107] (on Turkey's failure to rebut the presumption), [7.121] (the Panel's conclusion that Turkey had denied or failed to grant Certificates of Control to import rice outside of the tariff rate quota, and its characterisation of this as a 'quantitative import restriction', contrary to Art 4(2)), and [7.134] (the Panels' conclusion that Turkey's conduct could also be considered as a practice of 'discretionary import licensing', contrary to Art 4(2)).

21 Ibid [7.136].

22 Ibid [7.138].

address the claim relating to Article XI(1) of the GATT 1994;[23] and also that it was not necessary to consider the manner in which the Turkish measures had been administered for the purposes of Articles X(1) and X(2) of the GATT 1994, and Article 1.4 of the Import Licensing Agreement.[24]

The panel's finding that the decision to deny or fail to grant the certificates constituted a quantitative restriction and breached Article 4(2) is less remarkable than the fact that the panel was able to reach a finding of fact that the Turkish government had made a decision to deny, or fail to grant the certificates. The Turkish government denied that it had made any such decision and maintained that it was continuing to grant Certificates of Control needed for imports systematically and regularly. While there was evidence of one part of the Turkish government making a recommendation to the Minister to suspend the grant of Certificates of Control for the importation of rice, there was no conclusive evidence of the Turkish government making the decision that had been recommended to it. The panel relied on a range of evidence to establish a prima facie case and, in the absence of rebuttal from Turkey, accepted that the Turkish government had made a decision to suspend the grant of the Certificates.

With regard to Turkey's domestic purchase requirement, the panel considered that this measure 'modified the conditions of competition in the Turkish market to the detriment of imported rice.'[25] It concluded that through this measure, Turkey 'accorded less favourable treatment to imported rice than that according to like domestic rice', in a manner inconsistent with Article III(4) of the GATT 1994.[26] In accordance with the principle of judicial economy, the panel refrained from making any findings on the claims made under Article 4.2 of the Agreement on Agriculture, and Article XI(1) of the GATT 1994.[27] Nor did the panel find it necessary to address the claim made under the TRIMS Agreement.[28]

As for the United States' other claims, namely (i) that the combination of the domestic purchase requirement and the denial or failure to grant licences to import rice was a breach of Article XI(1) of the GATT 1994, Article 4(2) of the Agreement on Agriculture, and Article 1.6 of the Import Licensing Agreement; (ii) that Turkey was in violation of its obligations under Articles 3(5), 5(1), 5(2), 5(3) and 5(4) of the Import Licensing Agreement; and (iii) that Turkey was in violation of its obligations under Article 3(5) of the Import Licensing Agreement, for discouraging the full use of quotas, the panel refrained from making any findings on these measures, as it was not required to do so in order to dispose of the dispute.[29]

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23 Ibid [7.142].
24 Ibid [7.147]–[7.148].
25 Ibid [7.234].
26 Ibid [7.241].
27 Ibid [7.255].
28 Ibid [7.259].
29 With regard to the United States' claim regarding the combination of the domestic purchase requirement and the denial or failure to grant licences to import rice, the

In light of its findings that Turkey was in breach of its obligations under Article 4(2) of the Agreement on Agriculture due to Turkey's denial of or failure to grant Certificates of Control to import rice outside of the tariff rate quota, the panel recommended that the Dispute Settlement Body request Turkey to bring its measures into conformity with its obligations under the WTO agreements.[30] As for its finding that the 'domestic purchase requirement' was a violation of Article III(4) of the GATT 1994, the panel observed that the measure in question was no longer in force, and it therefore refrained from making a recommendation in this regard.[31]

The Dispute Settlement Body adopted the panel's report on 22 October 2007. On 10 October 2008, Turkey notified WTO member States that it had already complied with the recommendation of the Dispute Settlement Body.[32]

While the panel decided to assess the legality of the suspension of the Certificates of Control under Article 4.2 of the Agreement on Agriculture rather than GATT Article XI:1, it seems impossible that the panel could have found anything other than that the suspension of the Certificates also constituted a 'restriction' in violation of GATT Article XI:1. Article 4.2 of the Agreement on Agriculture came into existence at the end of the Uruguay Round as part of a move back to a stricter application of the prohibition of quantitative restrictions under GATT Article XI:1. The significance of that prohibition on quantitative restrictions was stressed in another case against Turkey when the panel said:

> The prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT is that tariffs are the preferred and acceptable form of protection.[33]

A persistent practical problem with making the Article XI:1 prohibition work effectively has been the application of the prohibition to situations in which there is no law, regulation or express decision of a government to restrict imports. A

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panel observed that it had 'already found that the two measures challenged in conjunction by the United States … [were] each individually inconsistent with Turkey's obligations under covered agreements', and concluded that, in the light of those findings, 'and under the guidance of the principle of judicial economy', it did not need 'to reach a separate conclusion on [those] measures considered jointly': ibid [7.281]. As for the claim concerning Turkey's failure to provide information on, and failure to notify, its import licensing regime, the panel exercised judicial economy in refraining from examining whether Turkey's conduct also amounted to a violation of the relevant provisions: ibid [7.287]–[7.292]. And as for the United States' claim that Turkey was administering the tariff-rate quotas in such a way that discouraged the full utilisation of quotas, the panel also exercised judicial economy in not addressing the issue whether Turkey was in breach of its obligations under Art 3.5 of the Import Licensing Agreement: ibid [7.299]–[7.301].

30 Ibid [8.1]–[8.2].

31 Ibid [8.3]–[8.4].

32 *Turkey — Measures Affecting the Importation of Rice*, WTO Doc WT/DS334/14 (2008) (Status Report by Turkey).

33 *Turkey – Restrictions on Imports of Clothing and Textiles*, WTO Doc WT/DS34/R [9.63] (Report of the Panel), adopted 19 November 1999.

similar situation was faced in the *Korea Beef* case in 2001 (in which Australia was complainant). In that case, the panel was prepared, in the absence of better evidence, to assess the market conditions in which a state trading entity with exclusive import rights was operating in order to find that the entity must have imposed a restriction on imports in violation of GATT Article XI:1.[34] The evidence was considerably stronger in the present case. Despite the ruling having been made under Article 4.2 of the Agreement on Agriculture rather than GATT Article XI:1, the panel decision in *Turkey Rice* makes another step toward achieving an effective prohibition on quantitative restrictions, an important contribution to the integrity of the WTO system.

World Trade Organization — GATT Article XX(b) — Interpretation of necessity — arbitrary or unjustifable discrimination — disguised restriction

Brazil – Measures Affecting Imports of Retreaded Tyres, WTO Doc WT/DS332/R (2007) (Report of the Panel)
Report of the Appellate Body, WTO Doc WT/DS332/AB/R (2007)
Adopted by the Dispute Settlement Body on 17 December 2007

Australia was a third party in this case which made a significant contribution to the WTO jurisprudence on GATT Article XX.

Facts

Brazil had imposed a prohibition on imports of retreaded tyres and on internal marketing of imported retreaded tyres. Brazil conceded that the measure was in violation of GATT Article XI:1 and III:4, but argued that the measure was justified under Article XX(b), the exception for measures 'necessary to protect human, animal or plant life or health'.[35] Brazil argued that the measure was part of a package of measures adopted for health reasons. It argued that used tyres contribute to two risks to human health: they are a breeding ground for mosquitoes which spread various tropical diseases; and if they catch fire, they emit fumes that are dangerous. The Brazilian government indicated that it was seeking to reduce these risks to the maximum possible extent. To do so, the Brazilian government had also imposed a ban on the importation of used tyres and had imposed regulations requiring manufacturers and importers of new tyres to collect and dispose of a minimum number of waste tyres for every new tyre sold.[36]

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34 *Korea — Measures Affecting Imports of Fresh Chilled and Frozen Beef,* WTO Doc WT/DS161, 169/R, adopted with the Report of the Appellate Body, WTO Doc WT/DS161, 169/AB/R, on 10 January 2001. See the panel's conclusion at [845(g)] reflecting the reasoning at [721]–[767]. This finding was not appealed.

35 *Brazil — Measures Affecting Imports of Retreaded Tyres,* WTO Doc WT/DS332/R (Report of the Panel) ('*Brazil Tyres*') and Report of the Appellate Body, WTO Doc WT/DS332/AB/R, adopted 17 December 2007. See Panel Report [7.2] and Appellate Body Report [3].

36 *Brazil Tyres*, Appellate Body Report, [154].

Brazil argued that the prohibition on imports of retreaded tyres would cause a reduction in the total number of used tyres in Brazil because it would result in some tyres already in Brazil being retreaded in Brazil to have a second life as a retreaded tyre. Brazil further argued that the reduction in the total number of used tyres in Brazil would help to reduce the two health risks that could arise from the presence of waste tyres.

Two other aspects of the Brazilian law were important. First, that the Brazilian law prohibiting imports of retreaded tyres exempted imports of retreaded tyres from countries that were, with Brazil, part of the Mercosur customs union; and second, that despite the Brazilian law prohibiting the import of used tyres, the Brazilian courts had granted injunctions permitting imports of used tyres.

The panel considered whether the measures were within the exception in GATT Article XX(b), first whether the measures were within paragraph (b) and then whether they conformed to the requirements of the chapeau.

The complainant, the European Communities ('EC'), argued that the measure was not necessary for protection of human health for three reasons. First, Brazil had not demonstrated that a reduction in waste tyres leads to a reduction in the risks to human life and health.[37] Second, Brazil had not demonstrated that the prohibition on the import of retreaded tyres decreases the number of waste tyres in Brazil.[38] Third, there were reasonably available alternative methods for reducing the number of waste types in Brazil including (i) measures to encourage the retreading of tyres in Brazil and measures to restrict the import of used tyres into Brazil; and (ii) measures to improve the management of waste tyres including controlled landfilling, and material recycling.[39]

The EC also argued that Brazil was not applying the measure in a way that conformed to the requirements of the chapeau of Article XX. On that point, the EC's two main arguments were based on (i) the prohibition in Brazilian law prohibiting imports of retreaded tyres not applying to imports of retreaded tyres from countries in the Mercosur customs union; and (ii) the exceptions being allowed by Brazilian courts to the Brazilian prohibition on imports of used tyres.

The Question of Necessity

Both the panel and the Appellate Body utilized the complex approach originating from the *Korea Beef* case of making the determination of necessity on the basis of a process of weighing and balancing various factors.[40] The Appellate Body described the test as requiring a weighing and balancing of relevant factors in order to make a preliminary finding of necessity (such factors being, in particular, the

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37 *Brazil Tyres*, Panel Report, [7.144].
38 Ibid [7.124].
39 Ibid [7.159]–[7.161].
40 Ibid [7.104] and the accompanying footnote which refers to the *Korea Beef Case,* WTO Docs WT/DS161,169/R and WT/DS161, 169/AB/R, adopted 10 January 2001, and other previous cases dealing with the test for necessity. See also *Brazil Tyres,* Appellate Body Report, [178] ff.

importance of the interests or values at stake, the trade restrictiveness of the measures, and the extent of the measure's contribution to the achievement of the measure's objective). The test then required that a comparison be undertaken of the measure with possible alternative measures 'which may be less restrictive while providing an equivalent contribution to the achievement of the objective'.[41]

By way of comment, it may be that the Appellate Body has stated the test too formally. It seems reasonable that a finding of necessity requires a comparison between the measure and alternative measures in the light of the trade restrictiveness of the measure and the contribution of the measure to the realization of the objective. However the text of Article XX(b) provides no basis for the formal division of the test into two stages. Nor does it provide a basis for the panel to inquire into the relative importance of the interests or values furthered.

The panel found that the measure was 'necessary' within the meaning of Article XX(b). In its Report, the Appellate Body dismissed the appeals against that finding. Two important aspects of the Appellate Body's review of the finding of necessity relate to the findings that: (i) the measure contributed to the achievement of the objective; and (ii) a less restrictive alternative measures for achieving the objective was not reasonably available.

Concerning the first of these aspects, the panel had found that the import ban on retreaded tyres was capable of producing or 'apt to produce a material contribution to the achievement of the objective of reducing exposure to the risks arising from the accumulation of waste tyres',[42] but the panel had not made any finding as to the extent to which the ban on imported retreaded tyres would reduce the total number of waste tyres. The panel had also found that a reduction in the total number of waste tyres in Brazil would contribute to a reduction of the risks to human, animal and plant life and health arising from waste tyres[43] but the panel not did make any determination of the extent to which a reduction in the total number of waste tyres in Brazil would contribute to a reduction in the risks to human, animal and plant life and health.

The basis for the panel's finding that the measure contributed to achievement of the objective was limited to observations that it was possible that used tyres sourced from within Brazil could be retreaded in Brazil and that, therefore, the import ban would cause some substitution away from purchases of imports of foreign retreaded tyres toward the retreading in Brazil of used tyres. The panel saw it as obvious that there would necessarily have to be an overall reduction of waste tyres in Brazil. On appeal, the EC argued that the panel had 'to determine the extent to which the Import Ban makes a contribution to the achievement of its stated objective' and had erred by not quantifying the reduction of waste tyres resulting from the import ban.[44] The EC argued that it was not enough for the

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41 *Brazil Tyres*, Appellate Body Report, [178].
42 Ibid [152].
43 *Brazil Tyres*, Panel Report [7.146]-[7.148] cited in *Brazil Tyres,* Appellate Body Report, [149].
44 *Brazil Tyres*, Appellate Body Report, [137].

panel to find that the measure could make a contribution to the objective of reducing the health risks; the panel had to find whether the measure was making an actual contribution to the reduction of health risks.[45]

The Appellate Body responded to the EC's arguments by making two points:

- That with some complex health or environmental problems, it may be necessary to use a combination of measures, and that it may be difficult to isolate out the contribution of a single measure to the objective from the contribution of other measures; and
- That it may not be possible to know in advance what the contribution of a measure to realizing an objective (and the Appellate Body gives the example of measures adopted in order to attenuate global warming and climate change) will be but that in such cases a panel can rely on evidence or data pertaining to the past or present that establish that the measure makes a material contribution to the protection of public health or environmental measures pursued.[46]

The Appellate Body considered the Brazilian import ban in the context of the other measures which Brazil had adopted, including the ban on imports of used tyres and the regulations requiring manufacturers and importers of new tyres to dispose of waste tyres. The Appellate Body concluded that with the import ban in place, fewer waste tyres would be generated and that the import ban was likely to make a 'material contribution to the achievement of its objective of reducing the exposure to risks arising from the accumulation of waste tyres.'[47]

As for the EC's second ground of appeal, on the issue of whether the Brazilian measures were 'necessary' given possible alternative measures, the Appellate Body confirmed the approach taken in *United States – Gambling* that for an alternative measure to constitute a reasonably available less restrictive alternative, it is not only necessary that the alternative measure be reasonably available but also that the alternative measures would achieve the same 'desired level of protection with respect to the objective pursued'.[48] Therefore, when a complaining member suggests an alternative measure, the responding member can establish that the measure is necessary by showing either that each suggested alternative measure does not achieve the same objective, or is not reasonably available.

With respect to each of the alternative measures suggested by the EC, the panel had found either that the alternative measure was already in place, that it would not achieve Brazil's level of protection with respect to the desired objective or that it was not reasonably available.[49] On appeal, the EC challenged the panel's finding that a better enforcement of the import ban on used tyres and better enforcement of

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45 Ibid [11].
46 Ibid [151].
47 Ibid [154]–[155].
48 *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R [308], adopted on 20 April 2005, quoted in the *Brazil Tyres*, Appellate Body Report, [156], [170].
49 *Brazil Tyres,* Panel Report, [7.212].

the existing disposal schemes were not reasonably available alternatives because they would not on their own achieve the desired objective. The Appellate Body agreed with the panel, saying that these policies operated as part of a comprehensive policy in combination with the import ban on retreaded tyres, and that removing the import ban on retreaded tyres from the comprehensive policy would weaken the overall effect on reducing the volume of waste tyres.[50] The Appellate Body also agreed with the panel's finding that the various waste management measures suggested by the EC could not achieve Brazil's desired level of protection with respect to the desired objective, that is, 'reducing the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres' to the maximum extent possible", because the waste management measures themselves posed certain risks to human life and health.[51] The Appellate Body also found that the panel did not err in finding that materials recycling was not a reasonably available alternative because of the cost and required technology.[52]

The Chapeau: Arbitrary or Unjustified Discrimination

Turning to the issue of whether the conditions in the chapeau of Article XX were satisfied, the panel had found that two elements of the application of the measure resulted in discrimination. These were, first, the fact that the prohibition on imports of retreaded tyres did not apply to imports from Mercosur countries resulted in discrimination between Mercosur countries and other WTO members;[53] and second, the fact that the ban on imports of new tyres was being applied in a way that permitted certain volumes of used tyres to be imported resulted in discrimination in favour of tyres retreaded in Brazil using imported tyre casings to the detriment of imported retreaded tyres.[54] These findings as to the existence of discrimination were not appealed.

The panel moved on to consider whether the discrimination was 'arbitrary or unjustifiable' and whether the discrimination was 'discrimination between countries where the same conditions prevail'.

(i) Non Application of Prohibition to Mercosur countries

A tribunal established under the dispute settlement system of the Mercosur customs union had found that Brazil's import ban on retreaded tyres from other Mercosur countries violated Brazil's obligations under the treaties constituting the customs union. Following that decision, Brazil had exempted Mercosur countries from the prohibition on imports of retreaded tyres.[55] The EC argued that this exemption constituted both 'arbitrary discrimination' and 'unjustified discrimination' inconsistent with the chapeau of Article XX.

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50 *Brazil Tyres,* Appellate Body Report, [172].
51 Ibid [174] incorporating quotations from *Brazil Tyres,* Panel Report, [7.102], [7.108].
52 Ibid [175].
53 *Brazil Tyres*, Panel Report [7.235].
54 Ibid [7.243].
55 Ibid [7.265].

In assessing the question of arbitrary discrimination, the panel took the view that discrimination would be 'arbitrary' if it was 'capricious or random' and found that this discrimination in favour of imports from Mercosur countries was not 'capricious or random' because it arose from an order of a tribunal under the Mercosur treaty.[56]

As for the issue of 'unjustified discrimination', the panel indicated that the discrimination between imports from Mercosur countries and other imports would be unjustifiable discrimination if it significantly undermined the ability of the prohibition on imports of retreaded tyres to achieve the desired objective (the reduction of accumulation of waste tyres to the greatest extent possible).[57] The panel found that imports from Mercosur countries under the exemption were not significant, and accordingly, that the exemption had not significantly undermined the ability of the prohibition to achieve its objective. Therefore, the exemption had not resulted in unjustifiable discrimination.[58]

On appeal, the Appellate Body reversed all of the panel's findings on this issue. It rejected the proposition that discrimination cannot be arbitrary if it is not 'random or capricious'.[59] It also rejected the proposition that discrimination cannot be unjustifiable if the quantitative effects of the discrimination do not significantly undermine the achievement of the objective of the measure at issue.[60] The Appellate Body held that the focus must be on the rationale for the discrimination and that the effects of the discrimination are relevant only for determining the rationale for the discrimination.

The Appellate Body indicated that the test for determining the existence of arbitrary or unjustifiable discrimination is whether the rationale for the discrimination is rationally connected to the objective falling within a paragraph of Article XX.[61] Applying this test to the present case, the Appellate Body found that the rationale for the exception for imports from Mercosur countries, being the desire to comply with the Mercosur tribunal, was not rationally related to the objective of reducing the health risks arising from accumulation of waste tyres and, therefore, the measure was applied in a way that constituted arbitrary or unjustifiable discrimination. This was the case even though the exception was not capricious, and even though it did not significantly undermine the achievement of the objective.[62]

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56 Ibid [7.272]–[7.281].
57 Ibid [7.272]–[7.288].
58 Ibid [7.289].
59 Brazil Tyres, Appellate Body Report, [232].
60 Ibid [229]–[230].
61 Ibid [224]–[230].
62 Ibid [224]–[234].

(ii) Application of Prohibition Such that Certain Volumes of Tyre Imports Were Permitted

It seems obvious that if domestic operators were to import used tyres and to use the casings from those used tyres to make retreaded tyres, then the prohibition on retreaded tyres might not lead to any reduction in the total quantity of waste tyres in Brazil.

Brazil's prohibition on importation of retreaded tyres was indeed accompanied by a prohibition on imports of used tyres. However, there had been a number of challenges to the ban on imports of used tyres resulting in Brazilian courts granting injunctions allowing the import of used tyres.[63] The EC argued that allowing import of used tyres for retreading in Brazil but not allowing imports of retreaded tyres into Brazil amounted to arbitrary and unjustifiable discrimination.

The panel took the same approach it had taken to determining whether the Mercosur exception constituted arbitrary or unjustifiable discrimination. The panel found that the discrimination between imported retreaded tyres and local retreaded tyres made from imported used tyres which arose from the court injunctions was not 'arbitrary discrimination' because it was not the result of 'capricious' or 'random' action.[64] However, the panel did find that the discrimination was 'unjustifiable', because the effect was to allow imports of used tyres to an extent that significantly undermined the achievement of the objective of the prohibition on imports of retreaded tyres, that is, the reduction in accumulation of waste tyres to the greatest extent possible.[65] Having found the existence of unjustifiable discrimination, the panel next considered whether it was unjustifiable discrimination 'between countries where the same conditions prevail' and concluded that it was. In reaching that conclusion, the panel noted that the same environmental effects arose from a retreaded tyre made in Brazil as from an imported retreaded tyre and that Brazil had not identified any pertinent difference between the conditions prevailing in Brazil and in other WTO Member countries.[66]

In reviewing the finding with respect to the imports of used tyres under court injunctions, the Appellate Body indicated again that the test for determining the existence of arbitrary or unjustifiable discrimination is whether the rationale for the discrimination is rationally connected to the objective falling within a paragraph of Article XX.[67] It found that the rationale for the discrimination being the desire to comply with court injunctions was not related at all to the objective of the prohibition on imports of retreaded tyres, that is, the reduction to the greatest extent possible of risks arising from the accumulation of waste tyres. The Appellate Body reversed the panel's findings that the imports under court injunctions had not resulted in arbitrary or unjustifiable discrimination to the extent that they had not resulted in effects which undermined the achievement of the objective and to the

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63 *Brazil Tyres*, Panel Report, [7.292].
64 *Brazil Tyres*, Panel Report, [7.294].
65 Ibid [7.295]–[7.306].
66 Ibid [7.309].
67 *Brazil Tyres*, Appellate Body Report, [246].

extent that the imports were not the result of capricious or random action. Accordingly, the Appellate Body found that as a result of the absence of a rational connection between the rationale for permitting the imports of used tyres under the injunctions and the objective of reducing the health risk, the discrimination was arbitrary and unjustifiable (even to the extent it was not capricious and even to the extent it did not have the effect of undermining the achievement of the measure's objective).[68]

The Chapeau: Disguised Restriction on International trade?

In assessing the question of whether the measures were applied in a manner which constituted a disguised restriction on international trade, the panel indicated that a measure would be a 'disguised restriction on international trade' where it would be an abuse of the exception in Article XX.[69] The panel said that this is not just an issue of transparency; a restriction need not be formally concealed in order to constitute a disguised restriction.[70] The panel distinguished between a general argument that the measure was adopted to protect the Brazilian industry and narrower arguments that the two factors mentioned above, the admission of imports of retreaded tyres from Brazil and the admission of imports of used tyres, resulted in the measure being applied in a manner that constituted a disguised restriction on international trade.

The EC's broader argument was that the measure was adopted with the intention of protecting the Brazilian industry rather than for the purpose of protecting public health. The panel indicated that a government's intention in adopting a measure is relevant to determining whether the measure is a disguised restriction on international trade and that examination of the design of the measure and of statements by the government may both be useful indications of the intention of the legislator.[71] After examining those factors, the panel concluded that it was 'not persuaded that [those factors] conclusively demonstrate that Brazil did not adopt the prohibition on importation of retreaded tyres with the intention of protecting the public health or the environment.'[72] This finding was not appealed.

The panel proceeded to examine the more specific arguments and applied the same test as it applied to the determination of whether the application of the measure resulted in unjustified discrimination (namely, whether the application of the measure significantly undermined the measure from achieving its objective). This was essentially an assessment of the extent to which the relevant aspect of the application of the measure resulted in a significant volume of imports. The panel found that the exception for imports of retreaded tyres from Mercosur countries did not result in a significant volume of imports of retreaded tyres from Mercosur countries. The panel found that:

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68 Ibid [246]–[247].
69 *Brazil Tyres*, Panel Report, [7.320].
70 Ibid [7.318]–[7.319], [7.326].
71 Ibid [7.330]–[7.332].
72 Ibid [7.341].

> 'the Mercosur exemption, to the extent that it results only in volumes of imports that do not significantly undermine the ability of the general import ban on retreaded tyres to fulfil its intended objective, does not result in the measure being applied in a manner that constitutes a disguised restriction on international trade.'[73]

The panel found that the fact that injunctions were being granted to permit imports of used tyres was resulting in significant imports which significantly undermined the achievement of the objective of the prohibition on retreaded tyres.[74] Therefore, the occurrence of the imports of used tyres did mean that the prohibition on retreaded tyres was being applied in a manner which constituted a disguised restriction on international trade. In contrast, the exemption for imports of retreaded tyres from Mercosur countries had not been shown to constitute a disguised restriction on international trade.

Both of these findings of the panel were reversed by the Appellate Body.[75]

The reason given by the Appellate Body for reversing those findings is brief. The Appellate Body says that it should reject the conditioning of a finding of a disguised restriction on whether the relevant aspect of the application results in an undermining of the achievement of the objective of the restriction, for the same reason that it rejected the conditioning of a finding of arbitrary or unjustified discrimination on whether the relevant aspect of the application results in an undermining of the achievement of the objective of the restriction.[76] This finding is open to question. It may be the case that the existence of a rational relationship between the discrimination and the objective is an appropriate touchstone for determining if discrimination is 'arbitrary' or 'unjustifiable'. It does not necessarily follow, however, that the existence of a rational relationship between the protective effect of a measure and the asserted objective of the measure is an appropriate way to determine whether a measure is applied in a manner that constitutes disguised protection. In this case, the Appellate Body has made some useful steps toward clarifying the interpretation of Article XX, particularly the guidance on arbitrary and unjustified discrimination, but it would seem that the task is not yet finished.

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73 Ibid [7.354].
74 Ibid [7.347]–[7.349].
75 *Brazil Tyres*, Appellate Body Report, [239], [251].
76 Ibid [239] in relation to the Mercosur exemption and at [251] in relation to the imports of used tyres under the court injunctions.

World Trade Organization — scope of coverage of Agreement on Agriculture Article 4.2 — meaning of variable levy and minimum import price — the task of DSU Article 21.5 panels

Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina, WTO Doc WT/DS207/RW & Corr.1 (circulated 2006) (Report of the Panel) and Report of the Appellate Body, WTO Doc WT/DS207/AB/RW(circulated 2007) adopted together by the Dispute Settlement Body on 22 May 2007**.**

Australia was a third party in a complaint by Argentina against Chile's price band system ('PBS') for determining customs duties on imports of certain agricultural products including wheat and wheat flour, a number of vegetable oils and sugar products.[77] The panel report as modified by the report of the Appellate Body in the original complaint was adopted by the Dispute Settlement Body on 23 October 2002. Before the end of 2003, Chile made amendments to its PBS to attempt to bring the measure into conformity with the Dispute Settlement Body ruling. However, Argentina was not satisfied with the new version of the price band system and, on 29 December 2005, Argentina requested that the question of whether Chile's application of the new PBS to wheat and wheat flour complied with the Dispute Settlement Body ruling be referred back to the original panel under DSU Article 21.5.[78] The outcome of the Article 21.5 proceedings is that the panel held, in findings upheld by the Appellate Body, that the revised version of Chile's PBS was, like the version adjudicated upon in the original proceedings, in violation of Article 4.2 of the Agreement on Agriculture.

Chile's PBS consisted of the legislative rules which determined the customs duty to be applied. Under Article 12 of law 18.525 of 1986, the duty was made up of two components:

(1) A fixed ad valorem duty which in 2002 was 7 per cent;[79]

(2) A price band specific duty which would depend on the comparison between a reference import price which was determined weekly and the upper and lower thresholds of a price band which was determined annually so that:

   a. If the reference price were within the price band, then the price band specific duty would be zero;

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77 For a description of the products covered by Chile's measures, see *Chile — Price Band and Safeguard Measures Relating to Certain Agricultural Products*, WTO Doc WT/DS207/AB/R (Report of the Appellate Body) ('*Chile Price Band*') [12] and accompanying fn 20.

78 The sequence of steps in the litigation is set out in *Chile — Price Band System and Safeguard Measures Related to Certain Agricultural Products — Recourse to Article 21.5 of the DSU by Argentina*, WTO Doc WT/DS207/AB/RW (Report of the Appellate Body) ('*Chile Price Band Recourse to Article 21.5'*) [2.7]– [2.11].

79 *Chile Price Band*, Appellate Body Report, [14]. Note that by the time of the Art 21.5 proceedings this fixed duty was at the rate of six per cent: see *Chile Price Band Recourse to Article 21.5,* WTO Doc WT/DS207/RW (Report of the Panel) [2.17].

b. If the reference price were less than the lower threshold of the price band, then the price band specific duty would be equal to the difference between the lower threshold of the price band and the reference price ; and

c. If the reference price were above the higher threshold of the price band, then there would be a price band rebate equal to the amount by which the reference price exceeded the reference price but in no case higher than the fixed ad valorem duty under (1) above. [80]

The reference price was closely related to the current world price and the upper and lower thresholds of the price band were determined by reference to a moving average world price over a 5 year period so the specific duty would prevent fluctuations away from the 5 year average price from being transmitted into prices inside Chile. In general, for any given shipment, the price band duty was equal to the difference between the lower threshold price of the annually determined price band and the reference price applicable to the week in which the particular goods had been shipped.[81]

Argentina's Schedule of Concessions contained a binding on all of the products at issue in the original dispute at an ad valorem rate of 31.5 per cent.[82] Part of Argentina's concern arose from the fact that in some years, the total duty levied by Chile had exceeded the bound rate. Therefore, Argentina argued that Chile's law violated GATT Article II:1(b). Argentina also argued that the PBS was in violation of Article 4.2 of the Agreement on Agriculture which provides:

> 4.2 Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties [see footnote below], except as otherwise provided for in Article 5 and Annex 5.
>
> The footnote provides:
>
> These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture specific provisions of GATT 1994 or of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

At the second panel hearing in the original complaint, that is, after the request for establishment of the panel, composition of the panel, submission of written submissions and the first hearing, Chile advised that it had amended the law so that the total duty could not exceed the bound rate.[83] On that basis, Chile's law appeared to no longer be in violation of the first sentence of GATT Article II:1(b). Nevertheless, the original panel still found a breach of Article II:1(b) but upon the

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80 *Chile Price Band*, Appellate Body Report, [29].
81 Ibid [27].
82 Ibid [14] and *Chile Price Band,* Panel Report, [7.5].
83 *Chile Price Band*, Panel Report, [7.3]–[7.5].

basis of the second sentence. The panel found that the PBS was a fee or charge other than an ordinary customs duty beyond the limit set by the second sentence of Article II:1(b). The original panel also found that the price band system was in violation of Article 4.2 of the Agreement on Agriculture upon the basis that the PBS was a measure of a kind that was required to be tariffed within the meaning of Article 4.2. The Appellate Body confirmed the finding of a violation of Article 4.2. However, it found that the panel's finding regarding Article II:1(b), second sentence was outside the terms of reference and found it unnecessary to rule on consistency with Article II:1(b).[84] Therefore, it was the finding of inconsistency with Article 4.2 with which Chile had to comply.

In order to explain the decision in the Recourse to Article 21.5 decisions, it is necessary to observe the elements of inconsistency with Article 4.2 that were found by the original rulings. The violation of Article 4.2 arose from a finding by the panel, as modified by the Appellate Body, that the price band measure was both similar to a 'variable import levy' and similar to a 'minimum import price' measure ('MIP') and, therefore, within the class of measures prohibited by Article 4.2. There had been a difference of approach between the panel and the Appellate Body with the original panel assessing whether the price band system had the fundamental characteristics of a variable levy or MIP and the Appellate Body saying that the focus should be on an empirical assessment of any elements of likeness or resemblance sufficient to find that they are 'similar' rather than upon the existence of fundamental characteristics.[85] The elements of similarity relied on in the original Appellate Body decision were:

- That the variability in the PBS was inherent in the measure itself and that the measures ensured automatic and continuous variability in the duty;[86]
- That the PBS impeded the transmission of world market prices to domestic prices (even thought the lower threshold was based on a world price rather than a domestic target price);[87]
- That apart from the general nature of the scheme impeding the transmission of world market prices to domestic prices, specific aspects of the calculation of the price band duty further contributed to impeding the transmission of world prices.[88]
- That a number of elements of non-transparency and unpredictability in the operation of the PBS had a tendency to further limit the volume of imports by making it difficult for an exporter to predict the level of customs duty that would apply.[89]

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84 *Chile Price Band*, Appellate Body Report, [288].
85 Ibid [226].
86 Ibid [233], quoted in *Chile Price Band Recourse to Article 21.5,* Panel Report, [7.27].
87 *Chile Price Band*, Appellate Body Report, [246].
88 Ibid [250] and *Chile Price Band Recourse to Article 21.5,* Panel Report, [7.40(c)-(d)].
89 See the relevant parts of the *Chile Price Band*, Appellate Body Report, [234] cited in *Chile Price Band Recourse to Article 21.5,* Panel Report ([234] cited at [7.27]; [246] cited in [7.37]; [249] cited in [7.40(a)-(b)]).

The panel found that even with the ceiling set to keep the duty below the bound rate, the PBS was still similar to a variable levy and similar to a MIP and, therefore, within the class of measures prohibited by Article 4.2. The Appellate Body dismissed an appeal that the panel had failed to take proper account of the fact that Chile's duty was limited by the cap, saying that it found 'nothing in Article 4.2 to suggest that a measure prohibited by that provision would be rendered consistent with it if applied with a cap.'[90]

This finding is critical to the outcome of the entire proceedings. The first panel failed to observe that all of the measures described in Article 4.2 enabled a Member to limit the volume of imports to any level they desired. The Appellate Body report not only failed to observe this fundamental characteristic but actually stated that the task at hand was not a matter of identifying fundamental characteristics. In effect, the panel and Appellate Body concluded that a measure which did not enable a Member to limit the volume of imports as desired was similar to other measures described in Article 4.2, all of which do give a Member a capacity to limit the volume of imports as desired. In adopting an interpretation of Article 4.2 which overlooks the fundamental difference between Chile's price band measure and the measures described in Article 4.2 and focuses on other elements of similarity, the initial rulings made it virtually impossible for Chile to bring its measure into conformity with Article 4.2 without simply removing it and reverting to either always charging the full bound duty or alternatively using a completely non-transparent approach to announcing an applied rate from time to time within the bound rate. It seems that the approach adopted in the original proceedings made it an almost foregone conclusion that there was not going to be anything that Chile could do to alter the PBS to bring it into conformity with the rulings.

To attempt to comply with the Dispute Settlement Body ruling, Chile amended the PBS in a number of significant ways.

First, whereas the old scheme resulted in the setting of a new duty for goods shipped in each week, under the new PBS, the duty was determined six times per year for two month periods

Chile argued that, in light of this amendment, the price band duty was no longer automatic because the change to the duty occurred through a new administrative decree and was no longer continuous because it occurred only six times a year. The panel rejected this saying that the variability was still inherent in the measure itself and that it was still continuously variable. [91] Chile appealed that the panel could not have found that the variability had met the elements of automaticity and continuity which the original Appellate Body had regarded as part of the definition of a 'variable levy'. The Appellate Body rejected an appeal on this issue saying that the panel had needed only to find that the variability was inherent in the measures. It did not need to find that the variability was automatic and continuous but only needed to consider automaticity and continuity as part of the consideration of

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90 *Chile Price Band,* Appellate Body Report, [254].
91 *Chile Price Band Recourse to Article 21.5*, Panel Report, [7.57]–[7.61].

whether the variability was inherent in the measures itself. While the new PBS did change the duty less frequently than the old one, the panel had taken this into account and had not made any error of law.[92]

Second, the new PBS was still calculated by reference to a gap between the lower threshold and the Reference Price but, whereas under the old PBS, the lower threshold was a five year moving average of world prices, under the new PBS, the lower threshold was a fixed price for each year with the price for each successive year being reduced slightly.

Chile argued that, by introducing this modification of the PBS, it had abolished the characteristics that were found in the original Proceedings to render the PBS like a variable levy or like a MIP. The scheme no longer involved a calculation which excluded the top and bottom 25 percentiles of the five year prices (a methodology which the original panel and Appellate Body had found to make the calculation of the duty unpredictable and non-transparent). The panel found that Chile had not demonstrated that the exclusion of this element had made the PBS any more predictable or transparent.[93] The Appellate Body said that the panel had not made any error in finding that the new measure lacked transparency and predictability even though the Appellate Body acknowledged that the amended method of setting the reference price was more transparent and more predictable.[94] Further, the panel found that the fixing of the thresholds to preset prices meant that the measure still had the characteristic of impeding the transmission of world prices into the Chilean domestic market and the Appellate Body agreed.[95]

Third, as with the old PBS, the Reference Price was based on current prices in relevant markets but in the new PBS, the legislation specifically identified which markets would be used to determine the Reference price.

Chile argued that, in making this amendment, it had eliminated that element of non-transparency and unpredictability which derived from the uncertainty as to which markets would be used to determine the Reference price. This did not assuage the panel's concerns. It found that regardless of the improvement in transparency, the mere existence of the Reference Price caused a lack of transparency and predictability.[96] The Appellate Body confirmed that even though the new method of determining the Reference Price was more transparent, the measure still lacked transparency and predictability and this impeded the transmission of international prices.[97]

Fourth, whereas under the old PBS the comparison between the threshold price and the Reference Price was a comparison between a Reference Price ascertained by reference to Free on Board ('fob') prices and a lower threshold price ascertained

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92 *Chile Price Band Recourse to Article 21.5*, Appellate Body Report, [207]–[212].
93 *Chile Price Band Recourse to Article 21.5*, Panel Report, [7.79].
94 *Chile Price Band Recourse to Article 21.5*, Appellate Body Report, [221].
95 *Chile Price Band Recourse to Article 21.5*, Panel Report, [7.79] and *Chile Price Band Recourse to Article 21.5*, Appellate Body Report, [223].
96 *Chile Price Band Recourse to Article 21.5,* Panel Report, [7.72].
97 *Chile Price Band Recourse to Article 21.5,* Appellate Body Report, [221].

by reference to a 5 year moving average of international fob prices that were adjusted to Cost Insurance Freight ('cif') prices by adding an amount for import costs, under the new PBS, the comparison was between two fob prices with the reference price being directly based on fob prices and the lower threshold price being a fixed amount calculated by deducting import costs from cif prices.

Therefore, Chile argued that the scheme no longer involved a comparison between an fob price (for the reference price) and an cif price (for the threshold) which could inflate the size of the price band duty. The panel found that the new system had the same element of lack of transparency and predictability and impeded the transmission of international prices in the same way as the old system. The panel's argument was that the old system incorporated the non-transparent element of adding import costs in order to arrive at a cif equivalent threshold price whereas the new system involved a non-transparent system of deducting import costs in order to arrive at an fob equivalent threshold price.[98]

In assessing whether the new PBS was similar to a Minimum Import Price, the panel found that it was possible but improbable that with the PBS scheme the import price could fall below the lower threshold of the price band.[99] Therefore, the panel found that the New PBS was still similar to a MIP and therefore prohibited by Article 4.2, and the Appellate Body agreed.[100]

The Appellate Body decision also sheds some light on the way that a panel should approach its task in cases involving recourse to Article 21.5 and, in particular, as to the burden of proof which the panel should apply. The panel assessed whether the amendments to the PBS made the measure consistent with Article 4.2. On appeal, Chile argued that the panel had failed to place the burden of proof on Argentina to establish that the measure was inconsistent with Article 4.2. The Appellate Body confirmed that in this Article 21. 5 proceeding, the burden of proof was on Argentina to show that the revised PBS was inconsistent with Article 4.2 but the Appellate Body found that the panel had not committed an error. The panel had simply done its analysis 'in the light of the interpretations of the requirements of Article 4.2 in the original proceedings.' The Appellate Body was satisfied that the panel had properly considered whether the measure was consistent with Article 4.2.[101]

In the Article 21.5 proceedings determining whether the new PBS was in conformity with Article 4.2, the panel did not consider the argument made in the original proceedings that the measure was not a measure covered by Article 4.2 because it was expressly limited so that it could not exceed the bound duty. It appears that Chile did not remake the argument that the operation of the PBS within a bound tariff was not like a variable levy or like a minimum import regulation because of the existence of the ceiling. This issue is not dealt with by the Appellate Body either. It is difficult to discern from the face of the reports why the

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98 *Chile Price Band Recourse to Article 21.5*, Panel Report, [7.74]–[7.77].
99 Ibid [7.87]–[7.92].
100 *Chile Price Band Recourse to Article 21.5*, Appellate Body Report, [202].
101 Ibid [142].

issue was not raised again in the Article 21. 5 proceedings. The parties and the panel may have taken the view that the issue was res judicata, it having been decided in the original proceedings. The closest that the reports come to stating this is a statement by the Appellate Body that 'we are mindful that adopted panel and Appellate Body reports must be accepted by the parties to a dispute.' [102] Nevertheless, the Appellate Body was careful to point out that the panels task in the Article 21.5 review was to make a new determination of whether the new measure was consistent with Article 4.2 rather than merely to determine whether Chile had removed the elements of inconsistency identified in the original decision.[103] The Appellate Body also took some care to elaborate that the original Appellate Body decision had been based upon a comprehensive consideration of all of the characteristics of the PBs and was not a simple assessment of whether certain characteristics were present.[104] Taken to its logical conclusion, that view obliged the panel in the Article 21.5 review to consider all of the characteristics of the revised PBS measure including the fact that it was limited by the ceiling imposed by the tariff binding and obliged the Appellate Body to find that the panel had made an error of law in neglecting to do so.

The result of this litigation is curious. Chile could comply with the Dispute Settlement Body ruling by:

- abolishing the PBS scheme and charging the full 31.5 per cent all of the time; or
- charging the full rate of 31.5 per cent sometimes and then, from time to time, announcing a completely non-transparent change of the applied rate to a level below the bound rate.

Alternatively, Chile could decide not to conform to the panel and Appellate Body recommendation. In that event, Argentina could apply for authorisation to suspend obligations up to the level of the nullification or impairment of the tariff binding. This would involve a comparison between the level of trade that would flow in a counterfactual situation of applying the full 31.5 per cent duty all the time and the level of trade that would flow in the factual situation of the PBS being retained. It appears that the level of trade in the factual would exceed the level in the counterfactual so the permissible level of retaliation would be zero.

The decision also leaves WTO Members in a situation in which they are unable to know the extent to which they can change their tariff rate from time to time within a bound ceiling. If they implement any kind of reasonably predictable method for changing a bound duty inside the binding so as to flatten out fluctuations, then on the basis of the reasoning in this dispute, they would be implementing a measure which is inherently variable and likely to be regarded as similar to a variable levy, despite the fact that they are not exceeding their tariff

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102 Ibid [236].
103 Ibid [138]–[140].
104 Ibid [180]–[188] referring to the original Appellate Body Report in *Chile Price Band* at [261] and to the original Panel Report in *Chile Price Band* at [2.50].

binding. To the extent that Members would prefer to provide domestic suppliers and exporters some degree of predictability as to when they will charge the full bound duty and when they will not, this decision makes it rational for them to seek an amendment to the Agreement on Agriculture to clarify that it is legal for them to increase duties in response to falling world prices. This decision may have contributed to the demands in the Doha Round negotiation for a flexible special Safeguard Mechanism for developing countries.[105]

Chile could well have misgivings about this decision. The circumstances prior to the Uruguay Round were that the GATT could not achieve liberalization of agricultural trade through reciprocal tariff reductions because of the proliferation of quantitative restrictions under a variety of official and unofficial exceptions to the prohibition on quantitative restrictions in Article XI:1. Dealing with these 'exceptions' had been difficult. Although there had been one case, the *EC- MIPS* case, finding that a minimum import price scheme breached Article XI:1, there had never been such a ruling on a variable levy.[106] Voluntary export restraints were widely regarded as a 'grey area measures' in relation to which there were various arguments as to whether they were prohibited or fell within the cracks between the rules.[107] A series of disputes under Article XI:2 had eliminated some of the restrictions purportedly justified under this exception but there remained some contention over whether Article XI:2 could be wholly or partly removed from the GATT and there was no agreement on which part should remain if part of it were to be repealed.[108] The common consequence of all of these exceptions was that they allowed contracting parties to control the quantity of imports. The tariffication process removed all of the quantitative restrictions allegedly justified under all of these official and unofficial exceptions. Negotiators must have understood that Article XI:1 could be safely relied upon to ensure that some of the tariffed measures could not be reintroduced but that it could not be safely relied upon to ensure that all of the kinds of measures tariffed could not be reintroduced. Therefore, they added Article 4.2 to cover whatever gap was left by Article XI:1. By doing so, they could ensure that Members would not be able to apply measures

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105 Relevant here is the proposal in G33 Proposal on Special Safeguard Mechanism for Developing Countries, WTO Doc JOB(06)/64 (2006), also at <http://www.agtradepolicy.org/output/resource/G33_revised_proposal_SSM_23Mar06.pdf> at 9 September 2007. See the analysis of this proposal in B G Williams, 'The Falconer Draft Text for Doha Round WTO Negotiations on Agriculture — A "Ha'porth of Tar" to save the Vessel from Sinking or just a Dab of Paint on an Irreparably Broken Hull' (2007) 30 *University of New South Wales Law Journal* 368.

106 *European Economic Community — Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed fruits and Vegetables,* GATT BISD, 25th Supp, 68, (Report of the Panel), adopted on 18 October 1978, (L/4687).

107 See, eg, E Petersmann, 'Grey Area Trade Policy and the Rule of Law' (1988) 22 *Journal of World Trade* 23.

108 The last of the series of cases was the *EEC — Restrictions on Imports of Dessert Apples*, GATT BISD 36th Supp, 135, (Complaint by Chile, Report of the Panel), adopted 22 June 1989, (L/6491).

which enabled the Member to control the volume of imports. The Members would still be able to apply their negotiated tariff up to the level of the binding and the Members would tolerate that the application of the bound tariff would have the effect of directly raising the price and indirectly limiting the volume of imports up to a point but Members would not be able to use any measure that enabled them to absolutely control the level of imports.

In extending Article 4.2 to cover the operation of a variable levy within the limits of a bound tariff, the panels and Appellate Body reports in this series of litigation would appear to have cast the net of Article 4.2 beyond its object and purpose. In doing so, they have arrived at Dispute Settlement Body recommendations which are troubling because Chile can comply by adopting a more protectionist measure and also because the level of permissible retaliation against non-compliance would be zero. And they are arguably detrimental to the negotiation of further liberalization because they remove from Members the capacity to adjust duties within a binding so as to flatten out price fluctuations, thereby providing an incentive for them to propose a step back from liberalization in the Doha Round in the form of a separate special safeguard mechanism to expressly give the right to adjust duties in response to price fluctuations.