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# Legal Strategies for Reproduction of Environmental Inequalities in Waste Trade

## The Brazil – Retreaded Tyres Case

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# Legal Strategies for Reproduction of Environmental Inequalities in Waste Trade

## The Brazil – Retreaded Tyres Case

Elaini C. Gonzaga da Silva

**Abstract**

The objective of the present paper is to investigate, in an exploratory fashion, how the current legal framework governing global relations was managed in the *Brazil – Retread Tyres* case in an attempt to perpetuate the unequal distribution of environmental risks and costs related to waste tyre disposal both from a statist and a globalist perspective. After introducing the issue, the context of tyre production and waste tyre disposal is presented. Then, the strategy related to discourse and forum choice will be outlined. Finally, some remarks on possible future developments will conclude the paper.

**Keywords:** tyres | forum shopping | transregional environmental inequalities | World Trade Organization

**Biographical Notes**

Elaini Cristina Gonzaga da Silva is presently practicing law as Attorney at Barbosa, Müssnich & Aragão in Sao Paolo. She received her Ph.D. in International Law at the University of Sao Paulo, under the supervision of Professor Alberto do Amaral Júnior. From October 2010 to March 2011 she was a visiting Doctoral Researcher at desiguALdades.net in Research Dimension III: Socio-ecological Inequalities, under the supervision of Professor Barbara Göbel. She was previously a Researcher in the Democracy and Law Group of the Brazilian Center for Analysis and Planning (Cebrap).

## Contents

## 1. Introduction

On 17 December 2007, the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) adopted the Appellate Body report (WTO 2007a) and the Panel report (WTO 2007b) to dispute *DS332 – Brazil – Measures Affecting Imports of Retreaded Tyres* (henceforth, *Brazil – Retread Tyres*) between the European Union[1] and Brazil (WTO 2007c), as of such moment Brazil was expected to bring its ban on imports of used and retread tyres into conformity with the obligations assumed by the country before the WTO.

The Appellate Body upheld the Panel's finding that the import ban could provisionally be considered "necessary" to protect human, animal or plant life or health within the meaning of the General Agreement on Tariffs and Trade (GATT Article XX (b)), as justified by Brazil; but eventually found that both the exemption granted by the country to imports of retread tyres originated from other MERCOSUR[2] state parties and imports of used tyres allowed by domestic court injunctions rendered the import ban inconsistent with the obligations of the country before the trade organization, once applied in a manner that constituted arbitrary or unjustifiable discrimination (within the meaning of the chapeau of GATT Article XX).

The object of the dispute was a series of measures adopted by Brazil beginning in the early 1990s regarding the management and disposal of used and end of life tyres[3] on

1 As of the beginning of the dispute, the European Union was not classified as an international legal person – this happened only in 2009 after Lisbon Treaty entered into force. In this paper, nonetheless, the term European Union will be used for both periods to refer to the ongoing supranational integration process led by the following legal instruments: the Treaty establishing the European Coal and Steel Community (1951), the Treaty of Rome (1957), the Merger Treaty (1965), the Single European Act (1987), the Treaty on European Union (Maastricht, 1992), the Treaty of Amsterdam (1997), the Treaty of Nice (2001) and the Treaty of Lisbon (2007); and comprising the following countries as of 2005 (year when the dispute was formally initiated): Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia , Slovenia, Spain, Sweden, and the United Kingdom of Great Britain and Northern Ireland.

2 The Southern Common Market (MERCOSUR) is an international organization to foster intergovernmental economic integration between Argentina, Brazil, Paraguay, Uruguay, and Venezuela according to the following basic legal instruments: the Treaty of Asunción (1991), the Brasilia Protocol (1991), the Protocol of Ouro Preto (1994), and the Protocol of Olivos (2002).

3 A tyre is a "continuous metal ring, or pneumatic rubber and fabric cushion, encircling and fitting the rim of a wheel" (Access Science 2012) to protect it and enable better vehicle performance by absorbing shocks while keeping the wheel in its due place. New tyres are the ones manufactured for first use. Used tyres are pneumatics that have already undergone a cycle of life. Retread tyres can be produced through a number of different methods all encompassed by the generic term "retreading" (UNECE Regulations no. 108 and 109 of 1998): (i) top-capping, which consists in replacing only the tread; (ii) re-capping, which entails replacing the tread and part of the sidewall; and (iii) remoulding or "bead to bead" method, which consists of replacing the tread and the sidewall including all or part of the lower area of the tyre. Waste tyres have reached their end of life as tyres.

the grounds of environmental and public health concerns that affected imports of used and retreaded tyres into the country. In fact, the Brazilian import ban was challenged not only before the WTO dispute settlement system by the European Union[4] but also by Uruguay in the domain of the MERCOSUR integration initiative,[5] both economic organizations the main aim of which is to further liberalize trade among their members.

Hence this case not only illustrates the difficulty to reach a balance between economic interests and environmental protection, but also clarifies how the current legal framework governing global relations may be explored to reproduce an unequal distribution of environmental risks and environmental costs among different groups and regions across the globe in a context of increasing globalization.

This is so because while tyres are a first necessity good, environmentally sound disposal of waste tyres is an unsolved problem. Besides current restraints to the number of times a tyre may be retreaded, tires release highly toxic organic and inorganic pollutants when burnt. Tire disposal thus requires special and expensive technology, and even so ultimately the elimination of waste tires is not guaranteed. Furthermore, if not properly disposed of, tires in (often-illegal) dumping grounds become breeding grounds for mosquito larva and thus mosquito-borne diseases such as yellow fever, malaria, and dengue (CIEL 2006: 1), affecting primarily more vulnerable groups that live near disposal sites.

For those reasons, a number of developing countries, including Albania, Algeria, Argentina, Bangladesh, Bahrain, Cambodia, Colombia, Ecuador, The Philippines, Jordan, Macedonia, Morocco, Mexico, Nigeria, New Zealand, Pakistan, Peru, Thailand, Sri Lanka, Uganda and Venezuela, ban or restrict the imports of used or retreaded tires (CIEL 2006: 1). Developed countries, the main consumers of tyres, also regulate sound waste tyres disposal. The European Union, for example, adopted three Directives relevant to the issue: the Landfill Directive (EC 1999); the End of Life Vehicle Directive (EC 2000a); and the Waste Incineration Directive (2000b). Under this framework, the

4 On 20 June 2005, the European Communities requested consultations with Brazil on the imposition of measures that allegedly adversely affected exports of retreaded tyres from the European Union to the Brazilian market. At its meeting on 20 January 2006, the DSB established a panel to hear the case. The report was circulated by the panel to WTO Members on 12 June 2007. On 3 September 2007, the European Union notified its intention to appeal, and on 3 December 2007 the Appellate Body division hearing the case issued a report, which was adopted by the DSB on 17 December 2007. For a more detailed historical background of the dispute, see Amaral Jr. et al (2009).

5 On 15 March 2001, Uruguay requested consultations with Brazil regarding a Brazilian import ban on retread tyres that affected exports of Uruguay to Brazil. As direct negotiations were unable to lead to a mutually satisfactory agreement, Uruguay filed a request for the establishment of an Arbitral Tribunal to hear the case on 12-13 June 2001. The Arbitral Tribunal was composed on 17 September 2001, and on 9 January 2002 a ruling was issued. For a more detailed historical background of the dispute, see Morosini (2006, 2008).

objective of the European Union is to prevent or reduce as far as possible negative effects of waste on the environment and human health, but while there is a limit to be respected within its borders, the European Union includes exportation of their waste, used and retreaded tyres among acceptable forms of disposal,[6] thus transferring to importing countries, including developing ones, the problem of environmentally sound disposal of tyres that have reached their of end of life.

As it will be further explained in Section 2 below, it is cheaper and easier to export used tyres to be disposed of abroad, rather than to address the problem domestically, in particular after the Landfill Directive that prohibits the disposal of shredded tyres in landfills as from 2006 on comes into force. A scenario that resembles the one related to hazardous waste trade.

In the late 1980s, it was brought to the world's attention that developing countries around the world were being used as dumping ground for toxic and hazardous wastes coming from industrialized nations (Clapp 1994; Pellow 2007). That happened because costs for disposal of hazardous wastes rose dramatically across the industrialised world in the 1980s, while the developing world was seen as an inexpensive place to off-load toxic industrial by-products – while in Europe, waste disposal could cost as much as $ 3000 per ton; in Africa it would amount as little as $2.50.

In fact, in a 1991 memo on trade liberalization distributed to the staff of the World Bank, Lawrence Summers, Chief Economist of the international organization, wrote: "Just between you and me, shouldn't the World Bank be encouraging MORE migration of the dirty industries to the LDCs [Least Developed Countries]?" (Pellow 2007). According to the memo, as the developing world was "under-polluted", it would be "welfare-enhancing" to move environmentally detrimental industries to poor nations. After the material leaked and controversy arose around such "approach", Summers said that this was intended to be "sarcastic" and spur debate, since although ethically disputable the economic rationale of the argument was flawless.

According to this very same rationale, in Stockholm in 1972 the Brazilian Minister João Paulo dos Reis Veloso invited rich countries to take their pollution to Brazil, in an attempt to attract foreign investment to the country.[7] Almost 30 years later, in 2001, the then-Russian President, Vladimir Putin, signed a package of laws allowing Russia to import spent nuclear fuel, opening the door to a trade estimated at $20 billion over the

6 See, for instance, the indicator fact sheet published by the European Environment Agency (EEA 2004).

7 According to Clapp (1994), most developing countries trapped in foreign debts would accept waste from creditor countries to offset their debts.

last decade in reprocessing and storing nuclear irradiated waste;[8] and in 2008 Ghana launched the initiative "Solid Waste: Big Problem! Big Opportunity!" As these regions were and are yet not equipped to handle those wastes in such a way as to protect peoples' health and the environment, the impacts thereof were even more strongly felt.[9]

In such a context, it is necessary to ask just how fair those flows are and analyse these according to principles of global justice,[10] not only in terms of the positive distribution of world resources,[11] but also in regard of patterns of distribution of environmental risks and costs. In order to do so, this paper will, in an exploratory fashion (Yin 2005), firstly outline a scenario of inequality (Section 2) and then how the current legal framework governing global relations was managed in the *Brazil – Retread Tyres* case in an attempt to perpetuate the unequal distribution of environmental risks and costs related to waste tyre disposal (Section 3).[12]

## 2. The Tyre Imbroglio

The first pneumatic tire was invented by John Boyd Dunlop in 1887, for his son, who had headaches while riding on rough roads.[13] Édouard Michelin, though, was the first patent holder for detachable tyres.[14] Pneumatic "tires are made of vulcanized (i.e. cross-linked polymer chains) rubber and various reinforcing materials" (Amari *et al.* 1999: 179). These reinforcing materials include fillers (such as black carbon), fibers

8 "Russia is legally required to ensure that the re-enriched fuel and reprocessed waste is returned or properly disposed of, but only a small percentage of the original material gets sent back. What happens to the rest? An estimated 700,000 tons of radioactive uranium tailings (including waste from Russia's domestic reactors) are being kept in Siberian cold storage, some outdoors in rusting steel canisters at Mayak, Russia's only reprocessing facility and site of a horrific nuclear accident in the 1950s" (Stein 2010).

9 By late 1980s and early 1990s, the cases of Benin, Somalia, Turkey and Lebanon became widely known (Pellow 2007). Recently, attention has been drawn to Somalia, the unprotected extensive coastline of which has become a cheap waste dump for anything from industrial heavy metals to radioactive nuclear waste (Environmental Graffiti 2010).

10 Excluding, of course, approaches like Rawls' (1999) that constrain demands of justice to the domestic scenario.

11 As it is usually the case of works on global justice (Pogge 2001; Forst 2001).

12 In Section 3, and as suggested by Hill (2003) a two-step analysis will be conducted: (i) firstly, of the relation among countries as unitary actors, applying hermeneutic and discourse analysis techniques for the study of the MERCOSUR and WTO decisions; and (ii) secondly, considering the different social actors trying to influence the decision making process at each moment, reconstructing information collected from interviews and documents.

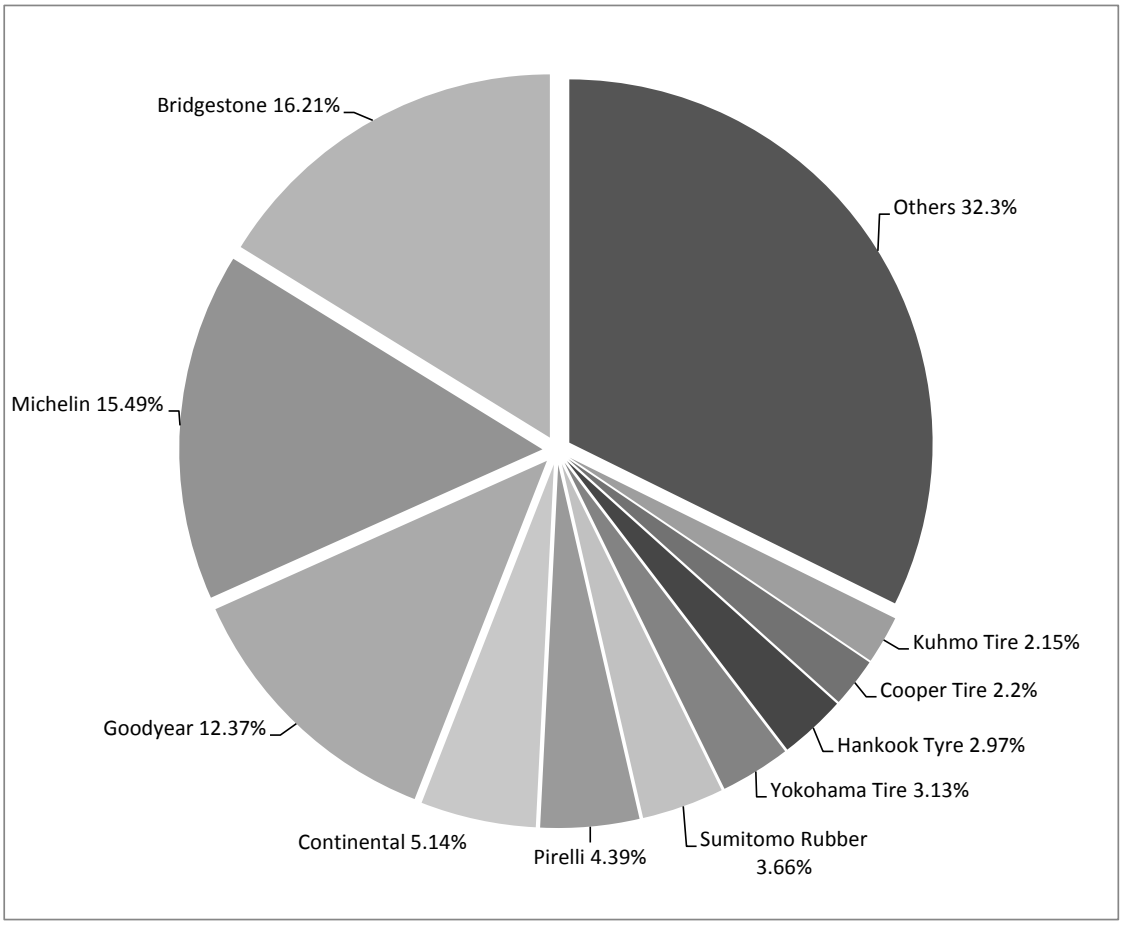
13 Dunlop's patent was later declared invalid because of a prior art also deposited by a Scot (Hutchinson Dictionary of Scientific Biography 2009).

14 A need he noticed to exist after spending three hours of labor and one night of drying in order to repair the tire on a bicycle and glue it back to the rim (Michelin 2010-11).

(such as textiles or steel threads), and extenders (chemicals used for controlling the properties of the compound).

The world tyre production surpasses 292 billion tyres a year, 800 million units a day or 555 thousand units every minute (Planetoscope 2008). The tyre industry is the largest part of the rubber manufacturing industry and sometimes is considered as an industry *per se* (cf. Mullineux 2004: 1).[15] Tyre companies were first started in the late 19th or the early 20th centuries, and grew in tandem with the auto industry forming a rather concentrated market (Bridgestone 2011; Michelin 2010-11; Goodyear 2011; Continental 2011; Pirelli 2008). As Figure 1illustrates, in 2010, the five largest tyre manufacturers (which come all from developed countries) answered for 53.6% of world tyre production.

**Figure 1: World Tyre Market Share**

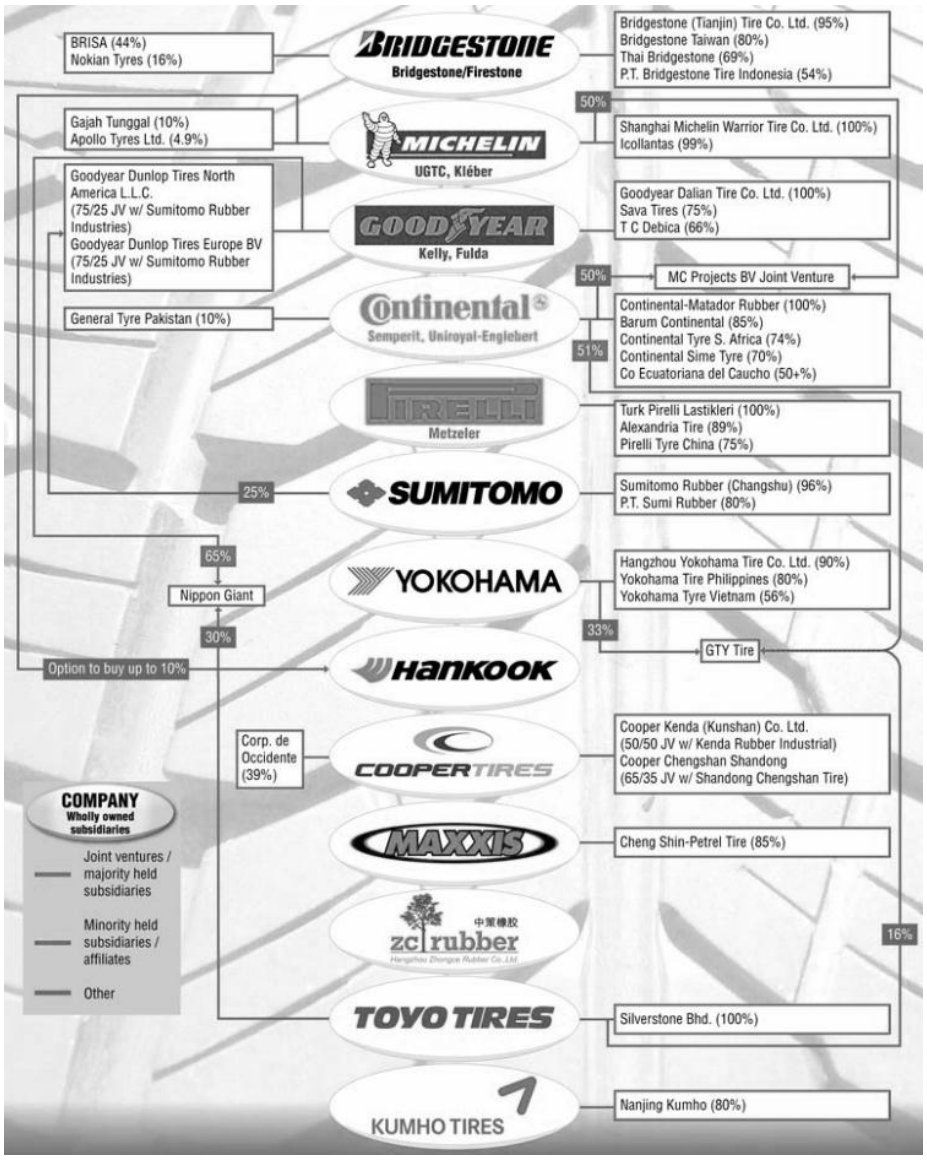



Source: Own elaboration with data from *Tyre Business* (2010a).

15 A pattern that is expected to change in 2013, when non tire rubber will outpace tire rubber demand, according to Freedonia (2010).

In fact the interplay of actors has changed over the last two decades, due to a movement of concentration among major players in the market. For instance, five of the ten largest companies in 1981 have now been taken over by competitors. This is an ongoing process also with smaller companies (Mullineux 2004: 13), as illustrated in Figure 2:

**Figure 2: Ownership in the Global Tyre Community**




Source: *Tyre Business* (2010b).

The tyre industry produces tyres, a necessity good, in such numbers that re-use and disposal of worn-out or obsolete tyres is a central problem, particularly because there is no proper and safe way out. There are said to be only five broad disposal alternatives for scrap tyres (reduction, re-use, recycling, recovery, and disposal), and not even having recourse to all of them will solve the problem, as explained below (Mullineux 2004: 6). As for the first strategy, reducing the number of tyres that need to be scrapped, this is

unlikely due to the need for tyres for road vehicles. In economics terms, tyres are a first necessity good, which are consumed because they are necessary. Making them more expensive with taxes or fees would not change the volume of tyres sold. Concerning its chemical composition, there is currently no alternative. There are some ways to re-use tyres, through retreading or using scrap tyres for other purposes.

One form of reuse, retreading, is still economically feasible, and has given rise to an industry in its own right. Differently from the new tyre community, the retreaded tyre industry is more fragmented. Taking Brazil for instance, the second largest market in the world for retread tyres, the Associação Brasileira do Segmento de Reforma de Pneus (ABR, established in 1985) estimates that the retreading industry in Brazil involves more than 1.600 services providers and 5.000 small and medium size companies (ABR 2011a). Retread tyres, however, have a shorter lifespan, because, due to safety reasons, passenger car tyres can only be retreaded once and truck tyres, three times.[16] This means that at some point all tyres become waste.

Another form of re-use is to take waste tyres as an input into other products. For example, scrap tyres have been added to asphalt, but this use is not without its own environmental and economic problems, as a study commissioned by the Government of Australia notes:

> The improved performance comes at a cost penalty multiple of two or three due not only to the higher cost of rubber crumb but also to increases in process time and new practices that are less suited to existing road making and repair equipment and outside the current experience of operators. [...] There are also concerns with increased emissions of air pollutants at the time when the road is refurbished by recycling the surface (Atech Group 2001)

Tyre recycling is also problematic. Recycling is a process of extracting materials out of one form in a product and remaking it into a new product (Bandyopadhyay *et al.* 2008: 74), reversing the production process, in order to use inputs in a new product. That is a problem for tyres, the use of which requires a product that can resist severe external conditions without altering its properties, which is achieved with the vulcanization process undergone by the rubber, in the presence of chemicals and other materials. Recycling tyres is then more of a technical challenge. In this sense, "[r]eversing the vulcanisation process is often likened to 'un-baking' a cake, and then reusing the eggs" (Bandyopadhyay *et al.* 2008: 75). Therefore, recycling options are limited with current technology.

16 UNECE Regulation no. 108 of 1998.

Recovery means recovering the energy from products, for example, by burning. Burning tyres, however, raises concerns related to emission of dangerous pollutants. According Schwartz *et al*, who reviewed health impact assessments of pollutant emissions from cement kilns in California, increases of the following pollutants were verified at cement kilns that burn up to 20% tyres:

> [D]ioxins and furans showed increases of between 53% and 100% in four tests; polycyclic aromatic hydrocarbons (PAHs) increased in three tests (between 296% and 2230%) but decreased by 68% in a fourth test; nitrogen oxide (NOx) emissions increased by less than 10% at Kaiser Cement (Bateman, 1996), but decreased by 22% in two other tests; sulfur oxides (SOx) increased by 7.5% in one test, but decreased in two tests by 45% and 90%; lead emissions increased in three tests, by 59%, 388%, and 475%, respectively, and decreased in one test, by 94%; hexavalent chromium increased in one test by 727%, and decreased in two tests by 36% and 87%, respectively. (Schwartz *et al.* 1998: 1)

Furthermore, each burnt tyre releases 10 liters of oils that can percolate and contaminate soil and groundwater (Rodrigues Jorge *et al.* 2004), and the remaining material also includes carcinogenic substances.[17]

The last option would be dumping; a long lasting alternative resorted to by governments, but which entails public health concerns other than the ones already mentioned. Vulcanised rubber has low compressibility, which contributes to shortening the life of landfills (Oda and Fernandes Jr. 2001: 1589), and, as it absorbs gases released by the decomposition of waste, swells and may even burst, damaging the cover of landfills (Motta 2008: 168). Besides that, as previously mentioned, tyres improperly disposed at landfills become containers and thus vectors for diseases transmitted by mosquitoes, such as yellow fever, malaria, and dengue (CIEL 2006).[18] Furthermore, as the calorific value of tyre components is higher than of coal, once set on fire, this is impossible to extinguish, which is the reason why fires burn for weeks or months, and sometimes even for years (HPA 2003).

For all this reasons, the regulation of waste tyres disposal has been an issue of major concern for countries in general. In the case of the European Union, waste management

17 See, for instances, studies of the environment at tyre manufacturing plants, as Tyroler *et al.* (1976) and Nutt (1976).

18 See, for instance, studies conducted by Sousa Santos (1999), Honório and Lourenço-de-Oliveira (2001), and Pinheiro and Tadeu (2002).

in general was first tackled by the 1975 Waste Directive[19] that, applying a restrictive definition of waste, left for members' legislation the function of determining what should be considered waste. In the particular case of waste tyres, the European Union Landfill Directive that came into force in July 1999 has banned the disposal of whole tyres as from July 2003 and shredded tyres as from July 2006 to landfills within its territory.[20] The ban applies to almost all tyres including car, truck, motorbike, aircraft, and industrial; an exception is made for bicycle tyres and tyres above 1.4 meters outside diameter, for instance, larger agricultural and earthmover tyres. Another relevant legal instrument is the European Union Directive on End of Life Vehicles, which came into force in October 2000 and introduced recycling and recovery targets for end of life vehicles. While the Landfill Directive already requires the recovery of tyres from end of life vehicles, tyres will provide an important contribution to meeting the overall targets.

Despite banning waste tyres disposal in landfills, the Landfill Directive does not establish how members are supposed to dispose of used and waste tyres. It only became clear in the subsequent country reports filed by members in compliance with Article 15 that exports were also being included in the overall target to be met by members.

**Table 1: Tyre Arisings and Use of Recovery Options for Various EU Countries**

| | Tyre Arisings (tonnes) | Overall Recovery Rate (%) | Reuse (%) | Retreading (%) | Materials Recycling (%) | Energy Recovery (%) | Export (%) |
|---|---|---|---|---|---|---|---|
| Belgium | 45,000 | 94 | | 22 | 11 | 33 | 28 |
| Finland | 30,000 | 80 | | 6 | 60 | 2.5 | 11.5 |
| France | 370,000 | 39 | | 20 | 9 | 7 | 3 |
| Germany | 596,000 | 92 | 2 | 14 | 15 | 45* | 16 |
| Italy | 330,000 | 60 | | 15 | 9 | 33 | 3 |
| Netherlands§ | 45,000 | 100 | 16 | 29 | 8 | 47 | |
| Spain | 241,000 | 19 | | 13.5 | 0.5 | 3.5 | 1.5 |
| Sweden | 58,000 | 98 | 19 | 8.5 | 6.5 | 54 | 10 |
| UK | 468,000 | 70 | 16 | 18.5 | 10.5 | 18 | 7.5 |

§ Car only * Capacity not actual usage

Source: Own elaboration with data from Hallett (2001: 14).

19 The current codified version of this document as further amended may be found in Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste.

20 Article 5: 3(d).

For Brazil, differently from the European Union, only in 2010, after 20 years of debate in Congress, was a national law (Law no. 12.305[21]) on solid waste approved. Until then, the legal framework on waste disposal followed the rather fragmented character of domestic environmental legislation. In particular in the case of tyres, the legislation comprises a set of norms related to retread tyres, used tyres, and waste tyres issued by different executive bodies in discharging their regulatory function.

At first, on 14 May 1991, the Department of Foreign Trade of the Ministry for Industry and Tourism (DECEX) issued *Portaria* (ministerial order) DECEX no. 8 prohibiting importation of used consumer goods, in the context of a general commercial and development policy pursued by the government. It is noteworthy, though, that by the time the Secretary of Environment, José Lutzenberger, and civil society organizations as Greenpeace were already demanding the regulation of tyres disposal and restrictions on imports thereof[22] – which happened only after Brazil acceded to the Basel Convention on Transboundary Movement of Hazardous Waste (henceforth Basel Convention).[23]

The Basel Convention was implemented in Brazil by *Portaria* IBAMA 138-N, issued on 22 December 1992 by the Brazilian Institute for Environment and Renewable Natural Resources (IBAMA). Besides prohibiting the importation of waste of any kind and in any event, *Portaria* IBAMA 138-N included an express reference to waste tyres. Despite this provision, Brazil has not notified the Basel Convention Secretariat of the ban on waste tyres.[24] Not until nearly seven years later, on 26 August 1999, did the Brazilian National Council for Environment (CONAMA) issue*Resolução* CONAMA 258 which establishes the obligation to dispose of waste tires in the national territory and prohibits improper disposal thereof. At the time, estimates stated 100 million waste tires were abandoned in Brazil the environment, and the percentage of used tires reused or retreaded was around 46.8%, leaving a remainder of 53.2% of useless tyres (Motta 2008). This regulation was later enforced by *Portaria* SECEX no. 8 of 25 September 2000 that prohibits the issuance of import licenses for retreaded tires and used either to serve as raw material or as a consumer good, and Decree 3919 of 14 September

21 This builds on Bill no. 203/1991, which aimed initially to regulate the disposal of health services waste, but then became a draft National Policy on Solid Waste. Interestingly, this bill was submit for congressional debate after request from the then Secretary of Environment, José Lutzemberger, the very same Brazilian Minister who wrote a letter to Lawrence Summers in response to the leaked memo on transboundary waste trade and relocation.

22 Interview with Marijane Lisboa, then Greenpeace officer in Brazil.

23 The Brazilian accession took place only on 1 October 1992, because the government opposed the adopted version of the Convention that only regulated and not banned transboundary movement of waste.

24 As noticed by a Brazilian diplomat in charge of following the dispute between Brazil and the European Union in the WTO (cf. Kweitel and Sanchez 2007).

2001 which sets forth the issuance of fines for every unit of used or retreaded tyres imported into national territory.

This framework was then challenged by Uruguay before the dispute settlement system of MERCOSUR, and according to the ruling issued by the Ad Hoc Arbitral Tribunal issued on 9 January 2002, was found to be incompatible with the obligations owed by Brazil to Uruguay, as will be further detailed in the next section. On 1 January 2003, the Brazilian President, Luiz Inácio Lula da Silva, was sworn in, and following a policy aiming at promoting the relations of Brazil and other South American countries,[25] issued on 11 February 2003 Decree 4592 exempting retreaded tyres imported from MERCOSUR from any fines.

On 17 November 2004, *Resolução* SECEX no. 14 consolidated the import regime, repealed the licensing of imports of retreaded and used tyres (whether as a consumer good or as raw material) and exempted imports of retreads tyres originated in other members of MERCOSUR from any fines. This framework would then go on to be challenged by the European Union in 2005.

This is a case of transference of ecological problems, because despite the fact that tyres are a necessity good, they also pose a waste disposal issue, and by exporting products that are somehow prohibited domestically, the European Union is allowing not just the waste but also the disposal issue to be exported to a less protective regulatory domain, since both the normative framework and means of disposal are weaker. Environmental inequalities may be manifested not only in the form of unequal access to environmental resources but also as asymmetrical environmental protection – which happens when the implementation of environmental policies – or the failure thereof – generates disproportionate environmental risks, whether intentional or not, for those most involved (Acselrad, Mello, and Bezerra 2009). Therefore, it is possible to argue that the export of an environmental problem from the European Union to Brazil is a case of environmental inequality. Furthermore, in Brazil the most affected by exported waste tyres will be those living near the dumping sites, usually poor people.

Transregional interdependencies also played an important role in the development of this case. In this research, transregional interdependencies are considered to be the linkages between different groups along the decision making continuum that goes from domestic politics to the international arena and back again, in a polyarchical fashion. At the domestic level, the measure was opposed by the private sector (which itself was not in consensus), different governmental agencies and civil society organizations favored

25 As for the Lula's foreign policy, see Almeida (2009), and Vigevani and Cepaluni (2007).

the adoption of the measure and at each following moment. At the regional level, before the MERCOSUR, the case between Uruguay and Brazil placed in opposition both the economy of the two countries and two different environmental and trade policies. At the multilateral level, the Brazilian measure was challenged by the European Union before the WTO, despite the fact that different aspects of tires trade were regulated also by the Basel Convention and the Stockholm convention.

## 3. Forum Shopping as a Legal Strategy

Pierre-Marie Dupuy argues that international law[26] has undergone a process of "expansion", in particular after the Second World War, which may be characterized by at least three features:

(1) An enlargement of the material scope of operation of international law, due to the growing necessity of international cooperation, international law now covers almost every field of human activity – political, social, economic, and scientific and technical;
(2) A multiplication of actors, with a growing role played by non-State actors, such as non-governmental organizations (NGOs) – their role has become one of necessity for some of the major international intergovernmental organizations; and
(3) An effort to improve the efficiency of public international obligations, with the establishment of some conventional and sophisticated "follow-up machineries", in particular in the fields of human rights, international economic law, international trade law, and international environmental law. (Dupuy 1998-1999: 795)

These interactions have resulted in a growth in the number of intergovernmental technical, economic and social organizations and the spread of organizations between individuals and non-governmental groups[27] – a process that can be referred to as

26 A basic instrumental concept of international law defines it as the set of rules negotiated by states to govern their relations. See, for instance, Combacau (1986), Brownlie (1987), and the ruling issued by the Permanent Court of International Justice (PCIJ) for the Lotus affair (1927). Those rules would be the ones recognized by Article 38 of the Statute of the International Court of Justice (ICJ): "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". The expansion process referred to here, nonetheless, has entailed changes on how international law is interpreted and applied, thus, including more encompassing pluralist-oriented theories, as Delmas-Marty (2004; 2005), and Koskenniemi (1990; 2005), among others.

27 The Yearbook of International Organizations counted 251 international organizations in 1999. It is beyond the scope of this paper to restate the history of international organizations, but this expansion of international law is closely related to the proliferation of international organizations in the second post-world war (Archer 2001).

"promoter of juridicity" (Lafer 1998), "judicialization" (Sweet 1999), "legalization" (Abbott *et al*. 2000), or "juridicization" (Silva 2007). This proliferation means in legal terms that there are a growing number of substantial rules (that were once limited to regulate the concurrent exercise by each state of its full sovereignty) and that new dispute settlement bodies are created, but despite this ongoing process international law has not lost its anarchical character (Combacau and Sur 2006). Accordingly, currently applicable norms of international law, international organizations and dispute settlement bodies have quite limited competence defined in their foundational charts and constrained to the areas specified by the latter.[28]

Against this backdrop, a strategy known as "forum shopping" may influence the outcome of any decision that has to be made regarding the law applicable to a given case. Forum shopping is a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict" (Black's Law Dictionary 1979). Originally a strategy related to conflicts of law and contracts (Siegel 1994), the combination of proliferating international courts and increasing global regulation, though, has shown the usefulness of the concept of forum shopping to understand how countries act in international relations (cf. Pauwelyn and Salles 2009).

In the present case of a dispute on waste trade, a strategy of forum shopping may be identified, as the decision of venue was made by the litigants according to two factors: which discourse to be engaged in; and which actors should be allowed to participate.

### 3.1. A Matter of Discourse[29]

As previously explained, tyres can be classified as new, retreaded, used or waste.[30] Tyres are a necessity good for road vehicles, but waste tyres are a global environmental and public health problem, to which there is no definite solution. By exporting retreaded tyres (with a shortened life-span) to Brazil, the European Union is not only providing the country with necessity goods, but also transferring a waste problem, therefore defining retreaded and used tyres either as goods or waste is the first decision impacting the law applicable to a dispute like this. If, as it was indeed the case, retreaded tyres are

28 A principle recognized by the ICJ in its Advisory Opinion regarding *Reparation for Injuries Suffered in the Service of the United Nations* (1949).

29 This section is the result of analysis of the rulings issued by the dispute settlement bodies acting on the case. Unless otherwise stated, documents submitted by parties to an international dispute are not public – which is the case for MERCOSUR and WTO dispute settlement systems. Final rulings, nonetheless, include a description of all arguments presented by each party to a dispute.

30 See Footnote 3 above.

to be considered an economic resource, as goods, then the appropriate forum to hear a dispute will be the economics ones, the MERCOSUR and the WTO, in the present case.

In both realms, there is an obligation firstly not to discriminate among members or domestic and imported goods (Art. 1, Treaty of Asunción; Articles I and III, GATT); and secondly not to maintain or institute quantitative barriers to imports of other members (Art. 5, Treaty of Asunción; Article XI, GATT) in relation to all negotiated tariff lines (Art. 5, Treaty of Asunción; Article II, GATT).[31] Therefore, the first step to characterize something as a good is to indicate its classification according to the Harmonized System Codes (HS),[32] on which the MERCOSUR's system is also based (cf. WTO 2007b).[33]

**Table 2: GATT Harmonized System Codes for Tyres**

| 4011 New Pneumatic Tires, of Rubber |
|---|
| 401110 New Pneumatic Tires of Rubber, of a Kind Used on Motor Cars |
| 401120 New Pneumatic Tires of Rubber, of a Kind Used on Buses or Lorries |
| 401130 New Pneumatic Tires of Rubber, of a Kind Used on Aircraft |
| 401140 New Pneumatic Tires of Rubber, of a Kind Used on Motorcycles |
| 401150 New Pneumatic Tires of Rubber, of a Kind Used on Bicycles |
| 401191 Pneumatic Tires of Rubber, Having a "Herring-Bone" or Similar Tread |
| 401199 Other Pneumatic Tires of Rubber |
| 4012 Retread or Used Pneu Tires, Solid Tires etc., Rubber |
| 401210 Retreaded Tires |
| 401220 Used Pneumatic Tires |
| 401290 Solid or Cushion Tires, Interchangeable Tire Treads, Tyre Flaps, of Rubber |

Source: World Customs Organization (WCO 2007)

31 For more detailed information about the most favoured nation and the national treatment clauses, see Bosche (2005).

32 The Harmonized Commodity Description and Coding System, or simply the Harmonized System (HS), is an international method of classification of goods, based on a framework of codes and their descriptions developed by World Customs Organization (WCO 2007).

33 As of January 2005, Brazil, Argentina, Paraguay and Uruguay adopted the MERCOSUR Common Nomenclature (NCM), which is based on the HS. Each tariff line is comprised of eight digits; the first six digits are formed by the HS, while the seventh and eighth digits represent the specific unfolded within MERCOSUR.

Afterwards, it is necessary to demonstrate which relevant obligations set forth in that realm were violated.

Before the MERCOSUR, Uruguay claimed that *Portaria* SECEX no. 8/2000, that prohibits the issuance of imports licenses for both retread and used tires, was in violation of Brazil's obligation not to institute new quantitative restrains on imports from other MERCOSUR members. The whole Brazilian defense, though, claimed that the *Portaria* in question was a clarification of *Portaria* DECEX no. 8 /1991 which banned imports of used goods and should be enforced according to Resolution GMC 109/94 (that allows domestic regulation on imports of used goods to prevail until otherwise stipulated by the integration bloc bodies). In other words , according to Brazil, *Portaria* SECEX no. 8/2000 would not constitute a new quantitative restriction because retreaded tyres would be encompassed by the term "used tyres", already in force when the MERCOSUR agreements entered into force and which should be applicable. No reference was made to any environmental concerns (cf. WTO 2006).

The Ad Hoc Arbitral Tribunal established has not accepted Brazil's justification[34] and ordered Brazil to change its laws in order to allow retreaded tires from Uruguay to access the Brazilian market – decision at the origin of the exemption challenged by the European Union.

Unlike the WTO agreements, MERCOSUR agreements have no provisions for exceptions related to environmental protection. In fact, bloc rules on environment and trade are sparse and in general oriented to address the effects of environmental regulation on trade flows. The MERCOSUR Benchmark Agreement on Environment, for instance, was first tabled as a proposal in 1994, a final version was adopted in 2001, and only in 2004 such agreement entered into force.

It is noteworthy that Uruguay has challenged not only the Brazilian ban but also the Argentinian prohibition as well (MERCOSUR 2006). Unlike Brazil, Argentina raised public health and environment issues as a defence to its measures as justified by the Treaty of Montevideo (1980). This treaty, though, is not a formal MERCOSUR treaty, yet a base for all integration initiatives in South America. According to Article 50(c), Treaty of Montevideo, no provision thereof should be interpreted as to prevent the adoption or enforcement of a measure aiming at the protection of peoples' lives, vegetables and animals. Although Argentina had its measure justified by the first Ad

34 Among elements grounding their decision, it is the fact that *Portaria* DECEX no. 8/1991 was followed by *Portaria* no. 1 of 9 January 1992, which allowed the import of used tires as raw material for retreading industry with a control procedure of destination of such tires; and then *Portaria* no. 18 of 13 July 13 1992, which repealed the former, bringing into force again *Portaria* no. 8 / 91.

Hoc Arbitral Tribunal, the Permanent Tribunal of Review (TPR) overruled such decision and did not accept any grounding on agreements other than MERCOSUR's.[35]

After complying with the Ad Hoc MERCOSUR Arbitral Tribunal ruling, Brazil was then challenged before the WTO by the European Union. The European Union claimed that the measures adopted by Brazil were inconsistent with GATT 1994 obligations regarding elimination of quantitative restrictions (Article XI: 1 and Article XI: 1, or, alternatively, Article III: 4) and non-discriminatory administration of quantitative restrictions (Article XIII: 1). Brazil did not contest that the prohibition on the importation of retreaded tyres and associated fines were *prima facie* inconsistent with any of the aforementioned articles. Instead, Brazil submitted that the measures under challenge were all justified under Article XX (b) and (d) of the GATT 1994, regarding general exceptions to the agreement on the basis of environmental and human health concerns (Amaral Jr. *et al*. 2009).

Although the WTO primarily decides non-discrimination issues related to trade, it also decides issues that go beyond mere non-discrimination, as intellectual property, safety harmonization, and technical standards harmonization. When deciding these issues, it also confronts subsidiary issues related to health, the environment, and national security. Moreover, although nowadays many WTO agreements sets forth provisions related to non-trade concerns, this kind of issue has made its way into the multilateral trade system since its inception through GATT Article XX.[36]

In brief, the Appellate Body upheld the Panel's finding that the import ban could be considered "necessary" consistently with Article XX (b) and is thus provisionally justified under that provision.[37] The Appellate Body did not agree with the Panel's findings concerning the MERCOSUR exemption and imports of used tyres under court

35 According to Hermes Marcelo Huck, one of the acting panellists, other members' concerns were related more to a possible arising "jurisprudence" (that is to say, the one ruling on the Brazilian measure) and the previsibility of decisions.

36 GATT Article XX sets forth general exceptions to the Agreement and reads as follows in the relevant part: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (…) (e) relating to the products of prison labour; (f) imposed for the protection of national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (…)".

37 This decision did not mean, though, a finding that the Panel had not complied with its obligation to conduct an objective assessment of the case under analysis. To the contrary, the Appellate Body found that the Panel did not breach its duty under Article 11 of the DSU. Please see paragraphs 184-209 of the Appellate Body's report.

injunctions. Its conclusions were that the application of both sets of measures made the challenged ban inconsistent with the WTO agreements, because such measures were arbitrary/unjustifiable discrimination within the meaning of the chapeau of Article XX.[38]

Therefore, Brazil was expected to bring its measures in consistency with the WTO obligations, and in order to so the country would have to (1) choose between lifting the ban on imports of retread tyres in relation to all WTO members, or imposing the ban for imports from all WTO members, which would have included MERCOSUR members;[39] and (2) adopt a final position regarding imports of used tyres that would not undermine the policy regarding retread tyres.

In this regard, the problem was that imports of used tyres for retreading within the domestic borders were authorized by domestic injunctions issued in order to allow imports of used tyres irrespective of other national regulations prohibiting them. Retreading companies challenged the constitutionality of such environmental regulations before national courts, claiming that these were in violation of the free competition and enterprise principles enshrined by the 1988 Brazilian Constitution. Although their claims were never finally approved, temporary court injunctions which were in force during the action hearing allowed imports of used tyres in such amounts that the DSB considered them to be undermining the national policy.[40]

Defining retreaded and used tyres as goods, thus, established the basic rule of permission to trade, with exceptions to be justified only within the restriction established on environmental and public health grounds. If retreaded and used tyres were instead to be classified as waste, the whole scenario would have been different.

Transboundary tyre movements are included in the scope of the Basel Convention and also the Stockholm Convention on Persistent Organic Pollutants (POP 2001). As noted by CIEL:

38 It is noteworthy that, differently from the Panel, the Appellate Body has not differentiated between arbitrary and unjustifiable. See Paragraph 215 of the Appellate Body's report.

39 A decision that originally was in contradiction with President Lula's foreign policy for the continent. See footnote 25 and accompanying text.

40 After the WTO decision, back to the domestic domain, the Brazilian government filed a complaint before the Superior Court of the country (STF) to instruct inferior stances to stop issuing court injunctions allowing temporary imports of used tires, and also banned imports of both used and retread tires from any country. At the present moment (January 2012), the STF decision is still pending publication, while it is not clear whether Uruguay challenge again the Brazilian ban before MERCOSUR.

> [T]he industrial and accidental combustion of tires leads to the release into the air, soil, and water of a number of toxic substances, including POPs, which are highly toxic chemicals that remain intact for years or decades, achieve wide geographic distribution through air and water, and accumulate in fatty tissue with increasing intensity as they move up the food chain. In humans, POPs can cause cancer, birth defects, memory loss, and can damage the immune, reproductive, endocrine, and nervous systems. (CIEL 2006: 7)

The Basel Convention defines as waste "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law" (Article 2: 1), and all wastes considered hazardous are listed in Annex A comprises a list of all categories of wastes to be controlled. In fact, the Basel Convention as adopted in 1989 did not ban transboundary movement of hazardous waste, the ban was set forth only in 1992, after adoption of the Ban Amendment, which have not yet entered into force. "Technical Guidelines on the Identification and Management of Used Tyres" were prepared by the Technical Working Group of the Basel Convention with support from industry and adopted by the fifth meeting of the Conference of the Parties in December 1999 in Basel, Switzerland (Basel Convention 2002).

Interestingly, though, the European Union has already internalized this ban by virtue of Council Regulation (EC) no. 120/97 of 20 January 1997 amending Regulation (EC) no. 259/93 on the supervision and control of shipments of waste within, into and out of the community territory. Furthermore, despite the fact that Brazil has not notified the Convention Secretariat of its ban on imports of waste tyres, an exchange of notes between the European Council and the Brazilian government included such category among prohibited imports.[41,42]

41 According to Haroldo Ribeiro, a Brazilian diplomat in charge of following the dispute. See also Kweitel and Sanchez (2007).

42 Marijane Lisboa, former Greenpeace activist in Brazil and a Deputy Secretary to the Ministry for Environment during Lula's mandate, noted that this notification has never been sent because there was no consensus within the government about how to treat waste tyres. The complex situation involving different executive bodies, judiciary, civil society and industry how far this lack of consensus led the country.

### 3.2. Who Will Have a Say on the Issue[43]

One may conclude, then, the importance of defining retreaded and used tyres either as waste or goods to the definition of the relevant forum and applicable law to a dispute. As the ruling issued by the WTO Appellate Body showed, nonetheless, there remains room for interpretation of existing agreements – and that is dependent on how actors build their defenses (or discourse) in a given dispute. As previously mentioned, the growing role of nonstate actors, as identified in the international relations literature (cf. Aron 2002; Morgenthau 2003), means that the discourse is wider than just among nations

The first theoretical approaches (in the European tradition) which sought to explain international relations supported the idea of an international policy focused on the figure of the state, aiming at amassing power or obtaining security (Silva, Spécie and Vitale 2011).In order to optimize efficiency in pursuing its objectives, then, a state should keep foreign policy isolated from ordinary domestic policy debates.A different strand of scholarship arose , demystifying foreign policy and considered it a public policy as any other policy, resulting from the battle between domestic coalitions (cf. Rosenau 1966; Putnam 1988; Milner 1997).

> In a complementary manner, it is understood that domestic, foreign and international policies make up a continuum of along a polyarchical decision making process. For this reason, a comprehensive public policy must be designed not only according to their national imperatives, but also in terms of utilization of related foreign or international *fora*. (Silva, Spécie and Vitale 2011)

Nevertheless, as the Cardoso Report on the United Nations and Civil Society notes:

> [A] clear paradox is emerging: while the substance of politics is fast globalizing (in the areas of trade, economics, environment, pandemics, terrorism, etc.), the process of politics is not; its principal institutions (elections, political parties and parliaments) remain firmly rooted at the national or local level. (UN General Assembly 2004)

43 This section is the result of a research primarily on rules on participation and interviews of actors from government and civil society with a focus on the decision making process in Brazil. The following interviewees were conducted: Celso Lafer (Professor of Law, USP; and former Brazilian Foreign Ministry), Juana Kweitel (Conectas Sur Direitos Humanos), Zilda Veloso (Ministry for Environment), Mirtes Boralli (Ministry for Environment), Celso de Tarso Pereira (Ministry for Foreign Relations), and Marijane Lisboa (former-Greenpeace, for Ministry for Environment, and Professor of Socioloy, PUCSP).

Against this backdrop, there is no general rule applicable to define or restrain actors to a given forum. In fact, “entre ce qui n’est plus et ce qui n’est pas encore”, we found ourselves in a context of “refondation des pouvoirs” (Delmas-Marty 2005). Whereas environmental regimes tend to be more open to non-state actors participation, on its turn, the world trade regime has proven to be rather hermetic. Therefore forum choice in this case had also effects on restraining participation of specific actors, as environmental civil society organizations and specialists who should make a decision regarding the propriety of the Brazilian ban.

As for the domestic realm, where regulations regarding used and retreaded tyres trade and disposal are negotiated, it is possible to note that different governmental bodies were related to the regulatory activity: before any international dispute was put forward against Brazil, both the economic and environmental ministries; and thereafter, also the Ministry for Foreign Affairs (henceforth Itamaraty) and finally the Casa Civil (a body in charge of governmental coordination).

In general, industry has been more closely involved with economic foreign policy making than other civil society organizations.[44] At the domestic level, the measures under challenge created at first a division within the private sector, which pit the retreading industry (comprised mainly by local businesses) against manufacturers of new tyres (mainly multinational companies based in Brazil). There are three local associations representing industries in this sector: the Associação Nacional Da Indústria De Pneumático (ANIP), a Associação Brasileira Do Segmento De Reforma De Pneus (ABR);[45] and the Associação Brasileira da Indústria de Pneus Remoldados (ABIP).

On the one hand, ANIP (2011) was established in 1960 to represent manufacturer of tyres and inner tubes installed in Brazil. Its associates today comprise nine companies and 15 factories in the states of São Paulo (seven), Rio de Janeiro (two), Rio Grande do Sul (two) and Bahia (three) and Paraná (a) – out of which five are multinational companies with locations in Brazil (Bridgestone, Goodyear, Michelin, Pirelli, and Continental) and only four are local companies (Levorin,[46] Maggion,[47] Rinaldi,[48] and

44 Celso Lafer, for instance, former Brazilian chancellor, when mentioning consultations with civil society is expressly referring to the private sector.

45 According to ABR (2011b), ABR represents three different sectors: tyres reformers, raw material providers for tyres remolding; and manufactures of machines and appliances for the remolding of tyres.

46 Established in 1943, is specialized in tyres for motorcycles, bicycles and industrial (cf. Levorin 2011).

47 Established in 1933, is the only Brazilian company associate that manufactures tyres for light vehicles (cf. Maggion 2011).

48 Established in 1969, manufactures tyres and innertubs for motorcycles, agriculture and industrial applications (cf. Rinaldi 2011).

Tortuga[49]). On the other, both ABR and ABIP are related to the retreading industry. ABR has long been maintaining a disposal scheme to be followed by its associates, what is not the case for ABIP (cf. Motta 2008); and the latter is closely related to the company called BS Colway (in fact, they are both presided by the same person: Francisco Simeão).

While initially ANIP associates in general widely defended a ban on imports of used and retread tyres, this defense has become more attenuated along time – a tendency associated by some with a possible guideline issued by their respective headquarters abroad.[50] Due to the cost difference between imported used tyres and used tyres collected domestically,[51] the retreading industry always has opposed the ban and associated measures.

After the implementation of Basel Convention by means of *Resolução* IBAMA no. 138-N/1992, non-governmental organizations first took part of the discussion when Brazil was challenged before the WTO, when a United States based organization with experience on trade-environment linkages, called Center for International Environmental Law (CIEL), established contact with a Brazilian human rights organization, Conectas Direitos Humanos, to raise awareness of the issue in Brazil and gather together a number of organizations willing to submit an *amicus curiae* brief to the panel.

Contact between CIEL (Marcos Orellana) and Conectas had been previously established in 2005, when CIEL attended a Knowledge Development Group on Trade and Human Rights organized by Conectas (Juana Kweitel) and the Development and International Trade Law Institute (IDCID) (Michelle Ratton Sanchez and Elaini C. G. da Silva) with financial support from Ford Foundation. After a first proposal by CIEL, Juana Kweitel communicated with Michelle Ratton Sanchez (now on behalf of DireitoGV, a law school situated in São Paulo) to hold a workshop on the issue with representatives of both government and civil society.

Such workshop was held on 18 May 2006, and resulted in the organization of a campaign called “We reject Brazil becoming a garbage dump for the European Union!!!”, and whose outputs consisted primarily of an *amicus curiae* brief submitted to the WTO, a letter sent to the European Commission and a demonstration in Geneva before the WTO building on 4 September 2006 (cf. Kweitel and Sanchez 2007). Besides CIEL and

49 Established in the first half of the XXth century, specialized in inner tubes (cf. Tortuga 2011).

50 This association was mentioned by an interviewee who expressly asked not to be mentioned.

51 Due to the lack of a centralized and organized collection system, it was cheaper to import used tyres than collect and transport then domestically.

Conectas, other civil society organizations in Brazil took part in the initiative: Associação de Combate aos Poluentes (ACPO), Associação de Proteção ao Meio Ambiente de Cianorte (APROMAC), Centro de Derechos Humanos y Ambiente (CEDHA), and from Argentina, Justiça Global e Instituto O Direito por Um Planeta Verde Planeta Verde. The following organizations prepared the *amicus curiae* brief: Associação de Combate aos Poluentes (ACPO); Associação de Proteção ao Meio Ambiente de Cianorte (APROMAC); Center for International Environmental Law (CIEL); Centro de Derechos Humanos y Ambiente (CEDHA); Conectas Direitos Humanos; Justiça Global; and Instituto O Direito por Um Planeta Verde.

Interestingly, one of the main problems cited by the organization was to find environmental and human rights organizations willing to enter the "trade and" agenda. In fact, only after concerted effort did the organization manageto find enough confirmed invitees to hold the initiative. The demonstration held in Geneva also reflected these limitations, in fact, it was a one-man demonstration. With very little help from others, one member of the Brazilian Forum of NGOs and Social Movements for the Environment and the Development (FBOMS) travelled to Geneva, rented a truck filled with tyres and dumped its content before the WTO building while holding up protest signs.

**Figure 3: Civil Society Organizations' Demonstration before the WTO Building on 4 September 2006**


Source: FBOMS (2007).

Private sector representatives were not invited to the meeting, but, nevertheless, an ABIP officer showed up on the day to try to participate. Interestingly, he had previously sent an email to the organization asking to be allowed to attend the workshop. What the

organization noticed was that this was an email which from a European Commission officer advising him to attend such meeting.

The workshop was also attended by government representatives from the Ministry for Environment and Itamaraty. In fact, unlike the traditional opposition demonstrated by the Brazilian government to civil society participation in the WTO (Amaral Jr. *et al*. 2009), Itamaraty not only maintained a close contact with civil society organizations in Brazil and in Geneva, but also made available all documents submitted to the Panel and Appellate Body on its website Itamaraty (2006-2008).

At the regional level, before the MERCOSUR integration initiative, participation was restrained to government members, according to the rules of the Protocol of Brasília. Arbitration is the dispute settlement mechanism established by the aforementioned Protocol. Therefore, secrecy is a natural characteristic. In fact, not only are proceedings secret, but the specific object of a dispute is made public only after a ruling is issued.[52] The Brazilian representation in the arbitration process was limited to trade officers of Itamaraty and the Ministry for Development and Industry (MDIC), other government branches (as the Ministry for Environment) were excluded, as were non-governmental organizations (which did not even take notice of the case). This was one of the main reasons of contention after a ruling was issued: the Ministry for Environment had not been heard for the Brazilian defense, and the exemption from fines for imports of retreaded tyres was implemented even before new officers had been appointed.

This was a critical point corrected along the process of building the Brazilian defense before the WTO. Once Brazil received a request for consultations, Itamaraty contacted the Casa Civil and both together concerted a process of decision making including members from the Ministry for Environment, MDIC and the Ministry for Health to decide which further steps should be taken. This process included regular meetings at which members presented their respective proposals and positions, and during which consensus was to be reached In this context, Marina da Silva, Brazilian Minister for Environment at the time, delivered a speech at the first hearing of the panel to the dispute between the European Union and Brazil at the WTO.

It was also during this meeting that the government decided to file a special motion before the Brazilian Supreme Court called Ação por Descumprimento de Preceito Fundamental, in order to prevent lower courts from issuing court injunctions allowing temporary imports of used tyres – ADPF no. 101. All of the civil society organizations and government bodies listed above participated in filing this motion.

52 Regarding participation under the MERCOSUR framework (cf. Sanchez 2005).

## 4. Conclusion: The Road Ahead

In legal terms, the waste issue could be understood as the problem of defining the extent to which the former owner is allowed to abandon something that no longer serves him or her, because its economic value (or use) has been exhausted or significantly reduced. In other words, what is the responsibility of the former owner for its final destination? The difference in conditions between where the owner is and where the waste will end up raises the fundamental problem of environmental inequality in disposal of any waste. Tyres are a good example of this problem. The EU transfers its environmental problems by allowing the export of used tyres to where a weaker regulatory framework is in force. E Furthermore, environmental inequalities include asymmetrical environmental risks, whether intentional or not (Acselrad, Mello, and Bezerra 2009). For tyres the risks are clear, particularly for the most vulnerable people.

Since outcomes of decisions about waste disposal may entail unfair contexts producing inequalities among different groups around the globe, one should be aware of all factors relevant to how decisions are made. This paper focused on the, legal strategies used to manage different discourses in different realms with the participation of different actors.

In fact, the adoption of such strategy by the European Union (regulation domestically as waste, exporting as good) brings to mind the issue of export of domestically prohibited goods. This topic was included in the 1982 GATT Ministerial Declaration, which called on contracting parties to notify the GATT, to the maximum extent possible, if products were exported which were banned for sale in the domestic market on grounds of human health and safety (Sankey 1989). Not long after completion of the Uruguay Round of multilateral trade negotiations, though, this issue has dropped from the agenda. Against the backdrop of a problem like the one approached in this paper, it would be interesting to reintroduce the topic in the current Doha negotiations, and there would be room to also address the prohibition of transference of ecological problems.

Furthermore, the very same discursive shift noticed has just been set in motion in the realm of the Basel Convention itself via a “non paper” released by the Meeting of Senior Advisory Group of Experts to the Executive Secretary of the aforementioned convention, established to explore the economic potential of the “waste-resource interface” (Basel Convention 2011). This group was convened by the Executive Secretary of the Basel Convention, Katharina Kummer Peiry, from 18 to 19 January 2011, to explore the economic potential of the waste-resource interface in the run up to the tenth meeting

of the Conference of the Parties to the Basel Convention (COP 10) which was held in Cartagena, Colombia, from 17 to 21 October 2011, and had as its theme “Prevention, minimization and recovery of wastes”. This is a trend that should be followed closely by civil society and other environmental and public health organizations acting in the field, in other to prevent any future amendment that could impair the enforcement of the Basel Convention and its respective Ban Amendment.

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**Contact**

**desiguALdades.net**
Freie Universität Berlin
Boltzmannstr. 1
D-14195 Berlin, Germany

Tel: +49 30 838 53069
www.desiguALdades.net
e-mail: contacto@desiguALdades.net

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