Semesterabschlussklausur im Wirtschaftsvölkerrecht: New Tyres for Mesalien

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Die folgende Fallkonstellation basiert in weiten Teilen auf der Entscheidung Brazil — Retreaded Tyres (2007)[1] des Streitschlichtungsmechanismus der Welthandelsorganisation (WTO – World Trade Organization). Der Entscheidung liegt eine klassische Fallkonstellation einer Verletzung und möglichen Rechtfertigung zugrunde. Im Vergleich zur Originalentscheidung wurde der Fall zu Prüfungszwecken modifiziert und vereinfacht.

Der Fall wurde als Abschlussklausur des Moduls „International Economic Law" an der Leuphana Universität Lüneburg gestellt. Dieses Modul ist zentraler Bestandteil von zwei englischsprachigen Masterstudiengängen[2], die sich gleichermaßen an in- und ausländische Studierende richten. Da die beiden Studiengänge vollständig in englischer Sprache angeboten werden, wurde auch die Klausur auf Englisch gestellt. Immer öfter finden sich jedoch auch in den Vorlesungsverzeichnissen sonst deutschsprachiger rechtswissenschaftlicher Studiengänge Lehrveranstaltungen und so auch Prüfungen in englischer Sprache. Dies gilt besonders für das Völkerrecht. Daher erscheint es sinnvoll, die Klausur auch hier auf Englisch zu veröffentlichen. Studierende sollten sich von technischen englischen Begriffen im Sachverhalt nicht abschrecken lassen. Wichtig für die Falllösung ist allein, die Zielrichtung der beschriebenen Maßnahmen zu verstehen.

Die Bearbeitungszeit für den Fall (mit einigen weiteren Wissensfragen, die hier nicht abgedruckt sind) betrug insgesamt 120 Minuten. Der Schwierigkeitsgrad dürfte einer Schwerpunktbereichsklausur entsprechen. Dabei geht der hier veröffentlichte Lösungsvorschlag über das hinaus, was von den Studierenden erwartet wurde, um die Maximalpunktzahl zu erreichen. Insbesondere brauchten die Studierenden die geprüften Vorschriften nicht grundsätzlich zu erläutern. Dies geschieht hier nur aus didaktischen Gründen.

Facts of the Case

Masalien (M) is a member of the World Trade Organization (WTO). M has had problems with waste tyres for a long time. As a reaction, M prohibited the import of simple used tyres a few years ago. However, the prohibition led to legal uncertainties in M on how to deal with so-called retreaded tyres. Retreaded tyres are produced by reconditioning used tyres by replacing the worn tread.

In order to clarify the matter, the Parliament in M in its new legislation finally also bans the import as well as the sale of all retreaded tyres that are manufactured outside of M. Retreaded tyres that are

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[1] Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 2.1-12; alle Berichte und Zusammenfassungen der WTO, die diesen Fall betreffen, sind abrufbar unter https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm (24.6.2025).

[2] Bei den beiden Studiengängen handelt es sich um „International Economic Law (LL.M.)" und „International Law of Global Security, Peace and Development (LL.M.)".

manufactured in M, however, are not affected by the new legislation in any way. Accordingly, the sale of retreaded tyres that are manufactured in M is still permitted.

When proposing the new legislation, M's government explained that the reason for the new legislation is the shorter lifespan of retreaded tyres compared to new tyres. This is true: Retreaded tyres cannot be retreaded again; thus, while retreaded tyres are not waste, they do become waste sooner than new tyres. Therefore, M's government argues that the ban is necessary to effectively prevent the unnecessary generation of waste tyres.

Waste tyres may lead to health threats, especially in tropical zones. When discarded and stockpiled, tyres create an ideal breeding ground for mosquitoes that carry dangerous and deadly diseases (malaria, dengue fever, etc.). For that reason, the amount of discarded tyres – so the reasoning of the government – must be kept to an absolute minimum in M.

Another member of the WTO, the Eutanian Union (EtU), is the largest exporter of retreaded tyres to M. When learning about the new legislation in M, the EtU is sceptical whether this legislation complies with WTO law. The EtU argues that there are no differences between retreaded tyres and new tyres from a WTO law perspective. Therefore, the EtU is considering requesting consultations under the Dispute Settlement Understanding of the WTO (DSU).

In order to assess whether dispute resolution might be successful, the EtU poses the following question to you as legal adviser.

Task

Is M's new legislation, as described above, in conformity with the General Agreement on Tariffs and Trade (GATT)?

Proposed solution

Notice: For the analysis, it is crucial to distinguish the two different measures under M's new legislation, namely the import ban and the sales ban. Therefore, the following text separately analyses the import ban and the sales ban. Following another structure in an exam is acceptable as well. However, it is important to make clear that the two measures have different legal implications under WTO law.

M's new legislation is in conformity with the GATT if the GATT is applicable and if M's new legislation does not violate any obligations arising from the GATT.

I. Applicability of the GATT

All members of the WTO are legally bound by the WTO's covered multilateral agreements.[3] M is a member of the WTO. In consequence, the GATT is applicable to M's legislation.

Notice: The question of the case only refers to the GATT. If instead the question referred to compliance with WTO law in general, it would have been necessary to also analyse whether any other of the thirteen agreements on trade in goods listed in Annex I of the Marrakesh Agreements were applicable as well. However, it should also be noted that in Brazil – Retreaded Tyres (2007), neither the Panel nor the Appellate Body applied any other agreements to the bans besides the GATT.
Nevertheless, the bans in question could be seen as covered by the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). According to its Art. 1.1 sentence 1, the SPS Agreement "applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade". Annex A.1 of the SPS Agreement, which is referred to by Art. 1.2 and 3 SPS Agreement, defines what a sanitary or phytosanitary measure is. The definition focuses on the purpose of the measure in question.[4] According to Annex A.1(a) of the SPS Agreement, a sanitary or phytosanitary measure is "[a]ny measure applied […] to protect animal or plant life or health within the territory of the Member from risks arising from the […] spread of pests [or] diseases […]". Furthermore, the definition of sanitary and phytosanitary measures encompasses "[a]ny measure applied

[3] In this regard, Art. II:2 of the Marrakesh Agreement states that "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members". Annex I of the Marrakesh Agreement inter alia includes the "General Agreement on Tariffs and Trade 1994" (GATT 1994). In turn, the GATT 1994 provides in its Art. 1 that "[t]he General Agreement on Tariffs and Trade 1994 ('GATT 1994') shall consist of […] the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947 […]" (GATT 1947). Accordingly, all members of the WTO are legally bound by the GATT 1947. In the following text the acronym "GATT" refers to the GATT 1947.

[4] For reference, see *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 1023.

[…] to protect human life or health within the territory of the Member from risks arising from diseases carried by animals […]" (Annex A.1(c) of the SPS Agreement).
Brazil stated that it banned retreaded tyres to avoid creating breeding grounds for mosquitoes that carry dangerous and deadly diseases.[5] That means that the ultimate purpose of the bans is to protect, inter alia, animals against the risks arising from the spread of diseases, namely against infections with dangerous and deadly diseases through mosquito bites. This purpose falls within the scope of Annex A.1(a) of the SPS Agreement. Furthermore, the bans aim at protecting human life and health against diseases carried by animals, namely mosquitoes. This purpose, in turn, is covered by Annex A.1(c) of the SPS Agreement.
Finally, the last element of the definition sets forth that sanitary and phytosanitary measures "include all relevant laws […] including, inter alia, end product criteria […]" (second sentence of Annex A.1 of the SPS Agreement). The bans in question are provided by law. They can also be seen as stating an end product criterion, namely for tyres not to be retreaded. Even if the bans would not be seen as stating an end product criterion, the bans could still fall within the definition, as the second sentence of Annex A.1 of the SPS Agreement only provides for a non-exhaustive, illustrative list.[6]
In conclusion, Brazil's bans can be seen as sanitary or phytosanitary measures as conceived by the SPS Agreement. Though, a counterargument would be that the protection against mosquito-borne diseases was only an indirect purpose of the bans.[7] The direct purpose, in contrast, was to avoid unnecessary waste. However, if one still assumes that the bans are sanitary or phytosanitary measures, they directly affect trade as required by Art. 1.1 sentence 1 of the SPS Agreement. Consequently, they would fall within the scope of the SPS Agreement.
The Agreement on Technical Barriers to Trade (TBT Agreement), in turn, does not apply to measures covered by the SPS Agreement (Art. 1.5 TBT Agreement).[8] In any case, the Appellate Body in general tends to see bans of products as being outside the scope of the TBT Agreement. The TBT Agreement applies to technical regulations (cf. Art. 2.1 TBT Agreement). Technical regulations are inter alia defined as documents which lay down product characteristics (Art. 1.1 of Annex I of the TBT Agreement). In EC -Asbestos (2001)[9] and in EC – Seal Products (2014)[10], the Appellate Body argued that a ban of a certain product per se does not lay down product characteristics. However, this can also be viewed differently: In Brazil Retreaded Tyres (2007), the bans could also be seen as laying down a product characteristic for imported tyres. The characteristic is that tyres must not be retreaded.
In general, if another WTO multilateral agreement on goods applies besides the GATT, the relationship of the two agreements depends on whether there is a conflict between these two agreements.

[5] See inter alia, Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 4.25.

[6] For reference, see *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, pp. 1024–1026.

[7] In Australia – Apples (2010), the Appellate Body required "a clear and objective relationship" and an "appropriate nexus" between the measure in question and the purposes listed in Annex A.1(a)-(d) of the SPS Agreement; see Australia — Apples, Report of the Appellate Body, WT/DS367/AB/R, 29 November 2010, mn. 176.

[8] If a measure has different purposes and the purposes are not fully covered by the SPS Agreement, the TBT Agreement can still be applied, though, see EC — Approval and Marketing of Biotech Products, Report of the Panel, WT/DS291/R, 29 September 2006, mn. 7.165.

[9] In EC – Asbestos (2001), the Appellate Body explained about an import prohibition on asbestos fibres that "[t]his prohibition on these fibres does not, in itself, prescribe or impose any 'characteristics' on asbestos fibres, but simply bans them in their natural state. Accordingly, if this measure consisted only of a prohibition on asbestos fibres, it might not constitute a 'technical regulation'", see EC – Asbestos, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001, mn. 71; however, the vague wording ("might not") indicates that the Appellate Body was not fully convinced that a ban cannot fall under the TBT Agreement.

[10] EC – Seal Products, WT/DS400/AB/R, 22 May 2014, mn. 5.58.

If the GATT and another multilateral agreement on goods contradict each other, the other agreement prevails. This is stated by the Interpretative Note to Annex 1A of the GATT. If there is no conflict between the two agreements, the panels and the Appellate Body apply both agreements in conjunction.[11]

II. Compliance of the Import Ban with the GATT

1. Violation of Art. XI:1 GATT

M's new legislation is not in compliance with Art. XI:1 GATT as it sets forth an import ban.

The purpose of Art. XI:1 GATT is to guarantee market access.[12] The provision is broad in scope[13] and reflects the general "tariffs-only approach" of WTO law.[14] WTO law prefers tariffs because tariffs do not provide for absolute limits.[15] Also, in contrast to most non-tariff barriers to trade, tariffs can be gradually lowered over time to liberalize international trade.[16]

Art. XI:1 GATT inter alia proscribes any "prohibitions" on importations.[17] That means that the WTO members must generally allow importations.[18] M's new legislation forbids to import retreaded tyres. This import prohibition, accordingly, is not in compliance with Art. XI:1 GATT.[19]

2. Violation of Art. III:4 GATT

The import ban of M's new legislation does not fall within the scope of Art. III:4 GATT.

Art. III GATT enshrines the national treatment principle. While paragraph 2 applies to fiscal measures ("internal taxes and other internal charges"), paragraph 4 applies to non-fiscal measures ("laws, regulations and requirements").[20] Accordingly, paragraph 2 is the more specific provision.

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[11] In Argentina Footwear (2000), the Appellate Body explicitly confirmed the Panel's approach to apply Art. XIX GATT and the Agreement on Safeguards in conjunction; the Appellate Body explained that "the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement", see Argentina – Footwear, Report of the Appellate Body, WT/DS121/AB/R, 14 December 1999, mn. 81; for the relationship between the multilateral agreements on trade in goods in detail, see inter alia *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, pp. 49–51, 976–978, 1027–1029.

[12] Cf. *Matsushita/Schoenbaum/Mavroidis/Hahn*, The World Trade Organization, Law, Practice, and Policy, 3rd ed. 2015, p. 240.

[13] See in detail *Van den Bossche/Prévost*, Essential of WTO Law, 2nd ed. 2021, p. 93.

[14] *Wolfrum*, in: Wolfrum/Stoll/Hestermeyer, WTO – Trade in Goods, 2011, mn. 3.

[15] Ibid.

[16] See in detail *Van den Bossche/Prévost*, Essential of WTO Law, 2 ed. 2021, pp. 84–86.

[17] See on the prohibited quantitative restrictions under Art. XI:1 GATT in detail ibid., pp. 92–95.

[18] In Brazil – Retreaded Tyres (2007), the Panel aptly concluded "Article XI:1 prohibits both 'prohibitions' and 'restrictions' with respect to the importation of any goods from other members. There is no ambiguity as to what 'prohibitions' on importation means: Members shall not forbid the importation of any product of any other Member into their markets.", see Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.11.

[19] In Brazil – Retreaded Tyres (2007), Brazil made imports of retreaded tyres subject to licenses and provided that retreaded tyres from outside the MERCOSUR area could not receive such licence; the Panel saw this regulation as an import prohibition in violation of Art. XI:1 GATT, see Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.8, 7.13-15; on the MERCOSUR exemption, see below.

[20] *Van den Bossche/Prévost*, Essential of WTO Law, 2 ed. 2021, p. 67.

If a domestic measure requires a payment, paragraph 2 applies.[21] In all other cases, paragraph 4 applies.[22] As the import ban in M does not require a payment, it is a regulation that in principle would fall under paragraph 4.

However, according to Art. III:4 GATT, the provision only applies to "internal" measures: The treatment must affect the "internal sale […]" of already "imported" products. This is further specified by Ad Art. III (Annex I): A regulation is also an internal measure in that sense if it "applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation".

The import ban of M's new legislation, however, is not an internal measure in that sense. It is solely a border measure and leaves those tyres unaffected that are already imported. Also, M's new legislation only applies to products originating from other states. Domestic products, in contrast, are not affected. Accordingly, the import ban is neither an internal measure under the wording of Art. III:4 GATT nor under Ad. Art. III of the Annex of the GATT.

3. Justification under Art. XX(b) GATT

The import ban might be justified under Art. XX(b) GATT.

Justification under the general exception clause, Art. XX GATT,[23] requires a two-tier test. As a first tier, for each of the grounds for justification under paragraph (a) to (j), the measure in question needs to be designed to fulfil the purpose of the respective ground that is invoked (design requirement). In addition, for those of the paragraphs that start with "necessary to" (like paragraph (b)), the measure in question also needs to fulfil the necessity test as part of the first tier.

The second tier of the test under Art. XX(a) GATT requires all measures to also fulfil the conditions of the chapeau of Art. XX GATT. In the dispute settlement practice of the WTO, the chapeau of Art. XX GATT is a highly relevant provision.[24] The chapeau focuses rather on the way a measure is applied and less on the measure itself.[25]

In the case at hand, for Art. XX(b) GATT, the analysis must at first consider whether the measure is designed "to protect human, animal or plant life or health". In addition, the measure must pass the necessity test. Finally, the measure must be applied in a way to fulfil the requirements of the chapeau.

a) Design Requirement

Firstly, the measure in question, namely the import ban, must be designed "to protect human, animal or plant life or health" (Art. XX(b) GATT). In order to determine the policy objective of a measure, the panels and the Appellate Body usually consider the statement of the respondent in the dispute.

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[21] *Matsushita/Schoenbaum/Mavroidis/Hahn*, The World Trade Organization, Law, Practice, and Policy, 3rd ed. 2015, p. 195.

[22] On the structure of Art. III GATT see ibid., pp. 192–193.

[23] For an overview of all exception clauses under WTO law, see *Van den Bossche/Prévost*, Essentials of WTO Law, 2nd ed. 2021, pp. 106–107.

[24] *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, pp. 603, 646.

[25] Ibid., p. 647; explicitly also stated by the Appellate Body inter alia in US – Gasoline, Report of the Appellate Body, WT/DS2/AB/R, 29 April 1996, p. 22 (this report does not provide for marginal numbers).

In addition, they analyse all other evidence available on the structure and operation of the measure in question. This includes documents from the legislative procedure.[26]

The government of M asserts that one of the purposes of the measure is to prevent dangerous and deadly diseases from spreading. Considering the structure and operation of the import ban, there is no indication to the contrary. Accordingly, the new legislation can be assumed to be designed to protect the life and health of humans and animals from dangerous and deadly diseases.

Notice: In Brazil – Retreaded Tyres (2007), the Panel assessed whether the stockpiling and transporting of waste tyres increased the risk of mosquito-borne diseases. Then, the Panel accepted Brazil's assertion that the import ban was designed to reduce the amount of waste tyres although the claimant, the European Communities, argued that the ban was imposed to protect the domestic industry.[27]

b) Necessity Test

Secondly, the import ban needs to fulfil the necessity test. The necessity test requires "the weighing and balancing [of] a series factors".[28] These factors include the importance of the goal pursued, the trade restrictiveness of the measure in question, its contribution to the goal pursued and the availability of alternative, less trade-restrictive measures.[29]

Notice: The necessity test is required by Art. XX(a), (b) and (d) GATT. Similarly, Art. XX(j) GATT, concerning products in short supply, requires that a measure is "essential". According to the Appellate Body the term "essential" has a similar meaning and functions as "necessary to".[30]
In contrast, Art. XX(g) GATT, covers measures that are "relating to the conservation of exhaustible natural resources". "[R]elating to" has a different meaning than "necessary to". "[R]elating to" is less strict than "necessary to". In order for a measure to relate to a ground, the measure needs to have a real and close relationship. In addition, the measure in question must not be disproportionately wide in scope and reach.[31]

[26] *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 605; see also (on Art. XX(a) GATT): EC — Seal Products, Report of the Appellate Body, WT/DS400/AB/R, 22 May 2014, mn. 5.144: "A panel should take into account the Member's articulation of the objective or the objectives it pursues through its measure, but it is not bound by that Member's characterizations of such objective(s). Indeed, the panel must take account of all evidence put before it in this regard, including "the texts of statutes, legislative history, and other evidence regarding the structure and operation" of the measure at issue. […]" (further evidence omitted).

[27] Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.101.

[28] Explicitly inter alia: Korea – Various Measures on Beef, Report of the Appellate Body, WT/DS161/AB/R, 11 December 2000, mn. 164.

[29] On the development of the current case law, see *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, pp. 608–613; Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.103-104, 7.209-10.

[30] India — Solar Cells, Report of the Appellate Body, WT/DS456/AB/R, 16 September 2016, mn-5.62-63.

[31] For reference, see *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, pp. 626–627.

The protection of human health and life against life-threatening diseases is an important goal in this regard.[32] In turn, an import ban is the most trade restrictive measure possible.[33] However, the import ban reduces the generation of waste tyres. Less waste tyres mean fewer breeding grounds for mosquitoes, which reduces the number of mosquitoes. A reduced number of mosquitoes lowers the risk of the population getting infected with deadly diseases. Therefore, the import ban contributes significantly to the goal of protecting against life-threatening diseases.[34]

Several less trade restrictive measures to reduce the amount of waste tyres in M can be conceived. These measures include encouraging retreading of all tyres through education and government procurement, technical requirements for all tyres whether produced in M or outside of M to improve their suitability for retreading, the promotion of public transport in order to reduce wearing and tearing of tyres, the promotion of inspections and more considerate driving habits.[35] Also, there are trade restrictive measures to improve the management of waste tyres in order to prevent them from becoming breeding grounds for mosquitoes. Such waste management measures include controlled landfilling, stockpiling, energy recovery and material recycling.[36]

However, none of the less trade-restrictive measures reduces the amount of waste tyres as effectively as an import ban on retreaded tyres which have a shorter life span than new tyres. While less trade restrictive measures can further reduce the amount of waste tyres, they still leave the contribution of retreaded tyres from outside M to the total amount of waste tyres untouched. Therefore, the measure cannot substitute but only complement a ban as they are less effective.[37] Alternative measures of waste management cannot ensure the same level of protection against mosquito-borne diseases. None of these measures can prevent waste tyres from becoming breeding grounds for mosquitoes as effectively as preventing the creation of waste tyres in the first place.[38]

In conclusion, compared to the important goal of preventing infections with deadly diseases, the import prohibition of a relatively specific group of products, namely retreaded tyres, seems necessary.[39]

Notice: In Brazil – Retreaded Tyres (2007), the Panel analysed whether the respondent, Brazil, provided sufficient evidence that the accumulation and transporting of waste tyres increased the risk of mosquito-borne life-threatening diseases.[40] In contrast, in this exam, it sufficed to point to the asser-

[32] This was acknowledged by the Panel; it called this objective "vital and important in the highest degree": Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.111-2, 7.210.

[33] The Panel calls it aptly "the heaviest 'weapon' in a Member's armoury of trade measures" and also "as trade-restrictive as can be", ibid., mn. 7.114, 7.211.

[34] Ibid., mn. 7.146-148.

[35] In Brazil -Retreaded Tyres (2007), the respondent, the European Communities, suggested these measures, see ibid., mn. 7.160, 7.212; the students were not expected to come up with an exhaustive list of less trade restrictive measures.

[36] Ibid., mn. 7.161.

[37] Ibid., mn. 7.768, 7.172.

[38] For all of the measures suggested by the complainant, the Panel analysed in detail whether each of them provided a reasonable alternative, see ibid., mn. 7.173-208; as this is beyond the scope of what can be expected in an exam, the students only had to state that no less trade restrictive measure was available with the same level of protection.

[39] The Panel came to the same conclusion, see ibid., mn. 7.215; this conclusion was confirmed by the Appellate Body, see Brazil — Retreaded Tyres, Report of the Appellate Body, WT/DS332/AB/R, 3 December 2007, mn. 258.

[40] Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.56-71, 7.84-93.

tion of the government. The final note allowed to "assume that the facts given by M's government are correct".
If the students argued that the measures in question do not pass the necessity test, this result was acceptable as well. However, in this case, they were expected to hypothetically continue their analysis.

c) Chapeau

The measure is also applied in a manner that is consistent with the chapeau of Art. XX GATT.

The wording of the chapeau is very broad. Therefore, it is difficult to find a comprehensive description for the content of the different conditions set out by the chapeau.[41] The existing case law provides some guidance, though[42]:

- An "arbitrary discrimination" takes place if countries where different situations prevail are treated equally or vice versa.
- An "unjustifiable discrimination" takes place if a country applies measures without attempting to find a mutually agreed multilateral solution.
- A "disguised restriction" to international trade takes place if the design or application of a measure reveals a protectionist purpose.

There is no indication that the measure falls under any of those categories.

Notice: If the facts of the case do not provide for information regarding any of the circumstances stated above, then there is generally no indication that the chapeau is violated. Such information to the contrary would inter alia point to a discriminatory or protectionist application of a measure or to the state in question refusing bilateral or plurilateral procedures. Absent of such information in an exam paper, it suffices to state in one sentence that the chapeau of Art. XX GATT is not violated.
The case of Brazil – Retreaded Tyres (2007) was different from the case presented in the exam paper in one important aspect that concerned the chapeau of Art. XX GATT: While in the exam case, the import ban was applied *without* allowing for any exemptions, in contrast, in the original case, Brazil allowed for two types of exemptions. Firstly, Brazil suspended the import ban through court injunctions and secondly, Brazil exempted the other MERCOSUR[43] states from the import ban. For the MERCOSUR exemption, the effect on trade of this measure was so small that the Panel saw no violation of the chapeau in this regard.[44] This, however, was reversed by the Appellate Body. The Appellate Body found the MERCOSUR exemption to be an arbitrary or unjustifiable discrimination.[45] Consequently, the Appellate Body concluded that because of the MERCOSUR exemption the import ban was applied in a manner that violated the chapeau of Art. XX GATT.[46] Concerning the court injunctions, both, the Panel and the Appellate Body, saw a violation of the chapeau.[47] In conclusion, the

[41] *Wolfrum*, in: Wolfrum/Stoll/Hestermeyer, WTO – Trade in Goods, 2011, mn. 4.
[42] See with further reference: *Van den Bossche/Prévost*, Essential of WTO Law, 2nd ed. 2021, pp. 118–120.
[43] On the Common Market of South America/Mercado Común del Sur (MERCOSUR), see inter alia *Herdegen*, Principles of International Economic Law, 2013, pp. 288–290.
[44] Brazil — Retreaded Tyres, Report of the Panel, mn. 7.354-5.
[45] Brazil — Retreaded Tyres, Report of the Appellate Body, WT/DS332/AB/R, 3 December 2007, mn. 233.
[46] Ibid., mn. 252.
[47] Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.356; ibid.

Panel and the Appellate Body only denied justification under Art. XX(b) GATT because of the two types of exemptions from the import ban. We can therefore assume that the ban applied as described in the case at hand would have passed the test of the chapeau under Art. XX GATT by the Panel and the Appellate Body.

d) Conclusion

In conclusion, the import ban can be justified under Art. XX(b) GATT.

Notice: The Panel and the Appellate Body in Brazil – Retreaded Tyres (2007) only analysed whether the import and the sales ban are justified under Art. XX(b) GATT. Therefore, the students were also only expected to refer to this alternative. If they also analysed whether the measure could be justified under further alternatives of Art. XX GATT, this would not have been a mistake, though.

III. Compliance of the Sales Ban with the GATT

1. Violation of Art. III:4 GATT

Turning to the second measure, M's sales ban under the new legislation might violate Art. III:4 GATT. The ban prohibits the sale of retreaded tyres that were manufactured outside of M, while at the same time, the sale of retreaded tyres that were manufactured in M remains permitted.

a) Applicability

Firstly, Art. III:4 GATT needs to be applicable. The *sales* ban is an internal measure. It concerns the "internal sale" of already imported tyres. Also, the ban is a regulation within the meaning of Art. III:4 GATT (in contrast to taxation that is covered by Art. III:2 GATT).[48]

In conclusion, the sales ban of M's new legislation falls within the scope of Art. III:4 GATT.

Notice: In this case, it seems clear that Art. XI:1 GATT only applies to the *import ban* and Art. III:4 GATT only applies to the *sales ban* of M's new legislation.[49] In general, while Art. XI:1 applies to measures at the border, Art. III:4 GATT applies to measures behind the border. However, as shown, Art. III:4 GATT also applies to certain *internal* measures that are *enforced at the border*. In these cases, the relationship of the two provisions is subject to academic debate and the case law of the panels and the Appellate Body is inconclusive.[50]

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[48] See above.

[49] In Brazil – Retreaded Tyres (2007), the Panel only applied Art. XI:1 GATT to the import ban without discussing the application of Art. III:4 GATT, see Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.34; the conclusion that the import prohibition was a *prima facie* violation of Art. XI:1 GATT was not addressed in the appeal, see Brazil — Retreaded Tyres, Report of the Appellate Body, WT/DS332/AB/R, 3 December 2007; in turn, the Panel only assessed whether the *sales* ban violated Art. III:4 GATT, see inter alia Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.417-419.

[50] For reference, see inter alia *Van den Bossche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, pp. 382–383; on the academic debate, see in detail *Kling/Rüffer*, Jura 2012, 956 (956–958).

b) Like Products

Art. III:4 GATT requires a "treatment no less favourable than that accorded to like products of national origin". M's sales ban only concerns retreaded tyres of foreign origin. In contrast, the sales ban explicitly does not affect retreaded tyres of domestic origin. Accordingly, for a violation of Art. III:4 GATT, retreaded tyres of foreign origin and of domestic origin need to be "like products" in that sense.

In order to determine if products are "like" the panels and the Appellate Body generally apply the following four criteria:[51]

- physical characteristics
- end use
- tariff classification
- consumers' taste and habits

Applying these criteria to imported and domestic retreaded tyres, it becomes clear that these two products are "like": They have the same physical characteristics, and they are intended for the same end-use, namely to be installed on different vehicles. Furthermore, they have the same tariff classification and there is no indication of any difference in consumers' tastes and habits. Accordingly, imported and domestically retreaded tyres are "like" in the sense of Art. III:4 GATT.[52]

Notice: Usually, the assessment of likeness is one of the main issues when analyzing whether a measure violates Art. I or III GATT. However, because it is "obvious", as the Panel in Brazil – Retreaded Tyres (2007) observed, that the same products are also "like" products within the meaning of Art. III:4 GATT, the students were not expected to apply the criteria of likeness stated above. Instead, it was sufficient to state that the same products are also "like" products.

c) Less Favourable Treatment

M treats retreaded tyres of foreign origin less favourably than retreaded tyres of domestic origin. While retreaded tyres that are produced outside of M may not enter the country, retreaded tyres that are produced in M may be sold and used in M.[53]

d) Conclusion

In conclusion, the sales ban of M's new legislation violates Art. III:4 GATT.

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[51] Four further explanation and reference on the criteria of likeness, see inter alia *Van den Bossche/Prévost*, Essentials of WTO Law, 2nd ed. 2021, pp. 58–59, 70–71.

[52] The application of the four criteria in the original case reads as follows: "The Panel also considers that imported retreaded tyres and domestic retreaded tyres, either made with domestic used tyre carcases or with imported used tyre carcasses, are indeed "like": the same physical characteristics (produced by reconditioning used tyres through one of the three types of processes); the same end uses (to be used for respective vehicle types, such as passenger cars, buses and trucks, and air planes); the same tariff headings (i.e. NCM headings 4012.11.00, 4012.12.00, 4012.13.00 or 4012.19.00); and no evidence of any difference in consumers' perceptions and behaviour in respect of imported and domestic retreaded tyres. If a measure concerns the same product and only refers to a product's origin, however, it is obvious that the same products are also 'like'.", see Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.415.

[53] The Panel in Brazil – Retreaded Tyres (2007), came to same conclusion, see Brazil — Retreaded Tyres, Report of the Panel, WT/DS332/R, 12 June 2007, mn. 7.420-2.

2. Justification Under Art. XX(b) GATT

The sales ban might as well be justified under Art. XX(b) GATT.

a) Design Requirement

Firstly, the sales ban has the same purpose as the import ban. Therefore, the sales ban is also designed to protect the life and health of humans and animals from dangerous and deadly diseases. Consequently, the sales ban also fulfils the design requirement of Art. XX(b) GATT.

b) Necessity Test

Secondly, the sales ban also needs to fulfil the necessity test. Generally, the same factors need to be considered as with the import ban. A sales ban is as trade restrictive as an import ban, as the product cannot be sold on the market. In the case at hand, the sales ban serves the same highly important goal. It should be noted, though, that the sales ban can only affect those retreaded tyres that were already imported to M before the import ban entered into force. This fact influences the question to what extent a sales ban can contribute to the goal pursued.

If already imported tyres cannot be sold in M anymore, the relevant question is whether this would reduce the amount of waste tyres. If the tyres affected by the sales ban were wasted instead of sold, the sales ban would not contribute to the goal of reducing the amount of waste tyres in any way. Rather the contrary, the sales ban would lead to a higher amount of waste tyres. However, it can be expected that retreaded tyres affected by the ban will likely be exported and sold elsewhere. There is no export ban and wasting newly retreaded tyres in most cases seems uneconomical.

In conclusion, compared to the important ultimate goal of preventing infections with deadly diseases, the sales ban of a very specific and small group of products, namely imported retreaded tyres before the import ban entered into force, seems necessary based on the assumption that those tyres would be resold outside the country instead of being wasted in M.

c) Chapeau

The measure is also applied in a manner that is consistent with the chapeau of Art. XX GATT.

d) Conclusion

In conclusion, the sales ban can be justified under Art. XX(b) GATT.

IV. Final Result

The import ban violates Art. XI:1 and the sales ban violates Art. III:4 GATT. Both measures can be justified under Art. XX(b) GATT, though. In conclusion, the bans are in conformity with the GATT.